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Angela LaBuda Collins

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NOTE

THE LATEST AMENDMENT TO 18 U.S.C. § 924(C): CONGRESSIONAL REACTION TO THE SUPREME COURT'S INTERPRETATION OF THE STATUTE

Angela LaBuda Collins+

Everyday occurrences of drug-related shootings and gang violence have resulted in the expansion of federal criminal laws that seek to implement the national war on drugs. One of the ways Congress attempted to armor itself in this battle is through the enactment of legisla-


Congress also enacted Sentencing Guidelines intending to limit a trial judge’s discretion in sentencing, thus creating more uniformity in the sentencing of defendants who committed similar crimes. See U.S. SENTENCING GUIDELINES MANUAL (1998) [hereinafter SENTENCING GUIDELINES] (trying to create a consistent guideline system for determining sentences); Bennett L. Gershman, Prosecutorial Discretion Under Federal Sentencing Guidelines, N.Y.L.J., Apr. 20, 1990, at 1. There has been considerable debate, however, over the constitutionality and actual effect of the Guidelines. See id. at 7. For a complete overview of the Sentencing Guidelines, see Anthony N. Doob, The United States Sentencing Commission Guidelines: If You Don’t Know Where You Are Going, You Might Not Get There, in THE POLITICS OF SENTENCING REFORM 199-250 (Chris Clarkson & Rod Morgan eds., 1995).
tion, pursuant to the Commerce Clause, that punishes individuals who use or carry a firearm during drug crimes. This legislation, 18 U.S.C. § 924(c), requires courts to impose minimum sentences when drug-related offenses are exacerbated by the presence of firearms.

The federal court system sentenced over 10,000 defendants under § 924(c) from 1991 to 1996. With this many offenders facing mandatory penalties, numerous appeals resulted from the statute’s application to situations where the narcotics and defendant were found merely in the same room as the weapon. Many of these appeals have focused on ob-

2. See U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause gives Congress the authority to enact laws to regulate interstate commerce. See id. But see 144 CONG. REC. H534 (daily ed. Feb. 24, 1998) (statement of Rep. Paul) (opposing the passage of H.R. 424, an amendment to § 924(c), because crime control and sentencing are powers belonging to the states, not the federal government).


4. 18 U.S.C. § 924(c). In general, § 924 sets forth the penalties for violations of federal crimes. See id.


7. See, e.g., United States v. McFadden, 13 F.3d 463, 464-66 (1st Cir. 1994) (sustaining a government appeal of a court-ordered acquittal where a gun hidden under a mattress with drugs in the same room was sufficient to show “use” under § 924(c)(1)); United States v. Hager, 969 F.2d 883, 885-89 (10th Cir. 1992) (rejecting a defendant’s appeal of
containing post-conviction relief for incorrect interpretations of § 924(c). With so many situations, cases, and appeals, there was great confusion among the circuit courts of appeals surrounding the interpretation and application of § 924(c).

8. See, e.g., Bousley v. United States, 118 S. Ct. 1604 (1998). The Supreme Court granted certiorari to this case to resolve the split in the circuits over the possibility of collateral attacks on § 924(c)(1) convictions executed by guilty pleas. See id. at 1608-09. The availability of collateral attacks was the result of the Supreme Court’s decision in Bailey, 516 U.S. at 143, in which the Court narrowed the definition of “use” in § 924(c)(1). See Bousley, 118 S. Ct. at 1608; see also infra notes 88-109 and accompanying text (discussing the Bailey opinion). The Court in Bousley held that a defendant can successfully petition for relief after a guilty plea only if the plea was not entered into voluntarily or intelligently or if the defendant establishes that he is actually innocent. See Bousley, 118 S. Ct. at 1610-12; see also 28 U.S.C. § 2255 (1994) (allowing a defendant to collaterally attack a judgment “imposed in violation of the Constitution or laws of the United States”).

The Bailey decision led to the reversal of numerous criminal convictions under § 924(c)(1). See, e.g., United States v. Garcia, 77 F.3d 274, 276-77 (9th Cir. 1996) (reversing the conviction of a defendant under § 924(c)(1) for using a machinegun that was found in a house with cocaine and heroin); United States v. Abdul, 75 F.3d 327, 329-30 (7th Cir. 1996) (reversing the conviction of a defendant who was charged with using a loaded gun found in same room as narcotics). See generally 144 CONG. REC. H531 (daily ed. Feb. 24, 1998) (statement of Rep. McCollum) (reasoning that the number of overturned convictions after Bailey supported the enactment of the latest amendment to § 924(c)).

9. Compare United States v. Edwards, 36 F.3d 639, 644 (7th Cir. 1994) (explaining that a firearm in proximity to a defendant during the course of a narcotics offense satisfies the § 924(c)(1) use requirement), with United States v. Jones, 28 F.3d 1574, 1578 (11th Cir. 1994) (holding that the statute requires only the presence of a firearm in an area where the defendant distributed illegal drugs), United States v. Clemis, 11 F.3d 597, 601 (6th Cir. 1993) (finding that “use” should be defined broadly so that it covers situations where the defendant had ready access to firearms to secure his drug trafficking transaction), and United States v. Jones, 990 F.2d 1047, 1049-50 (8th Cir. 1993) (noting that “[a] defendant need not brandish or discharge” a weapon for a § 924(c)(1) conviction and that the court may infer “use” when a firearm is available and present). See generally Jeffrey R. Kesselman, Casenote, 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, 526-544 (1997) (examining the different interpretations of § 924(c)(1) in the various circuit courts of appeal).
After refusing to hear many cases on the proper interpretation of § 924(c), the United States Supreme Court eventually accepted certiorari and resolved this problem in part by clarifying the definition of “use” under § 924(c). The Court held that exchanging a firearm for narcotics was an actionable “use” under § 924(c)(1), and in Bailey v. United States, the Court interpreted the “use” prong to require “active employment” of the firearm. Great confusion still remained among the circuits regarding the “carry” prong of the statute, however, until the

10. See, e.g., United States v. Wilkinson, 926 F.2d 22, 25 (1st Cir. 1991) (holding that the legal question in defining “use” is whether the defendant had control over the gun and then whether the gun facilitated the predicate offense), cert. denied, 501 U.S. 1211 (1991); United States v. Long, 905 F.2d 1572, 1576-77 (D.C. Cir.) (stating that although “use” is defined broadly, stretching this term to convict a defendant when the record lacks a nexus between the defendant and the gun, other than the defendant’s presence in the room, would be to eliminate a discernable boundary), cert. denied, 498 U.S. 948 (1990); United States v. Acosta-Cazares, 878 F.2d 945, 952 (6th Cir.) (requiring that the firearm facilitate the underlying offense), cert. denied, 493 U.S. 899 (1989).

11. See Bailey, 516 U.S. at 143 (holding that the “use” prong requires “active employment” of the firearm); Smith v. United States, 508 U.S. 223, 225 (1993) (finding that the “use” provision is satisfied when a defendant exchanges firearms for drugs).


14. See Bailey, 516 U.S. at 143.

15. Compare United States v. Eyer, 113 F.3d 470, 475-76 (3d Cir. 1997) (reasoning that conviction under § 924(c)(1) was supported by evidence that the defendant’s handgun was loaded and in a console between the two front seats of a moving car), with United States v. Cooke, 110 F.3d 1288, 1297 (7th Cir. 1997) (finding that carrying a weapon in a bag located in the bed of a pickup truck was not enough to support a conviction when a defendant was in the passenger compartment of the truck), United States v. Johnson, 108 F.3d 919, 921 (8th Cir. 1997) (holding that the government must prove a defendant carried a weapon on his or her person to establish a § 924(c)(1) conviction), United States v. Taylor, 102 F.3d 767, 769 (6th Cir. 1996) (indicating that the firearm must be immediately available for use and the defendant must be in the process of transporting the weapon for the statute to apply), cert. denied 118 S. Ct. 327 (1997), United States v. Willett, 90 F.3d 404, 407 (9th Cir. 1996) (holding that § 924(c)(1) requires that if the weapon is transported in an automobile, that the weapon be in a position where it is easily accessible, such as in the glove compartment), United States v. Hayden, 85 F.3d 153, 162 (4th Cir. 1996) (maintaining that use and carry are distinct from mere possession, and that the mere presence of a firearm is not enough to satisfy the statute), and United States v. Price, 76 F.3d 526, 528 (3d Cir. 1996) (indicating that the weapon must have played an active role in the underlying offense to sustain a conviction under the statute). The circuit courts of appeals often applied wildly divergent interpretations to the statute. See Mulry, supra note 1, at 505-21 (discussing the conflict in circuits over which interpretation to apply to § 924(c)(1)); Kristin Whiting, Note, 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, 697-700 (1997) (indicating the inconsistent results in circuit court decisions after the Bailey decision); Amy Sullivan Broadbent, Carrying on After Bailey v. United States: Where Will the Supreme Court Go from Here?, FED. LAW., Mar./Apr. 1998, at 22, 24-27 (noting the different approaches to § 924(c)(1) in the circuits). See generally Thomas J. Eme, The Meaning of “Carries” in a
Supreme Court resolved this issue in *Muscarello v. United States.* The *Muscarello* Court held that the term applies when a person knowingly possesses and conveys a firearm in a vehicle during and in relation to a drug crime.

Shortly after the Supreme Court issued these opinions, several members of Congress expressed their disappointment with the Court's interpretation of "use" under § 924(c).\(^{18}\) Almost immediately, representatives introduced bills to combat the restrictive effects of the opinion; however, none of these bills were enacted.\(^{19}\) Nevertheless, in November of 1998, Congress succeeded in enacting S. 191, which amended § 924(c) by adding a possession requirement to the statute.\(^{20}\) This amendment directly responded to the Supreme Court's limitation of the "use" prong.\(^{21}\)

By enacting S. 191, Congress amended the statute\(^{22}\) to extend its reach

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17. See id. at 1913-14.
19. See infra notes 220-22 and accompanying text (examining the bills enacted soon after the *Bailey* decision).
22. Before the amendment, the statute provided:

> 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, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. 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.

to defendants who possess a firearm in furtherance of a drug trafficking crime or crime of violence and to increase the penalties for second offenses.\footnote{See Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469. The amendment replaced subsection (c) with the following:}

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.).” \textit{Id.} § 924(c)(2). Additionally, “crime of violence” in the context of § 924(c)(1) means a felonious offense that involves a substantial risk of physical force against a person or property, or attempted, threatened, or actual physical force against a person or property. \textit{See id.} § 924(c)(3).

