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# Using a Firearm during and in Relation to a Drug Trafficking Crime: Defining the Elements of the Mandatory Sentencing Provision of 18 USC § 924(c)(1)

*Michael J. Riordan\**

## INTRODUCTION

The concept of mandatory minimum sentencing is not a new phenomenon to the federal criminal justice system. As early as 1790, mandatory minimum penalties were established for capital offenses.<sup>1</sup> Throughout the 19th century, Congress enacted provisions that required definite prison terms, typically quite short, for a variety of other crimes.<sup>2</sup> However, until recently, the enactment of mandatory minimum sentencing provisions was an occasional occurrence that was not comprehensively aimed at a whole class of offenses.<sup>3</sup>

A change in practice occurred with the passage of the Narcotic Control Act of 1956,<sup>4</sup> which mandated minimum sentences of considerable length for most drug importation and distribution offenses.<sup>5</sup> In 1970 Congress passed the Comprehensive Drug Abuse Prevention and Control Act.<sup>6</sup> With the passage of the 1970 Act, Congress retreated from the comprehensive application of mandatory minimum sentences for drug crimes which it had enacted fourteen years earlier and repealed virtually all mandatory penalties for drug violations.<sup>7</sup> Congress reasoned that increases in

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1. United States Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 5 (1991).

2. *Id.*

3. *Id.*

4. Pub L No 84-728, 70 Stat 651 (1956), codified at 8 USC §§ 1182, 1251 (1956).

5. *Mandatory Minimum Penalties in the Federal Criminal Justice System* at 5 (cited in note 1). As with all mandatory minimums, the sentence imposed could not be suspended or reduced. *Id.* at 6.

6. Pub L No 91-513, 84 Stat 1236 (1970) codified at 21 USC § 801 et seq (1970).

7. *Mandatory Minimum Penalties in the Federal Criminal Justice System* (cited in

sentence length "had not shown the expected overall reduction in drug law violations."<sup>8</sup> However, in the 1980's a shift in attitude toward sentencing once again occurred.<sup>9</sup> The change was primarily attributable to the bipartisan belief that rehabilitation of criminals was difficult to accomplish and by widespread dissatisfaction with judicial discretion in sentencing, which critics argued actually exacerbated the problems of controlling crime.<sup>10</sup> This dissatisfaction resulted in renewed support for mandatory minimum penalties, especially for crimes involving narcotics offenses.<sup>11</sup> Beginning in 1984, and every two years thereafter, Congress enacted an array of mandatory minimum penalties specifically targeted at drugs and violent crime. In 1984, Congress amended 18 USC § 924(c), incorporating an automatic five-year mandatory minimum sentence for the use or carrying of a firearm during a crime of violence.<sup>12</sup> Responding to public concern over increased narcotics-related crimes, and as part of its war on drugs, Congress applied mandatory minimum sentencing to drug crimes in the Firearm Owners' Protection Act of 1986.<sup>13</sup> The Firearm Owners' Protection Act extended the five-year mandatory minimum sentence enhancement of 18 USC § 924(c) to situations where a firearm is used or carried during or in relation to a drug trafficking crime.<sup>14</sup>

Since section 924(c)(1) was revised in 1986, it has been subject to varying interpretations by courts seeking to determine under what circumstances a person "during and in relation to . . . [a] drug trafficking crime . . . uses or carries a firearm."<sup>15</sup> This article provides guidance to the federal courts and practitioners in applying the mandatory sentencing provision of 18 USC § 924(c)(1) in relation to drug trafficking crimes. It analyzes the impact of the words "during or in relation to any . . . drug trafficking crime" on the construction and application of 18 USC § 924(c)(1) since the insti-

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note 1).

8. Id, quoting Comprehensive Drug Abuse Prevention and Control Act, S Rep No 91-613, 91st Cong, 1st Sess 2 (1969).

9. *Mandatory Minimum Penalties in the Federal Criminal Justice System* (cited in note 1).

10. Id.

11. Id at 7-8.

12. 18 USC § 924(c)(1)-(2) (1984).

13. Pub L No 99-308, 100 Stat 449 (1968), codified at 18 USC § 921 (1986).

14. 18 USCA § 924(c)(1) (West Supp 1991). In addition, in 1988 Congress passed the Omnibus Anti-Drug Abuse Act of 1988 which amended 21 USC § 844 and 21 USC § 848(a). *Mandatory Minimum Penalties in the Federal Criminal Justice System* 9 (cited in note 1).

15. 18 USCA § 924(c)(1) (West Supp 1991). See note 16 and accompanying text for the full version of 18 USC § 924(c)(1).

tution of the Comprehensive Crime Control Act of 1984, and the amendments of the Firearm Owners' Protection Act of 1986. Background information on the present version of section 924(c)(1) is provided. It defines the "during or in relation to" elements of the statute, examines the application of section 924(c)(1) to drug trafficking crimes and, finally, scrutinizes the statute's constitutional implications in relation to drug trafficking crimes.

## I. BACKGROUND

18 USC § 924(c)(1) mandates a five year sentence for using or carrying a firearm during and in relation to any drug trafficking crime. Section 924(c)(1) provides:

*Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he 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, be sentenced to imprisonment for five years. . . . Notwithstanding any other provision of law the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.<sup>16</sup>*

Section 924(c)(1) is an enhancing statute. The single purpose of the statute is to impose more severe penalties where firearms actually or potentially facilitated the commission of a drug trafficking crime.<sup>17</sup> The statute is part of the war on drugs the United States has waged over the past twenty-five years. Although section 924(c) was originally enacted in 1968, Congress amended the statute and included it in the Comprehensive Crime Control Act of 1984 (hereinafter "CCCA").<sup>18</sup> "The CCCA was an elaborate crime bill which

16. 18 USCA § 924(c)(1) (West Supp 1991) (emphasis added).

17. *United States v Stewart*, 779 F2d 538, 540 (9th Cir 1985) (opinion by J. Kennedy).

18. Comment, *Federal Sentencing Enhancement: Mandatory Penalties for Firearms Use Under the Comprehensive Crime Control Act of 1984*, 19 Loyola LA L Rev 823 (1986). The original § 924(c) stated:

Whoever—

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

(2) carries a firearm unlawfully during the commission of any felony for which he may

encompassed issues such as bail reform, narcotics enforcement, forfeiture, and sentencing."<sup>19</sup> In Title II of the CCCA,<sup>20</sup> Congress sought to achieve various sentencing reforms which are consistent with the creation of the modified section 924(c)(1).<sup>21</sup> Congress established the United States Sentencing Commission to promulgate detailed sentencing guidelines.<sup>22</sup> The sentencing guidelines are not just advisory; the federal courts are required to follow them.<sup>23</sup> Congress' strict approach toward parole provisions in Title II is apparent in section 924(c), which forbids parole.<sup>24</sup> The mandatory non-parolable five year sentence requirement in section 924(c)(1) is consistent with Congress' goal of limiting a federal judge's discretion in imposing sentences.<sup>25</sup>

be prosecuted in a court of the United States, shall in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten 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 two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

18 USC § 924(c)(1)-(2) (1984).

Section 924(c) originally required a conviction for either the use or the *unlawful* carrying of a firearm during any felony. Comment, Loyola LA L Rev at 826 (emphasis added) (cited in this note). The statute required that in addition to the punishment provided for the felony itself, a defendant would be sentenced for not less than one year or more than ten years.

