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## Defining Use of a Firearm

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## DEFINING "USE" OF A FIREARM

**Bailey v. United States, 116 S. Ct. 501 (1995)**

### I. INTRODUCTION

In *Bailey v. United States*,<sup>1</sup> the United States Supreme Court held that in order to "use" a firearm in relation to a drug-trafficking crime within the meaning of 18 U.S.C. § 924(c)(1), a criminal defendant must actively employ the weapon.<sup>2</sup> In separate and unrelated cases, petitioners Roland J. Bailey and Candisha S. Robinson were convicted in the United States District Court for the District of Columbia of, *inter alia*, using or carrying a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1). Different panels of the United States Court of Appeals for the District of Columbia affirmed<sup>3</sup> and reversed<sup>4</sup> the petitioners' convictions, respectively. The D.C. Circuit subsequently consolidated the two cases for *en banc* reconsideration, wherein the court affirmed both Bailey's and Robinson's convictions.<sup>5</sup> Bailey and Robinson then jointly petitioned for certiorari and the Supreme Court of the United States granted the petition in order to clarify the meaning of "use" under § 924(c)(1).<sup>6</sup>

This Note argues that the Court properly concluded that a defendant must "actively employ" a firearm in a manner that makes the firearm an operative factor in the predicate crime in order to violate 18 U.S.C. § 924(c)(1). The Note then explains how the unanimous decision, written by Justice O'Connor, narrowed the scope of § 924(c)(1) from the broad, far-reaching scope that O'Connor herself had implied in the majority opinion in *Smith v. United States*,<sup>7</sup> a previous Supreme Court decision regarding the scope of conduct reached by the statute.

Finally, this Note discusses whether the Court's recommendation that prosecutors charge offenders who mix guns and drugs under the "carry" prong of § 924(c) could lead lower courts to expand the stat-

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<sup>1</sup> 116 S. Ct. 501 (1995).

<sup>2</sup> *Id.* at 506.

<sup>3</sup> *United States v. Bailey*, 995 F.2d 1113 (D.C. Cir. 1993).

<sup>4</sup> *United States v. Robinson*, 997 F.2d 884 (D.C. Cir. 1993).

<sup>5</sup> *United States v. Bailey*, 36 F.3d 106 (D.C. Cir. 1994) (*en banc*).

<sup>6</sup> *Bailey v. United States*, 115 S. Ct. 1689 (1995).

<sup>7</sup> 508 U.S. 223 (1993).

ute's scope to reach the very conduct that the Court excluded in *Bailey*. As a normative matter, the Note argues that an astute definition of "carrying a firearm" should not include storing a firearm which is proximate to and accessible during a drug transaction.

## II. BACKGROUND

### A. LEGISLATIVE HISTORY OF 18 U.S.C. § 924(c)(1)

18 U.S.C. § 924(c)(1) mandates an enhanced sentence<sup>8</sup> for anyone who "during and in relation to any crime of violence or a drug-trafficking crime . . . uses or carries a firearm."<sup>9</sup> The current version of § 924(c)(1) resulted from a number of amendments that reflected Congress' concern over the increasing number of violent and narcotics-related crimes.<sup>10</sup> Congress originally adopted § 924(c)(1) as part of the Gun Control Act of 1968.<sup>11</sup> The section created a separate offense for using or unlawfully carrying a firearm during the commission of any felony, and penalized its violation with a sentence of not less than one year or more than ten years.<sup>12</sup>

The pressures leading to the eventual adoption of § 924(c)(1) were complex. Throughout the 1970's, an overcrowding of prisons,

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<sup>8</sup> An enhancing statute, § 924(c)(1) in this instance, has the sole purpose of imposing more severe penalties in cases where firearms facilitate the commission of the predicate drug trafficking crime. *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.).

<sup>9</sup> 18 U.S.C. § 924(c)(1) (1994). The full text of § 924(c)(1) provides in pertinent part that:

Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

*Id.*

<sup>10</sup> Michael J. Riordan, *Using a Firearm During and in Relation to a Drug Trafficking Crime: Defining the Elements of the Mandatory Sentencing Provision of 18 USC § 924(c)(1)*, 30 DuQ. L. Rev. 39, 40 (1991).

<sup>11</sup> Gun Control Act, 82 Stat. 1213, 1224 (1968) (codified as amended at 18 U.S.C. § 924(c)(1) (1994)).

<sup>12</sup> *Id.* The text of the original § 924(c) stated:

Whoever—

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

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. . . .

18 U.S.C. § 924(c) (1968).

coupled with the failure of increased sentence lengths to reduce the amount of drug related crimes, led Congress to become disenchanted with mandatory minimum sentencing for drug crimes.<sup>13</sup> However, the continued escalation of violent crime in the 1970's and 1980's and the public dissatisfaction with judicial discretion in sentencing led to renewed support by Congress for mandatory sentencing.<sup>14</sup> As a result, Congress passed the Comprehensive Crime Control Act of 1984, which amended § 924(c)(1) to read: "Whoever, during and in relation to any crime of violence . . . uses or carries a firearm . . . shall in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years."<sup>15</sup> Pursuant to this amendment, the new predicate offense became "any crime of violence," and the statute required the firearm to be used or carried "during *and in relation to*" the predicate offense.<sup>16</sup>

Courts quickly experienced difficulties in interpreting what constituted a "crime of violence," especially in the context of drug-trafficking.<sup>17</sup> Some courts held that drug trafficking did constitute a crime of violence while others arrived at the opposite conclusion.<sup>18</sup> This split led Congress to pass the Firearm Owners' Protection Act of 1986, which amended § 924(c)(1) to include specifically the predicate offense of drug trafficking.<sup>19</sup>

Congress has since amended § 924(c)(1) to mandate harsher sentencing in cases where the defendant uses a more destructive class of weapons.<sup>20</sup> The sentence becomes ten years if the firearm used in the predicate offense is a short-barreled rifle, a short-barreled shotgun, or semiautomatic assault weapon; and the sentence becomes thirty years if the firearm is a machine-gun, a destructive device, or is equipped with a firearm silencer or firearm muffler.<sup>21</sup>

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<sup>13</sup> Riordan, *supra* note 10, at 39-40.