\footnote{Id.}
fense and is ineligible for parole for the mandatory § 924(c) sentence. The addition of the possession standard and increased penalties continues Congress' attempts to get tough on crime.

This Note examines the latest amendment to § 924(c). First, this Note explores the legislative history of § 924(c) in an attempt to discover Congress' intent in enacting and then amending the statute. This Note then discusses the various interpretations of § 924(c) and the Supreme Court's attempts to define and clarify the meaning of the terms in the statute by reviewing the Supreme Court's decisions in Smith v. United States, Bailey v. United States, and Muscarello v. United States. Finally, this Note analyzes the most recent amendment to § 924(c), the result of congressional reaction to the Bailey decision.

I. LEGISLATIVE HISTORY BEHIND § 924(c)

Section 924, part of the United States Criminal Code, outlines additional penalties that may be levied upon criminal defendants. Congress first enacted § 924(c) as part of the Gun Control Act of 1968 to proscribe the use and carrying of an unlawful weapon when engaged in a federal felony. The enhanced punishment for using or carrying a gun in relation to a crime first appeared as an amendment to the then proposed Act. Representative Poff, the chief legislative sponsor of § 924(c), said that the provision sought "to persuade the man who is tempted to commit a Federal felony to leave his gun at home."

24. See id. (replacing subsection (c) with § 924(c)(1)(D)). Congress intended for the defendant to serve the mandatory sentence under § 924(c) prior to the start of the sentence for the underlying offense. See S. REP. NO. 98-225, at 313 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3491-92 (explaining the 1984 amendments that were intended to clarify the law); see also infra Part I (outlining the problems with the law that led to several congressional amendments).

25. See 144 CONG. REC. H10,329 (daily ed. Oct. 9, 1998) (statement of Rep. McCollum) (supporting S. 191 as "an important step in the battle against firearm violence" and "a clear message to violent predators that the criminal use of guns will not be tolerated").


28. See id. § 102, 82 Stat. at 1224; Mulry, supra note 1, at 502 (discussing the intent of Congress in enacting § 924(c)).


30. Id.; see also Busic v. United States, 446 U.S. 398, 405-06 (1980) (describing Rep. Poff's comments as "crucial material" when interpreting § 924(c)); Simpson v. United States, 435 U.S. 6, 13-14 (1978) (noting that Rep. Poff's comments on § 924(c) are "clearly probative" and "certainly entitled to weight"); infra notes 33-34 (explaining the importance of the Simpson and Busic cases).
The "carrying" portion of the law, however, applied only to defendants who did not have a permit for the gun. The provision faced criticism because, if a defendant had a permit for the gun, the enhanced punishment for carrying a gun during the felony did not apply. Additionally, the law encountered more criticism because the Supreme Court initially interpreted § 924(c) as an "enhancement provision" rather than a separate offense and a means of imposing longer sentences. The early cases applied § 924(c)(1) only if the underlying offense did not have statutorily imposed enhanced sentences.

The current language of § 924(c) is the result of six amendments during a ten year period. The first, a result of the Comprehensive Crime Con-

31. See Gun Control Act of 1968, § 102, 82 Stat. at 1224 (applying the carrying requirement to those who carry guns "unlawfully"); Clark D. Cunningham & Charles J. Fillmore, Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm," 73 WASH. U. L.Q. 1159, 1191-93 (1995) (indicating that "carries a firearm unlawfully" limited the statute's application to felons who did not have a gun permit and outlining the legislative history behind the original version of § 924(c)(1)).

32. See Cunningham & Fillmore, supra note 31, at 1191 (discussing the loophole in the law that allowed defendants to bypass punishment under § 924(c)(1) when the underlying crime allowed for additional penalties). The law faced criticism on other grounds also. See s. REP. NO. 98-225, at 312 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3490 (reviewing the problems with the statute); Whiting, supra note 15, at 685 (noting that the original version of § 924(c)(1) was criticized as ineffective because of the "lawful carrier" exception and the failure to ban parole).

33. See Busic, 446 U.S. at 404, 410 (holding that a defendant may not be independently prosecuted and sentenced under § 924(c)(1) if he had been sentenced under another statute); Simpson, 435 U.S. at 16 (finding that a defendant could not be sentenced under both § 924(c)(1) and the enhanced punishment provision of § 2113(d) for a bank robbery); Clare, supra note 5, at 823 (discussing the Supreme Court's early interpretations of the statute as an enhancement provision).

34. See Busic, 446 U.S. at 404-05; Simpson, 435 U.S. at 16. The Supreme Court based its decision in Busic on the Simpson decision concerning the sentencing provisions of § 924(c)(1). See Busic, 446 U.S. at 404 (relying on the language and reasoning of the Simpson decision). In Simpson, the defendants were sentenced under § 924(c)(1) and § 2113(a) and (d) for using handguns to perpetrate an aggravated bank robbery. See Simpson, 435 U.S. at 9. The Supreme Court held that the defendants may not be sentenced under the enhanced punishment provision in § 2113(d) and § 924(c)(1) because the legislative history did not support that construction of § 924(c)(1). See id. at 16. The Court relied on Representative Poff's floor statement that his amendment was not applicable to §§ 2113 or 2114 of Title 18. See id. at 13 (citing 114 CONG. REC. 22,232 (1968) (statement of Rep. Poff)). The Busic Court, in light of the Simpson decision, found it impossible to conclude that § 924(c) applied where the predicate felony contained its own enhancement provision. See Busic, 446 U.S. at 404 (also using the doctrine of "stare decisis" as part of its reasoning).

The Latest Amendment to 18 U.S.C. § 924(c) recognized a need to amend the statute in the face of the Simpson and Busic decisions that diminished the effectiveness of the statute. The amendment, part of an extensive bill that revised many areas of federal criminal law, closed the loophole left open by the earlier Busic decision. The Senate Committee on the Judiciary also revised the statute to ensure that anyone who commits a federal crime of violence receives a mandatory sentence without the possibility of parole or serving concurrent sentences. The change further amended § 924(c) to require mandatory five year sentences, without parole, for offenders who carried firearms during, and in relation to, the commission of any crime of violence.
Congress amended § 924(c) again in 1986 as part of the Firearms Owners' Protection Act. These amendments designated subsection (1) as using or carrying a firearm, and defined drug trafficking crime and crime of violence in subsections (2) and (3) respectively. The statute required five year mandatory sentences for those who used or carried a firearm during and in relation to a crime of violence or drug trafficking crime. Ultimately, the purpose of these amendments was to impose more severe penalties when firearms were involved in the commission of a felony, especially a drug trafficking crime.

In 1988, Congress modified the definition of drug trafficking crime, to incorporate any crime punishable under the Maritime Drug Law Enforcement Act, the Controlled Substances Act, and the Controlled Substances Import and Export Act into the definition. Subsequent amendments in 1990 and 1994 expanded the types of firearms covered and increased the mandatory sentences for certain offenses. The 1990 amendment imposed imprisonment for ten years if the firearm used or carried was a short-barreled rifle or shotgun and added "destructive device" to the list of weapons covered. The 1994 amendment added a "semiautomatic assault weapon" to the list of firearms punishable by a ten year mandatory sentence.
The sixth, and most recent amendment to § 924(c) passed in November of 1998, when Congress added possession in furtherance of a crime as an alternative to the “uses or carries” language. The amendment also increased the penalties for second offenses and added penalties for brandishing and discharging the weapon.

II. COURT CHALLENGES TO § 924(c)

The Supreme Court recently decided several cases that grapple with the congressional intent of § 924(c). These cases have dealt with every aspect of § 924(c) from the proper venue for trying a defendant under

1998.


50. See id.

51. See, e.g., Muscarello v. United States, 118 S. Ct. 1911, 1919 (1998) (finding that the “carrying” provision of § 924(c)(1) includes carrying a gun in a vehicle); United States v. Gonzales, 520 U.S. 1, 2-3 (1997) (holding that § 924(c)(1) forbids both state and federal courts from directing that the five year mandatory sentence run concurrently with any other sentences); Bailey v. United States, 516 U.S. 137, 143 (1995) (interpreting the “use” prong of § 924(c)(1) to mean “active employment”); Smith v. United States, 508 U.S. 223, 236-37 (1993) (finding that exchanging a firearm for drugs constitutes a “use” under the statute); Deal v. United States, 508 U.S. 129, 132 (1993) (finding that, for § 924(c)(1) purposes, “conviction” means a “finding of guilt by a judge or jury”). The Smith decision is reviewed infra notes 54-82 and accompanying text; the Bailey decision is discussed and analyzed infra 88-109 and accompanying text; the Muscarello case is discussed infra notes 112-73 and accompanying text.

In Gonzales, the defendant was convicted of state robbery charges, and later, federal narcotics charges. See Gonzales, 520 U.S. at 3. The United States Court of Appeals for the Tenth Circuit held that the defendant’s § 924(c)(1) sentence may run concurrently with the state sentence that the defendant already had begun to serve. See United States v. Gonzales, 65 F.3d 814, 819 (1995), vacated, 520 U.S. 1 (1997). The Supreme Court, however, disagreed and held that Congress clearly intended for the § 924(c) sentence and any other sentence to run consecutively. See Gonzales, 520 U.S. at 5.