19. Comment, 19 Loyola LA L Rev at 823 (cited in note 18).

The CCCA was enacted on October 12, 1984. CCCA of 1984. Pub L No 98-473, 98 Stat 3182 (1984), codified at 18 USC § 924(c)(1) (1984).

On March 16, 1983, President Reagan presented Congress with a legislative proposal entitled the Comprehensive Crime Control Act of 1983. He emphasized that his administration was interested in "improv[ing] the efficiency and coordination of Federal law enforcement, with special emphasis on violent and drug related crime." 129 Cong Rec 3160 (March 17, 1983). President Reagan said, "[i]f the forces of law are to regain the upper hand over the forces of crime, ensuring that criminals are put and kept behind bars, basic legislative changes are needed." *Id.*

20. Title II also abolished the United States Parole Commission. 18 USCA § 3583 (West Supp 1991). It curtailed "good-time release" by making its accrual more definitive and less discretionary. *Id.* "These changes are meant to result in more predictable prison terms." Comment, Loyola LA L Rev at 834 note 4 (cited in note 18).

21. Senator Edward M. Kennedy called the sentencing reform provisions of the CCCA "the most dramatic and important reforms in the entire crime package." Senator Edward M. Kennedy, *Forward to 22 Am Crim L Rev* at vii (1985).

22. 28 USCA § 991 (West Supp 1991).

23. 28 USCA § 994 (West Supp 1991).

24. Comment, 19 Loyola LA L Rev at 834 note 4 (cited in note 18).

25. For a full reading of 18 USC § 924(c)(1) see the text accompanying note 16.

Criticisms directed at the CCCA included the effect mandatory sentencing would have on

Prior to 1984, section 924(c) made it an offense to “carry a firearm unlawfully during the commission of a felony.”<sup>26</sup> When the statute was rewritten as part of the CCCA, the term “unlawfully” was eliminated, and the phrase “in relation to” was added.<sup>27</sup> The current language of section 924(c)(1) was added to the statute by amendment in 1986 as part of the Firearms Owners’ Protection Act.<sup>28</sup> The 1986 amendment added “drug trafficking crime” to the “any crime of violence” language. The statute now makes it an offense “during or in relation to any . . . drug trafficking crime” to use or carry a firearm.<sup>29</sup> The 1984 addition of the “in relation to” language was intended to explicitly allay the concern that a person could be prosecuted under section 924(c) for committing an entirely unrelated crime while in possession of a firearm.<sup>30</sup>

## II. DEFINING “DURING OR IN RELATION TO . . .”

When Congress revamped section 924(c) by substituting the phrase “during and in relation to” and eliminating the requirement that the firearm be carried unlawfully, it sought to preclude the section’s application to situations “where a weapon’s presence

the sentencing discretion usually employed by federal judges, and the inability of judges to consider each individual defendant on a case by case basis. Comment, 19 *Loyola LA L Rev* at 832 note 4 (cited in note 18), citing Attorney General’s Task Force on Violent Crime: Hearing Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong, 1st Sess 80 (1981). The criticisms also included that the mandatory sentencing would also aggravate prison overcrowding. *Id.*

In *Simpson v United States*, 435 US 6 (1978), the Supreme Court decided the pre-1984 § 924(c)(1)&(2) could not be used to increase a defendant’s sentence when the defendant was already receiving enhanced punishment for carrying a firearm under the state statute for the felony he committed. Justice Brennan, writing for the Court, found that the federal enhancing statute was ambiguous and that legislative history and established rules of statutory construction require that ambiguity concerning the scope of criminal statutes should be resolved in favor of lenity. *Simpson*, 435 US at 14, quoting *United States v Bass*, 404 US 336, 347 (1971).

Congress responded to the Supreme Court’s interpretation by amending § 924(c) and making it clear that a court must sentence a defendant to an additional five years, regardless of whether any other statutes require additional sentencing for the use of a firearm. Gun Control Act of 1968, 18 USCA § 924(c) (West Supp 1985). See also Comment, 19 *Loyola LA L Rev* at 828 note 37 (cited in note 18).

26. 18 USC § 924(c)(1)-(2) (1984). See note 18 for the full text of the statute.

27. See text accompanying note 1 for the full version of the statute.

28. Firearms Owners’ Protection Act, Pub L No 99-308, 100 Stat 456 (1986), codified at 18 USC § 924(c)(1) (1986). The Firearms Owners’ Protection Act was enacted on May 19, 1986.

29. 18 USCA § 924(c)(1) (West Supp 1991). See note 16 and accompanying text for the full version of the statute.

30. *Id.*

played no part in the crime."<sup>31</sup> The legislative history reveals Congress aimed to ensure that the statute did not punish people in instances where the presence of the firearm was merely coincidental and unrelated to the drug trafficking offense.<sup>32</sup> Apparently, Congress was concerned that, with the removal of the pre-1984 "requirement that the firearm be carried unlawfully, the statute could be applied to people who lawfully, but inadvertently, possessed a gun . . . in unrelated criminal activity."<sup>33</sup> Congress said the requirement that the firearm's use or possession be "in relation to" the crime would preclude the application of section 924(c)(1) to a situation where the firearm's 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.<sup>34</sup>

As in all cases of statutory interpretation, the starting point for an analysis of section 924(c)(1) is the plain language employed by Congress.<sup>35</sup> Congress stated, "whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm"<sup>36</sup> shall be subject to an additional five years of imprisonment.<sup>37</sup> The government thus has the burden of establishing a relationship between the firearm possessed by the defendant and the predicate drug trafficking offense.<sup>38</sup>

Section 924(c) is not a specific intent offense.<sup>39</sup> The legislative

31. *United States v Wilson*, 884 F2d 174, 176-77 (5th Cir 1989), citing Continuing Appropriations, 1985 — Comprehensive Crime Control Act of 1984, S Rep No 98-225, 98th Cong, 2nd Sess 314 n.10 (1983), reprinted in US Code Cong & Admin News 3182, 3942 n.10 (1984).

32. US Code Cong & Admin News at 3490-92.

33. *United States v Brown*, 915 F2d 219, 225 (6th Cir 1990).