In Deal, the defendant was convicted of six counts of bank robbery and carrying and using a firearm during and relation to a violent crime. See Deal, 508 U.S. at 130. The United States District Court for the Southern District of Texas sentenced the defendant to five years for the first § 924(c)(1) count and twenty years for each of the other five § 924(c)(1) counts under the statute’s requirement for second or subsequent offenses. See id. at 130-31. The defendant argued that because the District Court entered only a single judgment on all counts, he was convicted only once and therefore should not be subject to the “second or subsequent” provision of § 924(c)(1). See id. at 130. The Supreme Court, in an opinion authored by Justice Scalia, affirmed the decision and held that, under the statute, the term “conviction” means a finding of guilt by a judge or jury. See id. at 132. Thus, because the defendant was convicted of six counts, the lowest court correctly applied the sentence. See id.
the statute\textsuperscript{52} to the availability of collateral attacks under the statute.\textsuperscript{53}

A. "Using" a Weapon under Smith and Bailey

The Court first examined the "use" provision of § 924(c)(1) in \textit{Smith v. United States}\.\textsuperscript{54} Prior to \textit{Smith}, a conflict existed among the circuit courts of appeal on the issue of whether exchanging a firearm for narcotics constituted a "use" under the statute.\textsuperscript{55} The Supreme Court granted certio-

\textsuperscript{52} See United States v. Rodriguez-Moreno, 119 S. Ct. 1239, 1244 (1999) (explaining that the proper venue for trying a § 924(c)(1) charge is that which has venue over the underlying crime). In \textit{Rodriguez-Moreno}, the defendant was charged with kidnapping and using or carrying a firearm during a crime of violence. \textit{See id.} at 1242. During the commission of the kidnapping, the defendant traveled through Texas, New Jersey, New York, and Maryland; however, the defendant only carried the firearm in Maryland. \textit{See id.} at 1241. After the United States District Court for the District of New Jersey rejected Rodriguez-Moreno's argument against the application of § 924(c)(1) and convicted him, Rodriguez-Moreno appealed his § 924(c)(1) conviction for lack of venue, claiming that Maryland was the only place he used or carried the gun. \textit{See id.} at 1242.

The Supreme Court affirmed Rodriguez-Moreno's conviction because of the fact that the kidnapping continued throughout the four states, which made the charge valid in any of those venues. \textit{See id.} at 1244. Based on that finding, the Court held that the § 924(c)(1) charge was proper in any venue where the charge for the underlying crime was appropriate. \textit{See id.} Justices Scalia and Stevens, in dissent, argued that a § 924(c)(1) violation can occur only when the defendant uses or carries the firearm while committing the underlying crime. \textit{See id.} (Scalia, J., dissenting). Scalia stated that the language of the law required prosecution in the venue where this definition is completely satisfied. \textit{See id.}

\textsuperscript{53} See Bousley v. United States, 118 S. Ct. 1604, 1610-12 (1998) (holding that a defendant can successfully petition for relief after a guilty plea only if the plea was not entered into voluntarily or intelligently or if the defendant establishes that he is actually innocent); \textit{see also supra} note 8 and accompanying text (analyzing the \textit{Bousley} decision).

\textsuperscript{54} 508 U.S. 223, 225 (1993).

\textsuperscript{55} \textit{See Smith}, 508 U.S. at 227. This conflict within the circuits had come before the Court in 1991. \textit{See United States v. Featherston, 949 F.2d 770, 776 (5th Cir. 1991), cert. denied, 506 U.S. 930 (1992).} Justices White and Thomas dissented from the Court's denial of certiorari arguing that the large amount of conflict among the circuits warranted a grant of certiorari in order to clarify § 924(c)'s meaning and scope. \textit{See Langston v. United States, 506 U.S. 930, 930-32 (1992).}

The \textit{Smith} case arose from a decision by the United States Court of Appeals for the Eleventh Circuit that held that the language of § 924(c)(1) did not require the firearm to be actually used as a weapon. \textit{See Smith v. United States, 957 F.2d 835, 837 (11th Cir. 1992), aff'd, 508 U.S. 223.} Shortly before the Eleventh Circuit decision, the United States Court of Appeals for the District of Columbia ruled similarly. \textit{See United States v. Harris, 959 F.2d 246, 261-62 (D.C. Cir. 1992) (per curiam) (noting that the language of § 924(c)(1) was broad enough to cover the exchange of firearms for drugs, and that there was no reason why Congress would not allow this type of situation to be actionable under the statute).} The United States Court of Appeals for the Ninth Circuit held, however, that exchanging a firearm in a drug transaction did not constitute "use" under § 924(c)(1). \textit{See United States v. Phelps, 877 F.2d 28, 29-31 (9th Cir. 1989) (holding that the statute's purpose would not be served by convicting Phelps for using his firearm for barter).}
rari in Smith to resolve this conflict. In this six to three decision, the Court found that bartering for drugs with a firearm constituted an actionable "use" under § 924(c)(1).

In Smith, petitioner John Angus Smith offered to exchange an automatic weapon for cocaine with an undercover officer to secure drugs to later resell. Eventually, law enforcement authorities arrested Smith and then charged him with knowingly using a firearm during and in relation to a drug trafficking crime under § 924(c)(1). Smith received the mandatory thirty year sentence for "using" an automatic weapon with a silencer. On appeal, Smith argued that § 924(c)(1) applied only when the firearm was used as a weapon and not for other uses, such as bartering.

The Smith Court agreed with the Eleventh Circuits' prior decision and held that trading a firearm for drugs constitutes a "use" under § 924(c)(1). The Court first examined the ordinary meaning of the word "use" and defined it as "[t]o make use of[,] to convert to one's service[,] or to employ." Smith's attempt to exchange his firearm for cocaine, the Court

56. See Smith, 508 U.S. at 227.
57. See id. at 224. Justice O'Connor delivered the opinion of the Court, in which the Chief Justice and Justices White, Blackmun, Kennedy, and Thomas joined. See id. Justice Blackmun also filed a concurring opinion while Justice Scalia, joined by Justices Stevens and Souter, filed a dissenting opinion. See id. at 241.
58. See id. at 225.
59. See id. at 225-26. Smith and the undercover officer, who presented himself as a pawnshop owner, met in a hotel room, whereupon they agreed on a trade of the defendant's weapon for narcotics. See id. When the officer left the motel room to "obtain" the narcotics, Smith grew impatient and left the motel with his weapons. See id. Officers watching the motel followed Smith and a high-speed chase ensued. See id. Eventually, the officers apprehended Smith and a search of his vehicle revealed five weapons, two silencers, and ammunition. See id.
60. See id. at 226. Along with the § 924(c)(1) charges, the grand jury in the District Court for the Southern District of Florida charged Smith under 21 U.S.C. §§ 841(a)(1), 846, conspiracy to possess cocaine and attempt to possess cocaine, both with intent to distribute. See id.; see also 21 U.S.C. §§841(a)(1), 846 (1994).
61. See Smith, 508 U.S. at 227. Under § 924(c)(1)(B)(ii), when the firearm is a "machinegun" or is fitted with a silencer, the mandatory sentence is thirty years. See 18 U.S.C. § 924(c)(1)(B)(ii) (1994 & Supp. 1999); see also id. § 921(a)(23) (defining term "machinegun" to include automatic weapons as defined in the National Firearms Act, 26 U.S.C. 5845(b) (1994)).
62. See Smith, 508 U.S. at 227. The Smith case arose from the United States Court of Appeals for the Eleventh Circuit, which held that the language of § 924(c)(1) did not require the firearm to be used as a weapon. See United States v. Smith, 957 F.2d 835, 837 (11th Cir. 1992), aff'd, 508 U.S. 223. The Eleventh Circuit held that any use of the firearm in the facilitation of the offense would suffice under § 924(c)(1). See id.
63. See Smith, 508 U.S. at 241 (affirming the Eleventh Circuit's decision subjecting Smith to § 924(c)(1)'s mandatory 30 year sentence).
64. Id. at 228-29 (quoting definitions from BLACK'S LAW DICTIONARY 1541 (6th ed.
reasoned, thus constituted a “use” or “employment” of his gun. Although this definition supported Smith's conviction, the Court further interpreted the meaning of “use” in light of the surrounding terms used in the statute. The Court looked to § 924(d)(1) to aid in its interpretation of Congress' intent in choosing the word “use” in § 924(c)(1). That section acknowledges that a firearm could be “used” for trade. The majority reasoned that, if a weapon could be “used” for trade or transfer in the § 924(d)(1) scheme, it could also be “used” for trade under § 924(c)(1). The Court concluded that it could not find that the word “use” held two different meanings in two closely related statutes.

In dissent, Justices Scalia, Stevens, and Souter disagreed with the majority about the ordinary and natural meaning the Court gave to the word “use.” They argued that the majority did not “grasp the distinction between” the possible and ordinary application of a word. To the dissenters, “using” a firearm, in its ordinary sense, means using the firearm as a weapon. Scalia applied the United States Sentencing Guide-
lines’ version of "use" to support his interpretation of the statute. Justice Scalia concluded that the Sentencing Guidelines, which allow for greater sentences when firearms are "brandished, displayed, or possessed" or "otherwise used," supported his reading of "use" in § 924(c)(1), to mean use of the firearm as a weapon.

In addition, the dissenters stated that because Congress' meaning was unclear, the rule of lenity should apply. This rule applies in favor of a defendant when a criminal statute is ambiguous and the issue is subject to some doubt. Thus, when a statute's language does not plainly and unmistakably declare which conduct Congress has made criminal, a court should choose a more lenient alternative. The majority refused to apply between two philosophies of interpretation: textualism and strict constructionism. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 & n.30 (1997) (using the Smith opinion to demonstrate the differences between textualism and strict constructionism). According to Scalia, a textualist should construe a law "reasonably, to contain all that it fairly means." Id. Scalia, a self-proclaimed textualist, dissented from the opinion because he felt that the phrase "uses a gun" could only mean what guns are normally used for—as weapons. See id. at 23-24.