34. S Rep No 98-225 at 314 n.10 (cited in note 31).

35. *Indiana Port Comm. v Bethlehem Steel Corp.*, 835 F2d 1207, 1210 (7th Cir 1982). See also *United States v Rawlings*, 821 F2d 1543, 1545 (11th Cir 1987) (when examining § 924(c) "we must assume that Congress used the words of the statute as they are commonly and ordinarily understood.")

36. 18 USCA § 924(c)(1) (West Supp 1991).

37. *Id.*

38. *Wilson*, 884 F2d at 177.

39. *Brown*, 915 F2d at 225. Where the definition of a crime requires some forbidden act by the defendant, his bodily movement, to qualify as an act, must be voluntary. Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 28 at 201 (West 1972). The notion is sometimes summed up with the expression that all crimes require a "general intent." LaFave & Scott, *Criminal Law* § 28 at 201 (cited within this note). Courts have taken the view that intent may be presumed only as to general intent. *Id.* at 202.

The common usage of "specific intent" is to designate a special mental element which is required above and beyond any mental state required with respect to the physical act of the crime. *Id.* Common law larceny, for example, requires the taking and carrying away of property of another, and the defendant's mental state as to this act must be established, but in

history of the 1984 amendment indicates that the “in relation to” language was not intended to create an element of the crime that did not previously exist.<sup>40</sup> The general rule of construction of a criminal statute provides that where a statute does not specify a heightened mental element, such as specific intent, general intent is presumed to be the required element.<sup>41</sup> Section 924(c)(1) does not explicitly use terms such as “knowingly” or “willfully,” the scienter language generally found in statutes creating specific intent offenses.<sup>42</sup> It appears that Congress merely intended to emphasize a condition already implicit in the statute: that there be a relationship between the weapon and the predicate crime of drug trafficking.<sup>43</sup>

In *United States v Nelson*,<sup>44</sup> the Fifth Circuit held that a conviction under the pre-1984 version of section 924(c) required that the government prove the defendant “knowingly carried a firearm . . . .”<sup>45</sup> The *Nelson* holding is consistent with the general rule of statutory construction in that “knowledge of the facts constituting an offense is ordinarily implied where a statute does not expressly mention any mental element.”<sup>46</sup> In assessing the scienter requirement of section 924(c)(1), case law requires that the government prove the defendant’s conduct was knowing.<sup>47</sup> As such, the requi-

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addition it must be shown that there was an “intent to steal” the property. *Id.* Similarly, common law burglary requires a breaking and entry into the dwelling of another, but in addition to the mental state connected with these acts it must also be established that the defendant acted “with intent to commit the felony therein.” *Id.*

40. *Stewart*, 779 F2d at 539 (opinion by J. Kennedy), citing S Rep No 98-225 at 314 n.10 (cited in note 31).

41. *Id.* See also *Wilson*, 884 F2d at 178-79; *United States v Nelson*, 733 F2d 364, 370-71 (5th Cir 1984); *United States v Barber*, 594 F2d 1242, 1244 (9th Cir 1979).

42. *Wilson*, 884 F2d at 178. Scienter is used to signify a defendant’s guilty knowledge. *People v Gould*, 237 Mich 156, 211 NW 346, 348 (1926).

43. *Brown*, 915 F2d at 224.

44. 733 F2d 364, 370-71 (5th Cir 1984).

45. *Nelson*, 733 F2d at 370-71.

46. *Wilson*, 884 F2d at 178, citing *Barber*, 594 F2d at 1244. See also *Morissette v United States*, 342 US 246 (1951) (wrongdoing must be conscious to be criminal).

Subsequent legislative history affirms *Nelson*. The legislative history of the pre-1984, and original, version of § 924(c) is sparse. See *Simpson*, 435 US at 15. “However, a later Congress’ understanding of the legislative intent of an earlier Congress is entitled to deference.” *Wilson*, 884 F2d at 178 n.7, citing *Stewart*, 779 F2d at 540. “Although comments about an earlier act in a legislative report on a subsequent bill are not part of the legislative history of the earlier act . . . they are entitled to consideration.” *Wilson*, 884 F2d at 178 n.7, citing N. Singer, 2A *Sutherland Statutory Construction* §§ 49.11, 412-14 (Callaghan & Co., 4th ed 1984).

47. *Wilson*, 884 F2d at 178. In 1986, the Firearms Owners’ Protection Act set the stage for a revamping of § 924. *Id.*, citing Firearm Owners’ Protection Act, H Rep No 99-495, 99th Cong, 2d Sess 25-26 (1986), reprinted in US Code Cong & Admin News 1327, 1351-53.

site mental state for a violation of section 924(c) is knowledge of the facts constituting the offense.<sup>48</sup> A proposal that "willfulness" be adopted as the mens rea for certain weapons offenses has been specifically rejected.<sup>49</sup>

The requirement that there be a relationship between the weapon and the predicate crime existed prior to the 1984 amendment because the statute originally applied to a limited class of persons—those persons who carried firearms unlawfully while they engaged in felonies.<sup>50</sup> Supreme Court Justice Anthony Kennedy, then a judge on the Ninth Circuit Court of Appeals, concluded in *United States v Stewart*<sup>51</sup> that, when Congress deleted the limitation that the firearm be carried unlawfully, it added the phrase "in relation to" in order to limit the element of "during."<sup>52</sup> In reaching this conclusion, Justice Kennedy emphasized that the Senate report expressly noted significant changes resulting from the 1984 amendments, such as expansion of the statute's reach to "crimes of violence."<sup>53</sup> Yet, the report made no mention of any elements or a requirement of specific intent, which would have been a significant change worth noting in a Senate committee report.<sup>54</sup>

The purpose of the amendments to section 924(c) was to impose harsher sanctions "where firearms facilitated, or had the potential of facilitating, the commission of a felony," and, more specifically, the commission of a drug trafficking crime.<sup>55</sup> The statute necessarily implies some relation or connection between the underlying criminal act of drug trafficking and the use or possession of the firearm.<sup>56</sup> The terms "used" and "carried" should be construed broadly.<sup>57</sup> Congress did not intend that the statute be given a cramped reading.<sup>58</sup> Still, however broadly the terms may be con-

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48. *Wilson*, 884 F2d at 179.

49. *Id.* at 178, citing H Rep No 99-495 at 25-26 (cited in note 47).

50. *Stewart*, 779 F2d at 539 (opinion by J. Kennedy). Though the legislative history does not say so expressly, it strongly implies that the "in relation to" language did not alter the scope of the statute, explaining that "the [original] section was directed at persons who chose to carry a firearm as an offensive weapon for a specific criminal act." *Id.* at 539-40, quoting S Rep No 98-225 at 314 n.10 (cited in note 31).

51. 779 F2d 538 (9th Cir 1985).

52. *Stewart*, 779 F2d at 539.

53. *Id.* at 540.

54. *Id.*

55. *Id.* See *United States v LaGuardia*, 774 F2d 317, 321 (8th Cir 1985); *United States v Mason*, 658 F2d 1263, 1270-71 (9th Cir 1981).

56. See *United States v Robertson*, 706 F2d 253, 256 (8th Cir 1983).

57. *United States v Acosta-Cazares*, 878 F2d 945, 952 (6th Cir 1989), cert denied, \_\_\_ US \_\_\_, 110 S Ct 255 (1989).

58. *United States v Rosado*, 866 F2d 967, 970 (7th Cir 1989), cert denied, \_\_\_ US \_\_\_,

strued, section 924(c)(1) will not support a conviction for mere possession of a firearm during the course of criminal conduct.<sup>59</sup> The “in relation to” language was designed to avoid convictions for inadvertently carrying a firearm in an unrelated narcotics crime<sup>60</sup> and it connotes a causal connection between the defendant’s drug trafficking crime and the firearm.<sup>61</sup> The connection must be supported by ample evidence to permit an inference that the defendant carried the weapon “in relation to” the drug offense.<sup>62</sup> The government has the burden of establishing some relationship between the firearm the defendant possessed and the predicate drug trafficking offense.<sup>63</sup> “The ‘in relation to’ language connotes a causal connection between a [defendant’s] narcotics felonies and this firearm . . . .”<sup>64</sup>

### III. THE ELEMENTS OF SECTION 924(C)(1) AS APPLIED TO DRUG TRAFFICKING CRIMES

To bring the possession of a firearm within the “uses” provision of section 924(c)(1), one of the following is required: (1) proof of a transaction in which the circumstances surrounding the presence of a firearm suggest the possessor intended to have it available for possible use during the transaction; or (2) evidence surrounding the presence of a firearm in a place where a drug transaction takes place suggest the firearm was strategically located so as to be quickly and easily available for use during the transaction.<sup>65</sup> A conviction under section 924(c)(1) will stand “if the possessor of a weapon intended to have it available for possible use during or immediately following the transaction, or if it facilitated the transaction by lending courage to the possessor.”<sup>66</sup> “The defendant’s sole purpose in carrying the weapon need not have been the facilitation of the drug trafficking crime,”<sup>67</sup> nor is the government required to show that the defendant displayed or brandished the firearm.<sup>68</sup>

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110 S Ct 117 (1989).

59. *Brown*, 915 F2d at 224.

60. *United States v Ramos*, 861 F2d 228, 231 (9th Cir 1988).

61. *Ramos*, 861 F2d at 231.

62. *Id* at 230-31.

63. *Wilson*, 884 F2d at 177.

64. *Ramos*, 861 F2d at 230. The language was added to prevent prosecution of a person for inadvertently carrying a firearm in an obviously unrelated crime. *Id*.

65. *United States v Henry*, 878 F2d 937, 944 (6th Cir 1989).

66. *United States v Payero*, 888 F2d 928, 929 (1st Cir 1989).

67. *Payero*, 888 F2d at 929.

68. *Stewart*, 779 F2d at 540 (opinion by J. Kennedy).

Even if a firearm remains hidden throughout a crime, its concealed presence may facilitate the crime by emboldening the defendant, giving him or her the security and confidence needed to undertake the criminal act.<sup>69</sup>

Something more than strategic proximity of drugs and firearms is necessary for a conviction under section 924(c)(1).<sup>70</sup> "The relation between the firearm and the underlying offense is an essential element of the crime."<sup>71</sup> The phrase "in relation to" should be construed to modify the "during" element, and although the "in relation to" language does not add a substantive element, or make section 924(c)(1) a specific intent offense, it alters the nature of the proof required to secure a conviction.<sup>72</sup> The difficulty courts have had in defining the relationship between a weapon and an underlying narcotics offense is illustrated by *United States v Morrow*.<sup>73</sup> In *Morrow* a jury convicted defendants Timothy Wayne Morrow and George Mooneyham of three drug-related offenses. The jury found the defendants guilty on Count I of aiding and abetting the unlawful manufacture of marijuana under 21 USC §§ 841(a)(1), 841(b)(1)(C), and 18 USC § 2.<sup>74</sup> The defendants were also convicted on Count II, conspiracy to manufacture marijuana in violation of 21 USC § 846,<sup>75</sup> and on Count III, which charged that Mooneyham, aided and abetted by Morrow, carried a firearm during and in relation to a drug trafficking offense in violation of 18 USC § 924(c).<sup>76</sup>

Morrow and Mooneyham were arrested by special agents of the United States Forest Service as they tended plants in a large marijuana patch growing in the Cherokee National Forest in Tennessee.<sup>77</sup> As the defendants approached the marijuana patch, the agents noted that one of them, Mooneyham, wore a holster containing a handgun.<sup>78</sup> The defendants began cutting the plants once they entered the patch and, ten minutes later, the agents con-

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69. *Id.*

70. *Wilson*, 884 F2d at 177.

71. *Stewart*, 779 F2d at 540 (opinion by J. Kennedy). The failure to instruct upon the necessary relationship warrants reversal where there is a significant possibility that the jury might have acquitted if it had considered the matter. *Id.*

72. *Brown*, 915 F2d at 227.

73. 923 F2d 427 (6th Cir 1991), vacated, stay granted, reh'g en banc granted, 932 F2d 1146 (6th Cir 1991).

74. *Morrow*, 923 F2d at 429.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

fronted the defendants.<sup>79</sup> While Morrow was immediately apprehended, Mooneyham was captured about a half hour later after he ran into the woods.<sup>80</sup> When Mooneyham was arrested the holster was found to be empty.<sup>81</sup> A .22 caliber magnum revolver was later found by the agents at the entrance to the marijuana field.<sup>82</sup> It was loaded and in working order.<sup>83</sup>

At trial, Mooneyham argued that the gun's only purpose was to shoot snakes.<sup>84</sup> He testified that he was very frightened by snakes,<sup>85</sup> and that the incidence of rattlesnakes at the Cherokee National Forest is high.<sup>86</sup> "[T]he arresting agents testified that the holster bore the inscription 'For Snakes Only' and that one of the defendants, at the time of the arrest, stated that the pistol was 'for snake purposes.'"<sup>87</sup> The district court instructed the jury that 18 USC § 924(c)(1):

makes it illegal to use or carry a firearm in relation to any drug trafficking crime . . . . In order for the Government to carry its burden of proof, . . . the Government must prove, beyond a reasonable doubt, that; one, [the defendant] unlawfully manufactured marijuana plants . . . or conspired to manufacture marijuana . . . ; and secondly, that [the defendant] knowingly and willfully carried a firearm during and in relation to this offense.<sup>88</sup>

On appeal, Mooneyham challenged the jury instructions, arguing that the district court did not adequately instruct the jury on the elements of section 924(c)(1).<sup>89</sup> Specifically, Mooneyham contended that the court failed to advise the jury that the gun had to be an integral part of the drug trafficking crime.<sup>90</sup> The government, in response, submitted that "in relation to" is not a term of art, and therefore required no elaboration.<sup>91</sup>

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 435.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 434.