74. SENTENCING GUIDELINES, supra note 1.
76. See SENTENCING GUIDELINES, supra note 1, § 2B3.1(b)(2). The Sentencing Guidelines define "otherwise used" as conduct that does "not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm." Id. at § 1B1.1 cmt. n.1(g).
77. See Smith, 508 U.S. at 243 (Scalia, J., dissenting).
78. See id. at 246-47 (Scalia, J., dissenting). Justice Scalia writes that "[t]he rule of lenity is almost as old as the common law itself" and that "is validated by sheer antiquity." SCALIA, supra note 73, at 29 (citing SIR PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 239 (1875), which notes that the rule of lenity spans back to English common law when over 100 capital offenses existed).
80. See United States v. Bass, 404 U.S. 336, 347-48 (1971) (finding that when a statute's purpose and history is not clear, a narrower reading should apply).
lenity principles because it found that Congress' intent was clear.81

The Smith case clarified only that using a firearm in exchange for drugs is actionable under § 924(c)(1).82 Confusion remained in the circuit courts of appeal, however, regarding the meaning of “use” under § 924(c)(1) in other circumstances.83 Although the Smith Court found that “use” meant “to employ” a weapon, confusion existed with regard to a possession requirement;84 some courts of appeal held that the weapon should merely be readily available to satisfy § 924(c)(1),85 while other circuits found that standard insufficient.86 The Supreme Court granted certiorari in Bailey v. United States87 to clarify the definition of “use” under § 924(c)(1) and to resolve this circuit court split.88

The Bailey case consisted of two cases consolidated by the United States Court of Appeals for the District of Columbia, which involved convictions under the “use” provision of § 924(c)(1).89 In the first case, the police stopped Roland Bailey for a routine traffic violation and, upon searching the car, found drugs and a loaded pistol.90 Bailey was convicted for possession with intent to distribute, possession of a firearm by a felon, and using or carrying a firearm during a drug crime.91 In the second case,
officers searched Candisha Robinson’s apartment after an undercover officer made two controlled narcotics purchases from her. During the search, police found an unloaded gun and additional drugs in a locked trunk in the bedroom closet. Robinson was convicted, inter alia, of possession with intent to distribute a cocaine base, distribution of a cocaine base, and using or carrying a firearm during a drug crime. Although Bailey and Robinson were both convicted on all counts, including the “use” and “carry” provisions of § 924(c)(1), the court of appeals reviewed only their convictions on the “use” prong of the statute.

In its consideration of the consolidated cases, the United States Court of Appeals for the District of Columbia applied a “proximity and accessibility” test to determine if firearms had been “used.” The United States Supreme Court stated, however, that this test did not provide a court with guidance on evaluating if the weapon’s involvement resulted in more than mere possession under § 924(c)(1). To determine congressional intent, the Court looked to the dictionary definitions applied in the Smith case two years earlier. Again, the Court applied the ordinary meaning of “use,” selecting the definitions “to avail oneself of” or “to session of a firearm by a felon under 18 U.S.C. § 922(g), and using or carrying a firearm during a drug crime under 18 U.S.C. § 924(c)(1). See id.

92. See Bailey, 516 U.S. at 140.
93. See id.
96. See Bailey, 516 U.S. at 151. The Supreme Court did not consider whether Bailey and Robinson’s convictions satisfied by the “carry” provision because of the lower court’s focus on the “use” prong. See id.
97. See United States v. Bailey, 36 F.3d 106, 113, 115 (D.C. Cir. 1994) (en banc) (adopting a “proximity and accessibility” test), rev’d, 516 U.S. 137 (1995). The court held that “one uses a gun, i.e., avails oneself of a gun, and therefore violates the statute, whenever one puts or keeps the gun in a particular place from which one (or one’s agent) can gain access to it if and when needed to facilitate a drug crime.” Id.
98. See Bailey, 516 U.S. at 143-44 (noting that the District of Columbia Circuit did not require actual use, but criminalized “‘simpl[e] possession with a floating intent to use’”) (quoting Bailey, 36 F.3d at 121 (Williams, J., dissenting)).
99. See id. at 145 (quoting United States v. Smith, 508 U.S. 223, 228-29 (1993)); see also supra notes 54-82 (discussing the Court’s interpretation of “use” in Smith).
employ.”

The Court looked next to the textual context of § 924(c)(1) as it did in Smith. The Court stated that Congress intended “use” and “carry” to have distinct meanings, whereas the Government’s broad interpretation of § 924(c)(1) incorrectly combined both of the terms. Based on the rule of statutory construction that assumes Congress selects terms with distinct and independent meanings, the Court assumed a narrow, but active, interpretation of “use.” If the Court did not apply this rule, the “carry” prong would be read out of the statute without a significant role.

The Bailey Court then held that “use” under § 924(c)(1) means “active employment.” To avoid the confusion that followed the Smith decision, the Court went on to describe actionable activities under the “use” prong of § 924(c)(1). These activities include brandishing, displaying,
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bartering, or striking with a firearm.\textsuperscript{108} Ultimately, the Court held that the prosecution must prove that the firearm was actively employed by the defendant to obtain a conviction under § 924(c)(1).\textsuperscript{109}

With the meaning of "use" finally settled, the Supreme Court began to review petitions for certiorari involving the "carry" prong of § 924(c)(1).\textsuperscript{110} At that time, several circuit courts of appeal applied different standards to the "carry" prong.\textsuperscript{111} These divergent holdings on the

108. See id. The Court also concluded that a reference to a firearm or the "silent" presence of a gun on a table could be actionable "uses" under § 924(c)(1). See id. Storage, however, of a firearm is not actionable, nor is placement for later use. See id. at 149.

109. See id. at 150. The Court found that the evidence against both Bailey and Robinson did not support either conviction for "use" of a firearm under § 924(c)(1) because they did not "actively employ" the weapon. See id. at 150-51.

110. See supra note 10 and accompanying text (discussing the Court's refusal to hear cases on the proper interpretation of the statute).

111. In § 924(c)(1) "carry" cases, the Second, Sixth, and Ninth Circuits defined "carrying" as transporting a weapon that is immediately accessible to the defendant. See United States v. Giraldo, 80 F.3d 667, 676 (2d Cir. 1996) (holding that a firearm within reach during the commission of a drug offense is actionable under § 924(c)(1)); United States v. Riascos-Suarez, 73 F.3d 616, 623 (6th Cir. 1996) (stating that a firearm must be "immediately available for use" by either being on the defendant or within reach to convict under the "carrying" prong); United States v. Lopez, 100 F.3d 98, 101 (9th Cir. 1996) (holding that a defendant can be convicted under § 924(c)(1) when he has transported a firearm on or about his person and thus is immediately accessible); see also Broadbent, supra note 15, at 24-25 (discussing the decisions in the Second, Sixth, and Ninth Circuits).

The Fourth, Seventh, Tenth and Eleventh Circuits used a completely different standard, and held that a firearm transported in an automobile does not have to be easily accessible to be carried for § 924(c)(1) purposes. See United States v. Mitchell, 104 F.3d 649, 653-54 (4th Cir. 1997) (holding that a firearm does not have to be easily accessible to be carried under § 924(c)(1)); United States v. Molina, 102 F.3d 928, 932 (7th Cir. 1996) (stating that the firearm does not have to be within immediate reach to convict a defendant of "carrying" a firearm under § 924(c)(1)); United States v. Miller, 84 F.3d 1244, 1258 (10th Cir. 1996) (holding that the carrying prong is satisfied when a defendant exercises "dominion and control" over a firearm while in transport); United States v. Chirinos, 112 F.3d 1089, 1095 (11th Cir. 1997) (holding that the government needs only to prove that a defendant transported a weapon in a vehicle to convict under § 924(c)(1)), cert. denied, 118 S. Ct. 701 (1998); see also Broadbent, supra note 15, at 25-26 (discussing the decisions in the Fourth, Seventh, Tenth, and Eleventh Circuits).

Meanwhile, the First Circuit adopted the pure transport theory, which permitted mere transportation to convict a defendant for "carrying" under § 924(c)(1). See United States v. Cleveland, 106 F.3d 1056, 1066 (1st Cir. 1997) (finding that a gun carried in the trunk of a vehicle constituted "carrying"), aff'd sub nom. Muscarello v. United States, 118 S. Ct. 1911 (1998); see also Broadbent, supra note 15, at 26 (noting the decision of the First Circuit).

The Third and Eighth Circuits, however, did not address this issue conclusively. See United States v. Eyer, 113 F.3d 470, 476 (3d Cir. 1997) (concluding that in this instance, transporting an easily accessible firearm in a automobile could be carrying for § 924(c)(1) purposes, but declining to comment on whether it could always be carrying); United States v. Nelson, 109 F.3d 1323, 1325-26 (8th Cir. 1997) (assuming, but not deciding, that ready availability is required to convict for "carrying" under § 924(c)(1)); see also Broadbent, supra note 15, at 26-27 (noting the decisions of the Third and Eighth Circuits).
meaning of "carry" under § 924(c)(1) prompted the Supreme Court to
grant certiorari in Muscarello v. United States.112

B. "Carrying" a Firearm under Muscarello

One of the Supreme Court's most recent ruling on the meaning of
§ 924(c)(1) resulted from a consolidation of two cases113: United States v.
Muscarello114 and United States v. Cleveland.115 In both cases, the defen-
dants were convicted of using and carrying a firearm during and in relation
to a drug trafficking crime in violation of § 924(c)(1).116

In Cleveland, Donald Cleveland and Enrique Gray-Santana placed
three guns inside a duffel bag and then put the bag in the trunk of a car
in order to rob their cocaine supplier in an upcoming exchange.117 After
a lengthy investigation of Cleveland's supplier, the Drug Enforcement
Agency planned a raid on this exchange.118 When Cleveland and the
supplier arrived at the meeting point, DEA officers handcuffed the men
and searched their vehicles.119 The officers searched Cleveland's car,
found the bag that contained the guns along with rope and duct tape, and
then immediately arrested the two men and their supplier.120 The United
States District Court for the District of Massachusetts sentenced Cleve-
land and Gray-Santana to 180 months imprisonment and sixty months of
supervised release.121

Both Cleveland and Gray-Santana appealed their convictions under
§ 924(c)(1), claiming that the Supreme Court's decision in Bailey invalid-
dated their convictions.122 The United States Court of Appeals for the

ally Eme, supra note 15, at 16 (discussing the opportunities that the split in the federal
circuits gives to attorneys to mold the law into what is best for their clients).


113. See id.

114. 106 F.3d 636 (5th Cir. 1997), aff'd, 118 S. Ct. 1911 (1998).

115. 106 F.3d 1056 (1st Cir. 1997), aff'd sub nom. Muscarello v. United States, 118 S.

were convicted under both prongs of § 924(c)(1) and of other narcotics offenses, including
possession, intent to distribute and conspiracy to distribute. See Cleveland, 106 F.3d at
1060; Muscarello, 106 F.3d at 637.

117. See Cleveland, 106 F.3d at 1059.

118. See id.

119. See id.

120. See id.

121. See id. at 1060.

122. See id. The Bailey decision came down from the Supreme Court shortly after the
district court convicted Cleveland under § 924(c)(1). See id. Cleveland and Gray-Santana
filed a motion for relief in light of the ruling, but the district court denied their motions.
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First Circuit applied the definition of "use" from Bailey to Gray-Santana’s and Cleveland’s appeal and held that the two men could not be convicted under the "use" prong of § 924(c)(1). The court of appeals affirmed both convictions, however, under the "carry" prong of § 924(c)(1).

In Muscarello, the companion case, Frank Muscarello pleaded guilty to selling marijuana from his truck with a loaded firearm locked in the glove compartment. Like Cleveland and Gray-Santana, Muscarello appealed his § 924(c)(1) conviction based on the recently decided Bailey case and argued that he did not carry the weapon in relation to his drug crime.

The United States Court of Appeals for the Fifth Circuit, relying on Bailey, overturned Muscarello’s "use" conviction. The court, however, affirmed Muscarello’s conviction under the "carry" prong because Muscarello knew that the gun was in the vehicle. The court also rejected Muscarello’s reasons for carrying the gun, holding that when a defendant knowingly possesses a firearm in a vehicle and uses that vehicle for a

See id.; see also supra notes 7-8 (discussing post-conviction relief after the Bailey decision).

123. See Cleveland, 106 F.3d at 1065. The court of appeals applied the Supreme Court’s “active employment” interpretation, and then held that neither Gray-Santana nor Cleveland actively employed the weapons because they remained in the trunk during the drug interaction. See id.

124. See id. at 1068-69. The court of appeals explored the views of the other circuits on the “carrying” prong and decided that instant accessibility was not required to satisfy the statute. See id. at 1068; see also supra note 111 (discussing the divergent holdings of the circuits on the “carry” prong). The court further held that its decision is consistent with its previous holding that a firearm could be “carried” in a boat for § 924(c)(1) purposes. See Cleveland, 106 F.3d at 1065 (citing United States v. Ramirez-Ferrer, 82 F.3d 1149, 1154 (1st Cir. 1996)).


126. See id. at 637-38; see also Cleveland, 106 F.3d at 1060. Muscarello argued that the gun had been in the glove compartment for a long period of time and that he did not make a conscious decision to carry the gun in relation to the drug crime. See Muscarello, 106 F.3d at 637. In addition, he stated that, as a bailiff with the Sheriff’s office, he carried the gun in relation to his job. See id. at 637-38. The court of appeals rejected this argument and asserted that the statute required only that Muscarello knowingly possessed the firearm. See id. at 638-39.

Two other circuits followed this same rule. See United States v. Brantley, 68 F.3d 1283, 1289-90 (11th Cir. 1995) (finding that the statute does not require proof that the defendant knew about the features of the weapon if the defendant knew he possessed a firearm); United States v. Lopez, 37 F.3d 565, 571-72 (9th Cir. 1994) (asserting that the defendant’s stated purpose for carrying the weapon was irrelevant), cert. denied, 119 S. Ct. 1277 (1999).

127. See Muscarello, 106 F.3d at 638-39. The court of appeals applied the “active employment” interpretation of “use” and found that Muscarello did not “use” the firearm because it remained in the glove compartment during the drug crime. See id.

128. See id. at 639. In a previous decision, the Fifth Circuit noted that “the means of carrying is the vehicle itself.” Id. (quoting United States v. Pineda-Ortuno, 952 F.2d 98, 104 (5th Cir. 1992), which held that, for § 924(c) purposes, the vehicle is the mechanism for carrying).
drug trafficking crime, he is “carrying” a firearm for § 924(c)(1) purposes. 129

1. The Majority Opinion: A Broad Interpretation of the “Carry” Prong

The Supreme Court consolidated Muscarello and Cleveland’s appeals, and then granted certiorari to determine if “carrying” firearms in a vehicle is a chargeable offense under § 924(c)(1). 130 The Court, in a five-to-four decision authored by Justice Breyer, 131 concluded that possessing a firearm in a vehicle falls within the purview of the “carry” prong of § 924(c)(1). 132

As it did in the Smith and Bailey cases, the Court looked first to the statute’s language and the ordinary, natural meaning of the word “carry.” 133 The Court examined many sources to find the ordinary meaning of “carry,” including dictionaries, literature, newspapers, and even the Bible. 134 The Court concluded that “carry” means “to convey,” whether by car, hand, or boat. 135

The Court explored next the legislative history behind § 924(c)(1) to determine whether Congress intended “carry” to be construed in its ordinary sense, or if it intended the term to be interpreted in a more limited manner. 136 The majority used the statements of the statute’s legisla-

129. See id.
132. See id. at 1914.
134. See Muscarello, 118 S. Ct. at 1914-16 (exploring the various meanings for “carry” found in these different sources). The majority found that the Bible used the word carry to mean conveyance in a vehicle. See id. at 1914 (citing 2 Kings 9:28 (King James) (“[H]is servants carried him in a chariot to Jerusalem’ . . .”) and Isaiah 30:6 (King James) (“[T]hey will carry their riches upon the shoulders of young asses’ . . .’)).
135. See id. at 1915-16 (finding the meaning of “carry” can include carrying in a car “whether one carries a gun, a suitcase, or a banana”). On previous occasions, the Court described “carrying” drugs in a car in a manner that is consistent with the interpretation in Muscarello. See California v. Acevedo, 500 U.S. 565, 572-73 (1991) (allowing police searches of containers where there is probable cause to believe a suspect is “carrying marijuana in a bag in his car’s trunk”); Florida v. Jimeno, 500 U.S. 248, 249 (1991) (finding that when police have permission to search a vehicle because they believe a suspect is carrying narcotics in his car, they may also search open containers inside the vehicle).
136. See Muscarello, 118 S. Ct. at 1916. Courts generally look to the legislative history of a statute to gather evidence of Congress’ intent in enacting the statute. See Brock v.
tive sponsor to show that Congress created § 924(c)(1)'s mandatory minimum sentence to convince the criminal to leave his gun at home.137 After examining the statements, the Court did not find any "significant indication" that Congress sought to limit "carry" to require carrying on the person.138

The petitioners argued that the Court should take the same approach to construing terms that it did in Bailey, and thus construe "carry" narrowly.139 In doing so, both terms in the statute, "use" and "carry," would retain their independent meanings.140 The majority disagreed, however,

Pierce County, 476 U.S. 253, 263 (1986) (finding that statements of individual legislators, when consistent with the language of the statute, are helpful in determining congressional intent); County of Washington, Or. v. Gunther, 452 U.S. 161, 182 (1981) (Rehnquist, J., dissenting) (noting that it is "well settled that the legislative history of a statute is a useful guide to the intent of Congress"). But see Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 617 (1991) (Scalia, J., concurring) (arguing that legislative history is an unreliable source of congressional intent).

Justice Scalia strongly denounces the relatively new use of legislative history in interpreting statutes. See Scalia, supra note 73, at 29-37 (outlining Scalia's views on the overwhelming use of legislative history in recent years). His textualist theory of interpretation views "the objective indication of the words" as the most reliable source of the statute's meaning. See id. at 29. He argues that the legal community has come to rely on legislative history and routinely "make[s] no distinction between words in the text of a statute and words in its legislative history." Id. at 31. Ultimately, Justice Scalia urges the legal community, both judges and lawyers, to end the routine use of legislative history. See id. at 36. For more information on this subject, see William N. Eskridge, Jr., Dynamic Statutory Interpretation 48-49 (1994) (discussing the power of courts to revise and interpret statutes); Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 538 (1947) (quoting a letter from Justice Holmes, which stated that, as a judge, he wanted only to know what the statute's words meant and did not care about the congressional intent behind the term); Arthur W. Phelps, Factors Influencing Judges in Interpreting Statutes, 3 Vand. L. Rev. 456, 469 (1950) (arguing that statutes should be interpreted according to the needs and goals of modern society, as well as on the basis of legislative history).

137. See Muscarello, 118 S. Ct. at 1916 (citing 114 Cong. Rec. 22,231 (1968) (statement of Rep. Poff)). The Court noted also that other legislators made similar remarks. See id. (citing 114 Cong. Rec. 22,244 (1968) (statement of Rep. Randall) ("Of course, what we are trying to do by these penalties is to persuade the criminal to leave his gun at home."))) and 114 Cong. Rec. 22,236 (1968) (statement of Rep. Meskill) ("We are concerned . . . with having the criminal leave his gun at home.")).

138. See id. at 1917. The majority found that none of the legislators defined the scope of "carry," and therefore the term should not be limited to apply solely to instances where the gun was on the person. See id. The petitioners argued that Congress would have used the word "transport," not "carry," if it intended the statute to apply to vehicles. See id. Upon examining Congress' use of the two words, the Court concluded that "transport" is a broad category that encompasses "carry." See id. The majority found that "carry" is a more limited term and "implies personal agency and some degree of possession" whereas "transport" is not so limited. See id. at 1917-18.

139. See id. at 1918; Bailey v. United States, 516 U.S. 137, 146 (1995) (assuming that Congress intended each word to have a distinct meaning).