89. *Id.* at 433.

90. *Id.*

91. *Id.* at 434. The government relied upon *United States v Michaels*, 911 F2d 131, 132 (8th Cir 1990), cert denied, \_\_\_ US \_\_\_, 111 S Ct 981 (1991), to support its position. *Michaels* expressed the view that the phrase "during and in relation to" imports no more meaning than its plain language would suggest. The *Michaels* court upheld a jury instruction requiring "the jury to find at the very least, that the gun was available to the defendant, and that its availability facilitated the carrying out of the drug trafficking crime."

While the phrase "in relation to" does not create a separate substantive element, it nevertheless modifies the "during" element of section 924(c)(1), and requires that a court explain that a relational connection is required for there to be a conviction.<sup>92</sup> The *Morrow* opinion, which has subsequently been vacated,<sup>93</sup> said that by simply mirroring the language of section 924(c)(1) itself, the instruction given by the district court failed to explain that "in relation to" modifies "during" and requires proof of a relationship between the firearm and the drug trafficking offense.<sup>94</sup> The court, quoting *United States v Brockington*,<sup>95</sup> went on to give an example of an adequate jury instruction on section 924(c)(1):

[T]he government must prove beyond a reasonable doubt that the firearm had some relation to or some connection to the underlying crime. A firearm can be used in relation to a felony involving drug trafficking, if the person possessing it intended to use the gun as a contingency arose, for example, to protect himself or make an escape possible.<sup>96</sup>

The court concluded that "it is by no means inconceivable that a rational jury could conclude that the pistol carried by Mooneyham was solely for the purpose of shooting snakes, and not at all related to the drug trafficking offenses."<sup>97</sup>

Despite being vacated by the Sixth Circuit, the *Morrow* analysis illustrates the necessity for the government to prove beyond a reasonable doubt some relation or connection between the underlying drug transaction and the use or possession of the firearm. It is

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*Michaels*, 911 F2d at 132.

92. *Brown*, 915 F2d at 226-27.

93. The case has been set for a rehearing en banc. *Morrow*, 932 F2d 1146 (6th Cir 1991).

94. *Morrow*, 923 F2d at 434. The court of appeals said that the district court erred by not instructing more specifically on the relational aspect of the "during and in relation to" element. *Id.* The court said that a "trial judge's responsibility in charging the jury goes beyond merely reiterating the pertinent statute." *Id.*

95. 849 F2d 872 (4th Cir 1988).

96. *Morrow*, 923 F2d at 434, quoting *Brockington*, 849 F2d at 876.

Ironically, the *Morrow* panel cited cases containing other jury instructions with much less stringent language than that in *Brockington*, which it concluded properly explained the relational requirement of § 924(c)(1): *United States v Henning*, 906 F2d 1392, 1397-98 (10th Cir 1990), cert denied, \_\_\_ US\_\_\_, 111 S Ct 789 (1991) ("if a firearm plays any role in a drug trafficking offense or it facilitates the crime in any way, it is being used within the meaning of section 924(c)(1)"); *Payero*, 888 F2d at 929 ("[m]ere possession of a weapon is not enough . . . Rather, the government must prove that the firearm facilitated the drug trafficking crime in some way"); *United States v Poole*, 878 F2d 1389, 1393 n.3 (11th Cir 1989) ("a firearm must play a purpose or a function in carrying out the drug trafficking offense").

97. *Morrow*, 923 F2d at 435. The court of appeals said that "it is solely the function of the jury to weigh the evidence and judge the credibility of the witnesses." *Id.*

likely the Sixth Circuit will conclude, when the case is heard en banc, that in order for there to be a conviction under section 924(c)(1), a district court must simply emphasize the relational element between the firearm and the underlying narcotics transaction. It is doubtful that trial courts will be required to use a *Brockington* instruction, or an instruction ruling out all other possible uses of a weapon, as long as the court instructs that it must be proven that the possessor of the weapon intended to have the firearm available for possible use during the narcotics transaction, or that the weapon was strategically located for easy access during the transaction.<sup>98</sup> For conviction, the circumstances of the case must simply demonstrate that the drug trafficker was in possession or control of a firearm and that the firearm facilitated or aided the crime by giving courage to one who had the opportunity and/or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such a display or discharge in fact

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98. See *Henry*, 878 F2d at 944. In *Rosado*, 866 F2d 967 (7th Cir 1989), cert denied, \_\_\_ US \_\_\_, 110 S Ct 255 (1989), the defendant was convicted of violating § 924(c)(1) when a revolver was found in a jacket the defendant removed and placed in the front seat of a nearby automobile just prior to consummating a narcotics transaction with undercover Drug Enforcement Administration agents. The court found that although the weapon was not on the defendant at the moment of his arrest, he clearly “used” and “carried” the firearm in violation of § 924(c). *Rosado*, 866 F2d at 969. The court said the evidence at trial established that the defendant put on and wore the jacket containing the concealed weapon to the drug transaction, and availed himself of the protection which a gun offers in the acquisition and transportation of narcotics. *Id.* The court reasoned that the fact he never had the opportunity to brandish or discharge his gun does not mean he did not “use” it. *Id.*, citing *United States v Moore*, 580 F2d 360, 362 (9th Cir 1978). “Its presence ‘increased the likelihood of success, without [it] he probably would not have sallied forth.’” *Rosado*, 866 F2d at 969-74.

In *Ramos*, 861 F2d 228 (9th Cir 1988), the defendant was convicted of violating § 924(c)(1) despite not personally possessing a firearm during the underlying drug transaction. Defendant Ramos, while transporting a kilogram of cocaine, instructed his co-conspirator to pull a .22 automatic pistol from under the car seat and look at it. *Id.* at 230. The co-conspirator testified that Ramos later pulled the firearm from under the seat “to defend himself” when a “suspicious van appeared” while en route to the cocaine transaction. *Id.* The court concluded that since the cocaine was of substantial value, a rational inference was that Ramos intended to defend either the cocaine or himself when he pulled the weapon. *Id.* The court rejected appellant Ramos’ argument that it was almost a certainty he would have been found not guilty if the “during and in relation to” instruction had been supplemented with some further explanation of the term “in relation to.” *Id.* at 231. The court concluded there was sufficient evidence to conclude the firearm may well have emboldened one or more of the actors who had the opportunity to display or discharge the weapon to protect himself or intimidate others. *Id.*, citing *Stewart*, 779 F2d at 540 (opinion by J. Kennedy).