140. See Muscarello, 118 S. Ct. at 1918. The petitioners argued that a broad interpreta-
and further stated that its broader interpretation of “carry” did not consume the “use” prong.\footnote{141} The Court allowed the terms to retain independent meanings because carrying a gun in a car does not always involve the gun’s active employment.\footnote{142} The majority found that after interpreting “use” narrowly in \textit{Bailey}, the statute’s basic purpose would be defeated by interpreting “carry” narrowly.\footnote{143} Limiting the definition of “carry” to carrying on the person, would leave “a gap in coverage” unintended by Congress.\footnote{144}

Additionally, the petitioners argued that the Court should limit the scope of “carry” to instances in which the firearm was immediately accessible, as several of the courts of appeal had done.\footnote{145} The Court, however, found that a criminal could still “carry” a gun, regardless of whether the gun was immediately accessible.\footnote{146} Based on the legislative history of § 924(c)(1) and the generally accepted meaning of the word “carry,” the majority held that the defendants’ conduct fell within the scope of the statute.\footnote{147}

Finally, the majority held that despite a broad interpretation, the “during and in relation to” clause of the statute limited the statute’s application to the harms that Congress intended.\footnote{148} The Court viewed the
clause as confining the application of the statute to times when a defendant both "carries" a gun and participates in a drug trafficking crime.\textsuperscript{149} The majority reasoned that the "during and in relation to" clause supported its interpretation of the "carry" prong because a weapon could be "carried" in a vehicle "during" a crime without being on the person.\textsuperscript{150} The Court added that the "during and in relation to" limitation would prevent any possible misuse of the statute.\textsuperscript{151} The clause eliminates the possibility that the statute will be misused by being applied to such situations where, for example, guns were carried during a fight or checked in luggage.\textsuperscript{152}

2. \textit{The Dissent: Arguing for a Limited Interpretation of the "Carry" Prong}

The dissenters in \textit{Muscarello} disagreed with the majority's broad interpretation of the word "carry" and sought to confine the phrase to a more limited interpretation.\textsuperscript{153} The phrase "carries a firearm," Justice Ginsburg argued, requires more than a firearm's mere presence in a vehicle.\textsuperscript{154} Instead, for § 924(c) purposes, this term should be construed as bearing arms "in such manner as to be ready for use as a weapon."\textsuperscript{155}

In dissent, Justice Ginsburg noted that her interpretation of § 924(c)(1) respects the Sentencing Guidelines and punishes criminal behavior accordingly.\textsuperscript{156} Justice Ginsburg added that the statute would still accom-

\begin{itemize}
  \item \textsuperscript{149} See \textit{Muscarello}, 118 S. Ct. at 1918-19.
  \item \textsuperscript{150} See id. at 1919. The Court argued that whether a gun is carried in a car's trunk or glove compartment is irrelevant if the weapon is carried "during and in relation to" the drug crime. See id.
  \item \textsuperscript{151} See id.
  \item \textsuperscript{152} See id. at 1918; S. REP. NO. 98-225, at 314 n.10, \textit{reprinted} in 1984 U.S.C.C.A.N. at 3492 (giving the example of a gun carried during a barroom fight as a situation in which the statute would not apply).
  \item \textsuperscript{153} See \textit{Muscarello}, 118 S. Ct. at 1920 (Ginsburg, J., dissenting). The dissenters conceded that "carry" could be defined in many ways, including carrying in a vehicle. See id. They did not find that to be the proper interpretation when applied to § 924(c), however, because of the surrounding context in the statute. See id. at 1923. Justice Ginsburg argued that Congress would have inserted the word "transport" if it intended the meaning that the majority found. See id. at 1923-24. Justices Scalia and Souter continued their fight with the majority over the interpretation of § 924(c) from the dissent in the \textit{Smith} decision five years earlier. See Smith \textit{v.} United States, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting); \textit{supra} notes 71-81 and accompanying text (discussing Justice Scalia's disagreement with the method of statutory construction in \textit{Smith}).
  \item \textsuperscript{154} See \textit{Muscarello}, 118 S. Ct. at 1920 (Ginsburg, J., dissenting).
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} See id. at 1920-21. Under the Sentencing Guidelines System, Muscarello would only receive an additional four-month sentence. See id.; see also \textit{SENTENCING
plish Congress’ intent without resorting to the unnecessary broad application that the majority gave the word “carry.”\textsuperscript{157} The dissenters and the majority agreed that an enhanced punishment should apply; however, they disagreed on the source for the punishment, § 924(c) or the Sentencing Guidelines.\textsuperscript{158} Under either the Guidelines System or § 924(c)(1), drug traffickers would receive an enhanced sentence.\textsuperscript{159} Justice Ginsburg argued that the sentence enhancement available under the Sentencing Guidelines should apply to the case at hand because the possession of the weapon was not clearly connected with the crime.\textsuperscript{160} The dissenters im-

GUIDELINES, supra note 1, § 2D1.1(a)(3) (assigning Muscarello’s offense as a level 12 out of 42 for distribution of 3.6 kilograms of marijuana). The Sentencing Guidelines carry out “a major congressional effort to create a fairly sophisticated . . . system that distinguishes among different kinds of criminal behavior and punishes accordingly.” United States v. McFadden, 13 F.3d 463, 467-68 (1st Cir. 1994) (Breyer, C.J., dissenting).

While seemingly in support of mandatory minimum sentences in Muscarello, Justice Breyer denounced mandatory minimum sentences and supported the Sentencing Guidelines when he was the Chief Judge of the First Circuit. See id. at 468 (describing mandatory minimum penalties as an “ad hoc deviation” from general sentencing policy); see also Muscarello, 118 S. Ct. at 1919 (upholding a § 924(c) conviction for carrying a firearm in an automobile). In McFadden, Justice Breyer dissented against the application of § 924(c)(1) and argued for the application of the Guidelines to determine the defendant’s sentence. See McFadden, 13 F.3d at 467-68 (Breyer, C.J., dissenting). Justice Breyer may have developed an affinity for the Sentencing Guidelines because he was one of the initial commissioners on the United States Sentencing Commission before his appointment to the Supreme Court. See MICHAEL TONRY, SENTENCING MATTERS 84 (1996) (arguing that the Sentencing Commission was unsuccessful because a number of the initial commissioners aspired for higher offices). For more information on Justice Breyer’s views on the Sentencing Guidelines, see Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 HOFSTRA L. REV. 1 (1988) reprinted in sub nom. The Key Compromises of the Federal Sentencing Guidelines, in SENTENCING, JUDICIAL DISCRETION AND TRAINING 105 (Colin Munro & Martin Wasik eds., 1992).

157. See Muscarello, 118 S. Ct. at 1921 & n.1 (Ginsburg, J., dissenting). According to Justice Ginsburg, it was reasonable for Congress to provide mandatory sentences for life-threatening situations when a firearm is in or near the defendant’s hand and to provide a more flexible standard, like the Sentencing Guidelines, for less threatening situations, such as when a firearm is anywhere in the defendant’s vehicle. See id. at 1922.

158. See id. at 1921 (“The question that divides the Court concerns the proper reference for enhancement in the cases at hand, the Guidelines or § 924(c)(1).”).

159. See id. at 1921. The Sentencing Guidelines establish sentencing ranges that judges must consider when they sentence defendants. See STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 1164 (5th ed. 1996) (discussing the blending of the Sentencing Guidelines and mandatory minimum sentences). By enacting mandatory minimum sentences such as § 924(c)(1), Congress has required mandatory minimums to be merged into the structure of the Guidelines. See SENTENCING GUIDELINES, supra note 1, §5G1.1(b); SALTZBURG & CAPRA, supra, at 1164. If the Guidelines calculation for a crime is lower than the mandatory minimum penalty, the mandatory sentence will prevail. See SENTENCING GUIDELINES, supra note 1, §5G1.1(b); see also SALTZBURG & CAPRA, supra, at 1165 (citing United States v. Stoneking, 60 F.3d 399, 402 (8th Cir. 1995)).

160. See Muscarello, 118 S. Ct. at 1920-21 & n.1 (citing Justice Breyer’s language in
licitly maintained that applying the Guidelines System would serve congressional intent better than §924(c)(1) because these penalties are "tailored to the seriousness of the crime."\textsuperscript{161}

Justice Ginsburg disputed also the majority's use of popular definitions to justify its interpretation of § 924(c)(1).\textsuperscript{162} Questioning the accuracy of the majority's search, she argued that dictionaries, press clippings, and the Bible should not be held out as the ultimate interpretations of congressional intent.\textsuperscript{163} Although Justice Ginsburg conceded that "carrying" is defined as carrying in a car about one-third of the time, she concluded that the most familiar meaning of "carry" was to wear or bear on the person.\textsuperscript{164} Justice Ginsburg found, in light of the fact that "carry" conveys so many meanings, ordinary definitions were not a reliable indicator of con-

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United States v. McFadden, 13 F.3d 463, 466-68 (1st Cir. 1994) (Breyer, C.J., dissenting)).
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\textsuperscript{161.} See id. at 1921 (quoting McFadden, 13 F.3d at 466 (Breyer, C.J., dissenting)).

Although all fifty states and the federal court system have implemented mandatory minimum sentences and sentencing guidelines, both types of sentencing policies have been criticized as ineffective in achieving deterrence of crime and retribution. See JEFFERY T. ULMER, SOCIAL WORLDS OF SENTENCING: COURT COMMUNITIES UNDER SENTENCING GUIDELINES 1 (1997). In theory, sentencing guidelines are presumed to preserve judicial discretion in adjusting sentences to fit individual defendants or unusual situations. See id. at 2. Similarly, mandatory minimums have been blamed for removing local court discretion in sentencing. See TONRY, supra note 156, at 135. Many prosecutors and judges feel that mandatory penalties impose sentences that are too harsh and ultimately do not have a powerful deterrence effect. See id.