In *Wilson*, 884 F2d 174 (5th Cir 1989), the court found a sufficient relationship to support a conviction where the evidence showed the defendant was carrying a handgun in his waistband when entering his vehicle, which contained methamphetamine, and where the defendant reached for the weapon when the police approached him.

took place.<sup>99</sup> A jury instruction is sufficient if it emphasizes that there must be a linkage between possession of the firearm and the underlying drug transaction. As long as the district judge properly instructs on the relational requirement, a conviction under section 924(c)(1) will withstand appellate review if there is sufficient evidence from which a jury could reasonably find the requisite connection between the firearm and the predicate drug offense.<sup>100</sup> All other possible uses of a weapon need not be eliminated for a conviction. In addition, it need not be proven that the firearm was actually possessed during the commission of the underlying offense.<sup>101</sup>

#### A. *Section 924(c)(1) & The Fortress Theory*

In cases where firearms are not found on the person of the defendant, but are found on the premises under the control of the drug offender, the courts have applied the fortress theory. The fortress theory is utilized where weapons are found on the premises of which a drug trafficker is in actual or constructive possession. If the firearms are intended to protect drugs or otherwise facilitate a drug transaction, then such firearms are considered to have been used by the defendant "during and in relation to" the drug trafficking crime.<sup>102</sup>

In *United States v Matra*,<sup>103</sup> police found a large quantity of cocaine, cash, and drug paraphernalia in the defendant's house.<sup>104</sup> As police entered the house, they found Matra at the top of the stairs leading to the second floor of the house.<sup>105</sup> Inside the second floor bedrooms the police found a number of loaded firearms, including a machine gun, readily available ammunition, a large quantity of high-purity cocaine, and a large amount of cash.<sup>106</sup> None of the items were in Matra's actual possession, but all of them were considered to be under the defendant's control since they were found in his house.<sup>107</sup> The district court determined that Matra had complete control of the house and he knew cocaine and a ma-

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99. See *United States v Henning*, 906 F2d 1392, 1397-98 (10th Cir 1990), cert denied, \_\_\_ US \_\_\_, 111 S Ct 789 (1991); *Michaels*, 911 F2d at 132.

100. See *Henning*, 906 F2d at 1398.

101. See note 99, cases cited therein, and accompanying text.

102. *United States v Matra*, 841 F2d 837, 843 (8th Cir 1988).

103. 841 F2d 837 (8th Cir 1988).

104. *Matra*, 841 F2d at 838-40.

105. *Id* at 838.

106. *Id* at 839.

107. *Id* at 842.

chine gun were in a bedroom on the second floor.<sup>108</sup> It was also determined that Matra was a trusted member of a group that was using the house to sell cocaine.<sup>109</sup> As a result, Matra was convicted by the district court of violating section 924(c)(1).<sup>110</sup> On appeal, Matra urged the reviewing court to interpret the language of section 924(c)(1) to preclude conviction unless the government showed that the defendant *actually* possessed weapons during the drug transaction.<sup>111</sup>

The Eighth Circuit rejected such a narrow interpretation of section 924(c)(1)<sup>112</sup> and used a military analogy to support its position. Military installations keep weapons readily available against potential enemy attack; so, too, may weapons be kept ready to protect a drug house, thereby safeguarding and facilitating illegal drug transactions.<sup>113</sup> The appellate court concurred in the district court's observation that Matra's house was a veritable fortress.<sup>114</sup> It had only one usable entrance, which easily could be guarded from a second-story window.<sup>115</sup> The court found that although Matra did not have possession of the machine gun or the other firearms, he did have ready access to them.<sup>116</sup> Even though Matra did

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108. Id at 839-40.

109. Id at 840.

110. Id at 838.

111. Id at 841-42 (emphasis added).

112. Id at 842.

113. Id. The *Matra* court began by analyzing *United States v LaGuardia*, 774 F2d 317 (8th Cir 1985). In *LaGuardia* police found a loaded pistol inside a purse on a bed, another loaded pistol on a shelf in a closet among numerous items of clothing, and a rifle inside the trunk of *LaGuardia's* car parked outside the apartment. *LaGuardia*, 774 F2d at 318. Approximately eighteen ounces of cocaine, at least \$9,800 in cash, and various drug-related items also were discovered on the premises. Id at 318-19. Recognizing the utility of firearms to those who traffic in illegal drugs, the *LaGuardia* court held that the weapons, found in connection with the cocaine and the cash, were sufficient to support the submission of the § 924(c) firearms charge to the jury. Id at 321. The court stated that "[t]he presence and availability in light of the evident need demonstrates [sic] the use of the firearm to commit the felony." Id.

The court also cited *United States v Grant*, 545 F2d 1309, 1312 (2d Cir 1976), where the fortress analogy also was applied. The "fortress" in *Grant* was the Piggy Back Social Club, which had television monitors located throughout, special reinforced doors, and heavy locks. *Matra*, 841 F2d at 842. Guns were found in the Club, along with large quantities of cocaine, marijuana, and material used to "cut" these substances. Id. *Grant* managed the Club and apparently lived there. Id. The Second Circuit upheld *Grant's* conviction under the pre-1984 § 924(c), finding that the evidence established that *Grant* had used the guns as part of a tight security operation to protect large quantities of cocaine and hence to commit the felony of possessing cocaine with the intent to distribute. Id.

114. *Matra*, 841 F2d at 842.

115. Id.

116. Id at 843.

not brandish or discharge a weapon, the court concluded that the weapons were an integral part of his criminal undertaking and their availability increased the likelihood that the criminal undertaking would succeed.<sup>117</sup> In the court's view, it would defy logic and common sense to conclude Matra did not "use" the machine gun within the meaning of section 924(c) during and in relation to his possession of cocaine with intent to distribute.<sup>118</sup>

"Carries" does not necessarily require actual possession, and "uses" does not require actual brandishment or display. The elements of section 924(c)(1) will be satisfied by a sturdy, subtle spider's web,<sup>119</sup> such as the fortress theory, which encompasses the defendant, the narcotics, and the firearm. Section 924(c)(1) should be construed broadly to cover the gamut of situations where drug traffickers have ready access to weapons with which they secure or enforce their transactions.<sup>120</sup> The fortress theory demonstrates by analogy that when evaluating whether a firearm was carried in relation to an offense, the defendant's intentions as he engaged in the precise conduct that comprised the predicate offense should not be the sole focus.<sup>121</sup> Rather, the totality of circumstances surrounding the commission of the crime must be examined: "the emboldened sallying forth, the execution of the transaction, the escape, and the likely response to contingencies that might have arisen during the commission of the crime."<sup>122</sup> In fortress type cases, the sheer volume of weapons and drugs makes reasonable the inference that the weapons involved were carried in relation to the predicate drug offense since they increase the likelihood that the drug offense will succeed.<sup>123</sup>

### B. *Applying Section 924(c)(1) to Separate Underlying Predicate Drug Trafficking Offenses*

When a defendant is convicted of two separate underlying drug trafficking crimes, i.e., manufacturing and possession with intent to distribute, each separate offense may be a predicate for a separate

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117. *Id.*

118. *Id.*

119. *Id.*

120. *United States v Acosta-Cazares*, 878 F2d 945, 952 (6th Cir 1989), cert denied, \_\_\_ US \_\_\_, 110 S Ct 255 (1989).