Another criticism concerns the fact that the use of sentencing guidelines has led to disparities in sentencing in four major areas: race, gender, age, and mode of conviction. See id. at 7-10; see also LOIS G. FORER, A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING 60 (1994) (relating the author's disapproval of mandatory penalties and sentencing guidelines because of the disparities caused by factors such as race, gender, education, and mental conditions).

One commentator suggested four changes to mandatory minimum penalties that may alleviate these problems. See TONRY, supra note 156, at 135-36. First, the penalties for particularly serious crimes should be presumptive, not mandatory, so that judges can avoid any unintended consequences. See id. at 135. Second, legislators should add "sunset provisions" to any new sentencing laws so that "laws passed in the passion of the moment will not endure for decades." Id. at 136. Third, long prison sentences should be applied only to severe crimes like murder, aggravated rape, or armed robbery, and not to "minor crimes" concerning marginal amounts of narcotics. See id. Finally, correctional officers should be allowed to reevaluate the release dates of any offender receiving a sentence of more than five or ten years. See id. For a interesting discussion on a former judge's disgust with mandatory penalties, sentencing guidelines, and capital punishment, see FORER, supra.

\textsuperscript{162.} See Muscarello, 118 S. Ct. at 1921-22 (Ginsburg, J., dissenting).

\textsuperscript{163.} See id.

\textsuperscript{164.} See id. at 1921 (citing BLACK'S LAW DICTIONARY). To "carry arms or weapons" is defined as "{t}o wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." BLACK'S LAW DICTIONARY 712 (5th ed. 1979).
Additionally, the dissenters questioned the Court’s interpretation of the other statutes surrounding § 924(c)(1). Justice Ginsburg noted that Congress did not always follow the carry/transport distinction that the majority relied on. Giving an “on the person” limitation to “carry” is, according to the dissent, compatible with the other firearm statutes surrounding § 924(c)(1). Thus, based on the manner in which the surrounding sections used the word “carry,” the dissenters found that the majority’s interpretation of § 924(c)(1) was overly broad.

Due to the ambiguity surrounding § 924(c)(1) and Congress’ intent, the dissenters argued for the application of the rule of lenity. According to the rule, when a statute is not decisively clear, the defendants to whom the statute is to be applied should receive the benefit of the ambiguity. The majority, on the other hand, refused to apply the rule because its decision was “based on much more than a ‘guess as to what Congress intended.’” Ultimately, the dissenters argued that Congress has a duty to impose stricter penalties in clear and definite language.

III. THE ENACTMENT OF S. 191

A. Legislative History

In November of 1998, Congress amended § 924(c) for the sixth time since the statute’s original enactment in 1968 by adding another provision to the original “uses or carries” language. This provision broadened § 924(c)’s scope by mandating a five year penalty to those who possess a firearm in order to further a crime of violence or a drug trafficking

165. See Muscarello, 118 S. Ct. at 1922 (Ginsburg, J., dissenting).
166. See id. at 1923-24.
168. See id. at 1923-24 (Ginsburg, J., dissenting).
169. The sharp division in the Court indicated also that “the ‘issue [was] subject to some doubt.’” Id. (quoting Adamo Wrecking Co. v. United States, 434 U.S. 275, 284-85 (1978)).
170. See id.
171. See id. at 1919 (quoting United States v. Wells, 519 U.S. 482, 499 (1997)). The Court, believing that most statutes are ambiguous to some degree, held that the existence of some ambiguity in a statute is not enough to trigger the application of the rule. See id.
172. See id. at 1925 (Ginsburg, J., dissenting).
crime.\footnote{175} Also, Congress imposed more severe penalties on those defendants that brandish or discharge a firearm while committing such a crime.\footnote{176} In addition, the amendment increased the sentence for a second or subsequent conviction under the statute from twenty to twenty-five years.\footnote{177} Before this recent amendment, several members of Congress attempted unsuccessfully to amend \S{} 924(c)(1) to include a possession standard.\footnote{178} Most of the bills and amendments, however, died in committee or during floor debate.\footnote{179} Several of these amendments were direct reactions to the Supreme Court's \textit{Bailey} decision, which interpreted

\begin{footnotesize}
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\item 175. \textit{See id.} The "during and in relation to" clause still modifies the "uses and carries" language while the new "in furtherance of any such crime" language now modifies the "possesses" provision. \textit{See id.}
\item 176. \textit{See id.} If the firearm is brandished, the mandatory penalty is seven years. \textit{See id.} If the firearm is discharged, the mandatory sentence is ten years. \textit{See id.} Congress defined brandish as "to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person." \textit{Id.} \S{} 1(a)(2).
\item 177. \textit{See id.} \S{} 1(a)(1).
\item 178. \textit{See, e.g.,} 135 CONG. REC. 13,079 (1989) (providing a section-by-section analysis of \S{} 1225). The stated goal of the amendment was "to broaden the prohibitions in 18 U.S.C. \S{} 924(c)(1)... to reach persons who have a firearm or explosive available during the commission of certain crimes, even if the firearm is not carried or used." \textit{Id.} For more information on these congressional attempts, see Cunningham & Fillmore, supra note 31, at 1198-1203 (examining the past attempts to add a possession standard to the statute).
\item 179. \textit{See Cunningham & Fillmore, supra note 31, at 1200-02 (referencing the loss of several bills to committee or conference).}
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“use” to mean active employment. 180

On January 9, 1997, Representative Myrick introduced H.R. 424, the most recent amendment, which was an amendment that replaced the “uses or carries” language of § 924(c)(1) with language punishing possessing, brandishing, or discharging a firearm during or in relation to a crime. 181 Several other members joined Rep. Myrick in sponsoring the bill, 182 and the House passed the bill on February 24, 1998. 183 The report accompanying the bill explained that the amendment’s purpose was to clarify the congressional intent behind § 924(c) and to reverse “the restrictive effect of the Bailey decision.” 184

A few weeks later, on January 22, 1997, Senator Helms introduced a companion bill in the Senate, S. 191, which added the possession standard while keeping the “uses or carries” language. 185 Several Senators joined Senator Helms in co-sponsoring the bill. 186 In the Senate Judiciary


Some members opposed the bill, however, because of the “outrageous mandatory minimum penalties” that the bill prescribed. See, e.g., 144 CONG. REC. H10,330 (daily ed. Oct. 9, 1998) (statement of Rep. Scott). Rep. Scott felt that the penalties under the amendment were too severe when compared with other crimes. See id. He compared the seven year penalty for brandishing a gun with the five year penalty for voluntary manslaughter. See id. He saw the bill as crime legislation “run amok” with these types of penalties. See id.


186. See 143 CONG. REC. S11,779 (daily ed. Nov. 5, 1997) (Sen. Smith joining as a co-sponsor); 143 CONG. REC. S5264 (daily ed. June 3, 1997) (Sen. Hutchinson joining); 143 CONG. REC. S4246 (daily ed. May 8, 1997) (Senators Sessions and Shelby joining as co-sponsors of the bill); 143 CONG. REC. S4010 (daily ed. May 6, 1997) (Senators Thurmond,
Committee hearing regarding the bill, Senator Helms stated that Congress was "morally obliged" to fix the "latest blunder" made by the Supreme Court in the Bailey case. Although the Senate first passed the bill in late 1997, the House and Senate did not sign the current version of the bill until one year later because the House added an amendment to the bill.

The "Bailey Fix Act" resulted in enhanced penalties for criminal offenders. Members of Congress felt that the Bailey decision "dealt a serious blow to law enforcement" as well as changed the Justice Department's previous policy of applying the "use" prong to defendants whose firearms further their criminal endeavors. The Supreme Court's interpretation of the "use" prong limited the statute's application to cases when the defendant actively discharged or brandished his weapon. The amendment expands the statute's scope to apply also in those instances when a criminal possesses a firearm in furtherance of a felony.

B. The Possession Standard

Congress added the term "possession" to §924(c)(1) in order to broaden the application of the statute beyond the Supreme Court's prior

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187. See Criminal Use of Guns: Hearing on S. 191 Before the Senate Comm. on the Judiciary, 105th Cong. 3 (1997) (statement of Sen. Helms). Thomas G. Hungar also testified in the Committee hearing that S. 191 was "a measured response to the problems created by the Bailey decision." Id. at 34, 38. Mr. Hungar represented the United States before the Supreme Court in the Smith case. See id. at 34.


interpretation of the "use" prong.\textsuperscript{194} In essence, however, the Supreme Court's broad interpretation of the "carry" prong in \textit{Muscarello} already extended the statute to permit punishment for mere possession of a firearm.\textsuperscript{195} Yet, in enacting S. 191, Congress never discussed the \textit{Muscarello} decision or the impact the decision had on the statute.\textsuperscript{196}

Possibly, Congress did not discuss the \textit{Muscarello} decision because the utilization of the possession standard was not a novel idea in § 924(c) jurisprudence.\textsuperscript{197} Before the recent amendment, the circuit courts of appeal frequently applied differing theories of possession to the statute.\textsuperscript{198} The first of these theories is the fortress theory of possession, which convicts defendants under § 924(c) when firearms and narcotics are found on the premises and the firearm is under the control of the defendant.\textsuperscript{199} The fortress theory is founded on the premise that when numerous 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.\textsuperscript{200} In essence, the firearms helped facilitate the commission of the crime because of the increased likelihood of successful completion of the crime.\textsuperscript{201} The present version of the statute makes a convic-

\textsuperscript{194} See H.R. REP. NO. 105-344, at 6 (1997); Bailey, 516 U.S. at 143 (finding that a defendant must actively employ a firearm to be convicted under the "use" provision of § 924(c)(1)).

\textsuperscript{195} See \textit{Muscarello}, 118 S. Ct. at 1913-14 (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).

\textsuperscript{196} Cf. H.R. REP. NO. 105-344, at 6 (stating that the amendment is a direct reaction to the \textit{Bailey} decision); S. REP. NO. 98-225, at 312-13, \textit{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 \textit{Simpson} and \textit{Busic}).

\textsuperscript{197} See supra note 111 and accompanying text (noting the application of a possession standard in the lower courts).