121. *United States v Brown*, 915 F2d 219, 226 (6th Cir 1990).

122. *Brown*, 915 F2d at 226.

123. *United States v Wilson*, 884 F2d 174, 177 (5th Cir 1989).

section 924(c)(1) firearms charge.<sup>124</sup> The two separate section 924(c)(1) counts will not be merged into a single count.<sup>125</sup> This is because two separate predicate offenses are chargeable—not because there may have been two or more firearms involved.<sup>126</sup>

For example, in *United States v Henry*<sup>127</sup> the defendant was convicted of two separate drug offenses.<sup>128</sup> At the time the defendant was arrested, he was emerging from a car parked outside his farm house.<sup>129</sup> As he exited the car, he was found to be in possession of a pistol.<sup>130</sup> In addition, a rifle was later found inside his house.<sup>131</sup> The district court convicted Henry on two separate counts of violating section 924(c)(1).

Counts three and four of Henry's indictment read:

#### COUNT 3

On or about the 21st day of September, 1987, in the Western District of Kentucky, Jefferson County, Kentucky, LOUIS EDWARD HENRY, JR., during and in relation to a drug trafficking crime, to-wit, manufacturing and possessing with intent to distribute a controlled substance in violation of Title 21, United States Code, Section 841(a)(1), did use and carry a Model 59, Smith & Wesson 9 mm. semi-automatic pistol, bearing serial number A6022721.

In violation of Title 18, United States Code, Section 924(c)(1).

#### COUNT 4

On or about the 21st day of September, 1987, in the Western District of Kentucky, Jefferson County, Kentucky, LOUIS EDWARD HENRY, JR., during and in relation to a drug trafficking crime, to-wit, manufacturing and possessing with intent to distribute a controlled substance in violation of Title 21, United States Code, Section 841(a)(1), did use and carry two (2) firearms, to-wit, a .30 caliber U.S. carbine rifle, serial number unknown, and a .22 caliber semi-automatic Beretta pistol, bearing serial number 8ASO4453U.

In violation of Title 18, United States Code, Section 924(c)(1).<sup>132</sup>

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124. *Henry*, 878 F2d at 942. See also *United States v Jim*, 865 F2d 211 (9th Cir 1989) (defendant in same escapade shot at three different federal officers and was convicted of three counts of assault on a federal officer and three counts of using a firearm during a crime of violence); *United States v Fontanilla*, 849 F2d 1257 (9th Cir 1988) (because murder of one person and assault of another in the same episode were properly charged as separate crimes, it was permissible to charge the defendant with two separate § 924(c)(1) counts). Section 924(c)(1) "crime of violence" cases are analogous to "drug trafficking crime" cases since the applicable statute makes no distinction between the two.

125. *Henry*, 878 F2d at 942.

126. *Id.*

127. 878 F2d 937 (6th Cir 1989).

128. *Henry*, 878 F2d at 942.

129. *Id.* at 939.

130. *Id.*

131. *Id.* at 940.

132. *Id.* at 943.

On appeal, Henry's conviction on Count III was vacated.<sup>133</sup> The Sixth Circuit reasoned that the government failed to link the firearms specifically to each one of the drug counts. Instead, the government made reference to both drug counts in each of the section 924(c)(1) firearm counts.<sup>134</sup> The court said that section 924(c)(1) requires that the firearm be used or carried "during and in relation" to a drug trafficking offense.<sup>135</sup> Since the government failed to link a firearm to each of the predicate drug trafficking crimes, it failed to show how the firearms related differently to each of the predicate offenses.<sup>136</sup> Thus, the court vacated Count III of Henry's section 924(c)(1) conviction because the government had shown a lesser relationship between the firearm and the drug trafficking crime.<sup>137</sup> However, the court pointed out that if the government had related a firearm to each of the separate drug trafficking offenses, Henry's convictions on both section 924(c)(1) counts would have been affirmed.<sup>138</sup>

### C. *Aiding & Abetting under Section 924(c)(1)*

In order to sustain a conviction for aiding and abetting, the government must prove, beyond a reasonable doubt, both association with and participation in the substantive crime.<sup>139</sup> To meet the participation prong, the government must establish that the aider and abettor did some affirmative act designed to further the criminal venture.<sup>140</sup>

In *Morrow*, the government raised the inference that defendant Morrow knew his co-defendant used and carried a gun while tending marijuana plants, and thus the gun's presence supported a conviction for Morrow of aiding and abetting in the violation of sec-

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133. Id.

134. Id.

135. Id.

136. Id at 944-45.

137. Id at 945.

138. Id.

139. See *Nye & Nissen v United States*, 336 US 613, 619 (1949); *United States v Hughes*, 891 F2d 597, 599 (6th Cir 1989).

The aiding and abetting statute reads:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. Principals, 18 USCA § 2 (1969).

140. See *Nye & Nissen*, 336 US at 619; *Hughes*, 891 F2d at 599.

tion 924(c)(1).<sup>141</sup> The court reasoned that while the government's assertion may satisfy the association prong of the aiding and abetting test, it failed to produce any evidence sustaining the participation prong—a necessary element of the crime.<sup>142</sup> The court ruled that absent a showing of some active participation or encouragement, or some affirmative act by Morrow designed to further his co-defendant's use of the pistol during or in relation to the drug trafficking crime, a conviction for aiding and abetting cannot stand.<sup>143</sup>

However, a myriad of section 924(c)(1) cases have shown that the focus in a firearms prosecution is not on the presence of the gun, *per se*, but rather is on the integral relationship the weapon bears to the commission of the underlying criminal conduct.<sup>144</sup> Therefore, it may be more appropriate when addressing an aiding and abetting charge in connection with section 924(c)(1) to focus on the defendant's conduct with respect to the underlying narcotics offense, rather than exploring the defendant's "association" and "participation" with respect to the use or carrying of the weapon.<sup>145</sup>

Thus, the ultimate issue for determining whether a defendant aided and abetted in the violation of section 924(c)(1) is whether, from the totality of the circumstances, it can be concluded that the accused aider and abettor actively participated in the underlying substantive drug trafficking crime, and whether the accused knew his co-defendant was using or carrying a gun during or in relation to the underlying offense.<sup>146</sup> Although the case law is not decisive, in order for there to be a conviction for aiding and abetting under section 924(c)(1), it must be established beyond a reasonable doubt that the accused aider and abettor at least had knowledge that his co-defendant was "using" a firearm during or "in relation to" the underlying, substantive drug trafficking offense.

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141. *Morrow*, 923 F2d at 436. See notes 73 through 98 and accompanying text for the facts of *Morrow*.

142. *Morrow*, 923 F2d at 436.

143. *Id.*

144. *Id.* at 443. See *Acosta-Cazares*, 878 F2d at 951-52; *United States v Robinson*, 857 F2d 1006, 1010 (5th Cir 1988); *Matra*, 841 F2d at 842; *United States v Stewart*, 779 F2d 538, 540 (9th Cir 1985); *LaGuardia*, 774 F2d at 321.

145. See *Morrow*, 923 F2d at 443 (dissenting opinion).

146. *Id.*

## IV. CONSTITUTIONAL IMPLICATIONS OF SECTION 924(c)(1)

It is conceivable that a vagueness issue may arise when applying the mandatory five year sentence provision of section 924(c)(1). A defendant may not be aware that the underlying drug trafficking offense he committed can also result in an enhanced penalty if he uses a firearm during or in relation to the drug trafficking crime. For example, although a person carrying a firearm during a narcotics transaction knows that selling drugs is illegal, he may not be "on notice" that carrying the firearm is a separate offense.<sup>147</sup> Because section 924(c)(1) may not give enough notice to a defendant, and because the courts are given wide discretion in determining whether a firearm was used "during and in relation to" a drug trafficking crime, a defendant may mount a constitutional challenge.<sup>148</sup>

Congress has the right to address public concern over the use of firearms during certain crimes, but not at the expense of clarity.<sup>149</sup> Before an accused can be punished, the crime of which he is accused must clearly appear within the statute, otherwise a defendant's due process rights may be violated.<sup>150</sup> A defendant may not be subject to a penalty unless the words of a statute plainly impose it.<sup>151</sup> However, because an act of Congress is presumptively valid, a statute will not be held void simply because it is difficult to determine whether certain marginal offenses fall within its language.<sup>152</sup>

In *United States v Shaw*,<sup>153</sup> an appellant charged with possessing 117 grams of methamphetamine argued that conflicting penalty schemes failed to give him adequate notice of the penalty to which he would be exposed.<sup>154</sup> While acknowledging the defendant's constitutional entitlement to such notice,<sup>155</sup> the court noted that "overlapping sentencing provisions satisfy the notice requirements of the Due Process Clause so long as they clearly define the 'con-

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147. Comment, 19 Loyola LA L Rev at 841 (cited in note 18).

148. Id at 842.

149. Id.

150. Id at 841, citing *United States v Resnick*, 299 US 207, 210 (1936). The Fourteenth Amendment provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ." US Const, Amend XIV, §1.

151. *United States v Campos-Serrano*, 404 US 293, 297 (1971), quoting *Keppel v Tiffin Savings Bank*, 197 US 356, 362 (1905).

152. *Parker v Levy*, 417 US 733, 757 (1974).

153. 920 F2d 1225 (5th Cir 1991), cert denied, \_\_\_ US \_\_\_, 111 S Ct 2038 (1991).

154. *Shaw*, 920 F2d 1225.

155. See *United States v Batchelder*, 442 US 114, 123 (1979).

duct prohibited and the punishment authorized.’”<sup>156</sup> Section 924(c)(1) appears to apprise a defendant of the extra mandatory five year sentence for “using” a firearm “during and in relation to” a drug trafficking crime so long as a relationship of the firearm to the drug trafficking crime can be proven. As such, a constitutional challenge to section 924(c)(1) on vagueness grounds will most likely fail.

The Double Jeopardy Clause of the Fifth Amendment is applicable to multiple prosecutions for the same offense.<sup>157</sup> An argument may be made that sentencing a defendant under section 924(c)(1) and under the predicate drug trafficking offense penalizes the accused twice for the same offense.<sup>158</sup> However, in *Missouri v Hunter*,<sup>159</sup> the Supreme Court upheld a conviction under a deadly weapon statute and under a felony statute where the defendant was subject to a five year sentence under the deadly weapon statute and to a three year sentence for committing the felony.<sup>160</sup> The Supreme Court held that convictions under both statutes did not violate the Double Jeopardy Clause.<sup>161</sup> The Court said that where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether the two statutes proscribe the same conduct, a court’s task of statutory construction is at an end and the court may impose cumulative punishment under such statutes in a single trial.<sup>162</sup> Given the holding in *Hunter*, it is unlikely that section 924(c)(1) combined with a predicate drug offense will be held to violate the Double Jeopardy Clause of the Fifth Amendment.

## V. CONCLUSION

The present version of section 924(c)(1) imposes severe sanctions, in the form of a five year, non-parolable sentence, where a firearm facilitated or had the potential of facilitating the commission of a drug trafficking crime. Section 924(c)(1) is not applicable when one merely possesses a firearm during the commission of a drug trafficking crime. The government must prove beyond a rea-

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156. *Shaw*, 920 F2d at 1228, quoting *Batchelder*, 442 US at 123.

157. C. Whitebread, *Criminal Procedure, An Analysis of Constitutional Cases and Concepts* 501 (Foundation Press 1980).

158. See Comment, 19 Loyola LA L Rev at 845 (cited in note 18).

159. 459 US 359 (1983).

160. *Hunter*, 459 US 359.

161. *Id* at 368-69.

162. *Id*.

sonable doubt that the firearm was carried in relationship to the underlying drug offense.

The "in relation to" language of section 924(c)(1) requires that there be a causal connection between a defendant's narcotics felony and his firearm.<sup>163</sup> However, "carries" does not actually mean actual possession, and "uses" does not mean actual brandishment or display. The totality of the circumstances surrounding the commission of the drug trafficking crime and the possession of the firearm must be examined: "the emboldened sallying forth, the execution of the transaction, the escape, and the likely response to contingencies that might have arisen during the commission of the crime."<sup>164</sup> The elements of section 924(c)(1) will be satisfied by a sturdy, subtle, "spider's web,"<sup>165</sup> which encompasses the defendant, and shows a relationship between the narcotics and the firearm. Whether there exists a web sturdy enough to support conviction under section 924(c)(1) is ultimately a question for the trier of fact.

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163. *Ramos*, 861 F2d at 230.

164. *Brown*, 915 F2d at 226.

165. *Grant*, 545 F2d at 1312.