\textsuperscript{198} See Moore, \textit{supra} note 43, at 183-93 (outlining the divergent holdings in the circuits based on differing theories of possession); infra notes 199-207 (discussing the varying circuit court opinions).

\textsuperscript{199} 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 § 924(c) purposes, 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 the crime).

\textsuperscript{200} See Riordan, \textit{supra} note 5, at 54 (explaining the fortress theory); Kesselman, \textit{supra} note 9, at 530-31 (same).

\textsuperscript{201} See Riordan, \textit{supra} note 5, 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
tion under the fortress theory much simpler.

Previously, 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. Unlike the fortress theory, the firearm does not need to be near the narcotics; the mere presence of a firearm is enough proof under the emboldening theory. Congress designed the latest amendment to apply to instances when a defendant was emboldened by the presence of a firearm.

Under the last theory of possession, several federal courts of appeal held that the gun must be immediately accessible to the defendant in order to satisfy the carry requirement of § 924(c). According to the Supreme Court’s decision 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. 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. 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. Seemingly, the Committee on the facilitate the crime).

202. 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 Kesselman, supra note 9, at 534.

203. See Clare, supra note 5, at 844-45 (explaining the differences in the two theories).


205. 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), vacated, 119 S. Ct. 32 (1998); 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)).

206. See Muscarello v. United States, 118 S. Ct. 1911, 1919 (1998) (finding that Congress did not intend the statute to be interpreted as requiring the application of the immediate accessibility test).

207. 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)); Emé, supra note 15, at 15 (noting that the immediate accessibility test runs afoot of the Court’s reasoning in Bailey).

Judiciary accepted the immediate accessibility test because it found that "[t]he mere presence of a firearm in an area where a criminal act occurs" is not enough to impose liability under the possession provision of the statute.  

The addition of a statutory possession standard will ultimately alleviate the inconsistent punishment that defendants receive under § 924(c). Courts will have little difficulty applying a consistent standard to defendants convicted under the amendment because the law surrounding the term possession is well defined. There may, however, be some problems in the interpretation of the "in furtherance of" language when it is applied to the possession standard.

C. The "In Furtherance Of" Standard

The addition of the "in furtherance of" standard requires the government to show that the defendant possessed the firearm to advance or promote the perpetration of the underlying crime. The "in furtherance of" standard encompasses the "during and in relation to" standard and requires a slightly higher level of proof than the "during and in relation to" standard.

Before the enactment of the latest amendment, courts' application of the possession standard through the emboldening theory, the fortress theory, and the immediate accessibility test faced criticism on the ground that it would punish legitimate possession. These same concerns surfaced when Congress adopted the possession provision in the most re-

209. H.R. REP. NO. 105-344, at 12 (1997). The Committee added that, even under the possession standard, there would have been insufficient evidence to convict Bailey because the evidence did not meet the "in furtherance of" test. See id. at 13.
210. See Whiting, supra note 15, at 721 (giving examples of the inconsistent treatment defendants received under the statute).
211. See id. at 720-21 (projecting the results of a possession amendment).
212. See H.R. REP. NO. 105-344, at 12 (explaining the purpose behind each section of the amendment).
213. See id. (discussing the distinctions between the two standards).
214. See supra Part III.B (outlining the varying possession theories).
215. See Whiting, supra note 15, at 720 (citing Violent and Drug Trafficking Crimes: Hearing Before the Senate Comm. on the Judiciary, 104th Cong. 6-9 (1996) (statement of Kevin Di Gregory, Deputy Assistant Attorney General in the Department of Justice Criminal Division)).
216. See id. (discussing the misplaced criticism).
The Latest Amendment to 18 U.S.C. § 924(c)

cent amendment, but were quickly quashed because of the required standard of proof under the "in furtherance of" clause.218

After the release of the Bailey decision, legislative proposals to amend § 924(c) used standards other than the "in furtherance of" standard to limit the statute.219 In some proposed amendments, the sponsors kept the "during and in relation to" clause to quantify possession,220 but in another proposed amendment, the sponsor attempted to modify the statute to include the immediate accessibility standard.221

Before Bailey, Senator Dole attempted to clarify the statute by adding

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217. See 144 CONG. REC. H533 (daily ed. Feb. 24, 1998) (statement of Rep. Waters) (noting the possibility that a hunter possessing both a hunting rifle and a small amount of narcotics could be charged under the statute).


219. See supra notes 178-79 and accompanying text (outlining Congress' previous attempts to amend the statute).

220. See, e.g., S. 1612, 104th Cong. § 1 (1996) (striking the words "uses or carries" and adding "possession"); H.R. 125, 104th Cong. § 5 (1996) (deleting "uses or carries" and inserting "possesses," "brandishes," and "discharges"). The Senate passed S. 1612 and referred it to the House; however, the bill never resurfaced. See 142 CONG. REC. S12,390 (daily ed. Oct. 3, 1996); Summary and Status of S. 1612, 104th Cong., available in THOMAS (outlining the current status of the bill). The House also passed its bill, H.R. 125, but the bill died once it was referred to the Senate. See 142 CONG. REC. H2701 (daily ed. Mar. 22, 1996); Summary and Status of H.R. 125, 104th Cong., available in THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR00125:@@L> (detailing the legislative status of the bill).

221. See S. 1945, 104th Cong. (1996). This bill would have inserted "or has a firearm in close proximity to illegal drugs or drug proceeds, in close proximity at the time of his or her arrest, or in close proximity at the point of sale of illegal drugs" after "uses or carries a firearm" in the statute. Id. Senator DeWine introduced this bill on July 11, 1996, but after it was referred to the Senate Committee on the Judiciary, it never resurfaced. See 142 CONG. REC. S7764-65 (daily ed. July 11, 1996) (statement of Sen. DeWine); Summary and Status of S. 1945, 104th Cong., available in THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:SN01945@@@L> (noting the last action on the bill).
"or otherwise possesses" to the "uses or carries" language and defining possession of a firearm as "readily available at the scene of the crime during the commission of the crime."222 This type of language initially appeared in the latest amendment, but was removed after the Department of Justice opposed any definition of the word "possess."223 The Department of Justice argued that defining possession in a statute is not only "unnecessary and inappropriate," but that the definition proposed in the bill was "seriously flawed" because it did not cover many common situations.224

Although the latest amendment added the "in furtherance of" standard to the statute, if the "during and in relation to" clause is used, it still applies to the "uses," "carries," "brandishes," and "discharges" language.225 In the Smith case, the Supreme Court found that the "in relation to" language requires the government to prove that the firearm had "some purpose or effect" on the underlying crime.226 The firearm's presence cannot be coincidental or unrelated to the crime.227 The Committee on the Judiciary stated that previous court interpretations of the "during and in relation to" clause remain pertinent under the new amendment.228

D. Problems and Criticisms of the Latest Amendment

Although the latest amendment to § 924(c) garnered considerable support in Congress, several legislators opposed the measure.229 The amendment increased the length of sentences for second offenses from twenty years to twenty-five years, added a seven year sentence for brandishing a firearm, and added a ten year sentence for discharging a fire-

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224. See id. The Department added that no other statute defined possession, that courts could easily interpret the possession standard, and that defining possession might limit the scope of the statute to its list of arguments against inclusion. See id. at 15-16.
225. See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1, 112 Stat. 3469 (applying the "during and in relation to" clause to the "uses or carries" language and the new brandishing and discharging language).
227. See id.
Several representatives opposed the amendment because they felt that these increased penalties were too severe, especially when compared with sentences for other violent crimes. The Department of Justice and the American Bar Association also opposed the new penalty structure because they found that the existing penalties were adequate. The Department of Justice also found the brandishing provision to be "unsound" and questioned the appropriateness of such a dramatic difference in the sentencing provision.

In opposition to the amendment, Representative Scott introduced another amendment that would have kept the current penalty structure, but given the United States Sentencing Commission the power to assess current penalties and make recommendations. The majority opposed this amendment, however, in a voice vote. Subsequently, during debates on the bill, Representative Scott urged his fellow members to let the Sentencing Commission increase penalties if needed and to oppose the bill. Ultimately, the amendment passed without any reference to the Sentencing Commission.

Some of the opposition surrounding the amendment came also in response to the cost of the legislation. The Congressional Budget Office estimated that the cost of implementing the amendment would be $10

230. See Pub. L. No. 105-386 § 1, 112 Stat. at 3469; supra notes 22-23 (quoting the previous and current versions of the statute).


233. See Letter from Andrew Fois, supra note 223, at 16-17 (outlining the Department's problems with the brandishing provision).


235. See id.

236. See 144 CONG. REC. H10,330 (daily ed. Oct. 9, 1998) (statement of Rep. Scott). Scott urged the House to let the Commission "take the politics out of sentencing and put some common sense in." Id. Representative Waters agreed and stated that creating sentencing from the floor of Congress is problematic because everyone has different views on the subject. See 144 CONG. REC. H532 (daily ed. Feb. 24, 1998) (statement of Rep. Waters). Therefore, according to Representative Waters, this task should be left to the Sentencing Commission. See id.


million over the next five years. This estimate included the price of accommodating more prisoners in federal prisons and the cost of constructing new prisons. Again, Representative Scott challenged the amendment claiming that there were more cost-effective ways to control crime than using mandatory minimum sentences.

IV. CONCLUSION

In recent years, the Supreme Court has had ample opportunity to interpret the terms and provisions found in § 924(c). In general, when Congress finds fault with the way the Court interpreted a statute, Congress tries quickly to rectify the situation by amending the statute at issue. The latest amendment to § 924(c) is no exception. Congress added the possession standard as a remedy to the problems the Bailey decision created. Although the "problems" may be resolved in Congress' eyes, the Supreme Court will surely have another chance to interpret the revised version of the statute.

240. See id. at 11.
241. See 144 CONG. REC. H532 (daily ed. Feb. 24, 1998) (statement of Rep. Scott). Scott quoted survey findings that mandatory minimum sentences "were one of the least cost effective ways to reduce crime." Id.