<sup>14</sup> Cindy Crane, Note, *L. Smith v. United States: Enhanced Penalties For Using Guns As Barter In Drug Deals*, 20 J. CONTEMP. L. 295, 299 (1994).

<sup>15</sup> 18 U.S.C. § 924(c)(1)-(2) (1984), amended by 18 U.S.C. § 924(c)(1) (1994).

<sup>16</sup> *Id.* (emphasis added). The "in relation to" language was added to allay the concern that § 924(c)(1) would be applied where the firearm's presence played no part in the crime committed. Riordan, *supra* note 10, at 40.

<sup>17</sup> Crane, *supra* note 14, at 299.

<sup>18</sup> See, e.g., *United States v. Bushey*, 617 F. Supp. 292 (D.Vt. 1985) (stating that the common combination of firearms and narcotics does not make narcotics distribution by its nature a violent crime); *United States v. Jernigan*, 612 F. Supp. 382 (E.D.N.C. 1985) (ruling that possession of cocaine with intent to distribute is not a crime of violence pursuant to § 924(c)(1)).

<sup>19</sup> 18 U.S.C. § 924(c)(1) (1994).

<sup>20</sup> 18 U.S.C. § 924(c)(1) (1990), amended by 18 U.S.C. § 924(c)(1) (1994).

<sup>21</sup> *Id.*

## B. THE CIRCUIT COURTS' INTERPRETATION OF 18 U.S.C. § 924(c)(1)

While the 1986 amendment clarified that § 924(c)(1) did indeed reach the use of firearms where the predicate crime was one of drug trafficking, the amendment failed to guide the courts in construing what constituted "use" of a firearm under the statute.<sup>22</sup> Accordingly, the circuit courts were forced to wrestle with the issue of defining the nebulous term.<sup>23</sup> Although the majority of circuits concluded that the statute reached a broad range of conduct, the statute was applied inconsistently and unpredictably. In some circuits, for example, the mere presence of firearms at the scene of a drug trafficking crime was sufficient to constitute use, since the weapons could be used to protect the defendants' drugs, cash, or paraphernalia, and thereby increase the likelihood that the crime would succeed.<sup>24</sup> Other circuits, however, required that a firearm be strategically placed and readily available for use during the underlying crime.<sup>25</sup> In some of these circumstances, the conduct constituting "use" was interpreted so broadly

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<sup>22</sup> Jamilla A Moore, Comment, *These Are Drugs. These Are Drugs Using Guns. Any Questions? An Analysis of the Diverse Applications of 18 U.S.C. § 924(c)(1)*, 30 CAL. W. L. REV. 179, 182 (1993).

<sup>23</sup> *Id.*

<sup>24</sup> The First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. circuits applied this "drug fortress" doctrine in interpreting § 924(c)(1)'s "use" requirement. See generally *United States v. Nelson*, 6 F.3d 1049 (4th Cir. 1993) (affirming the conviction where police found guns and drugs in the same room); *United States v. Travis*, 993 F.2d 1316 (8th Cir. 1993) (weapon found in locked glove compartment properly supported conviction of defendant who did not own the car or possess the key to the glove compartment); *United States v. Dietz*, 991 F.2d 443 (8th Cir. 1993); *United States v. Jefferson*, 974 F.2d 201 (D.C. Cir. 1992) (use can be accomplished without actually employing the firearm); *United States v. Ivy*, 973 F.2d 1184 (5th Cir. 1992) (holding that a gun located in briefcase was sufficient to show use); *United States v. Castro-Lara*, 970 F.2d 976 (1st Cir. 1992) (stating that conviction was proper where the defendant picked up drugs in a car with an unloaded gun and cash in the trunk); *United States v. Smith*, 957 F.2d 835 (11th Cir. 1992) (stating that the defendant need not intend to use the firearm as a weapon to constitute use); *United States v. Torres-Medina*, 935 F.2d 1047 (9th Cir. 1991) (use requirement satisfied where a gun was found in a crawl-space below the house even though the defendant was a paraplegic and was unable to retrieve the weapon); *United States v. Head*, 927 F.2d 1361 (6th Cir. 1991) (finding that a shotgun found with crack cocaine in defendant's apartment was sufficient to constitute use); *United States v. Parrish*, 925 F.2d 1293 (10th Cir. 1991) (firearm located on a closet shelf above the defendant during an attempted drug transaction constituted use); *United States v. Garrett*, 903 F.2d 1105 (7th Cir. 1990) (affirming conviction where defendant entered driver's side of a car in which cocaine and a gun were found under the seat).

<sup>25</sup> The Second and Third Circuits applied this "ready access" doctrine in interpreting the scope of the statute. See generally *United States v. Medina*, 944 F.2d 60 (2d Cir. 1991) (holding that a gun left on a bedroom dresser was used because it was strategically placed and readily available for use during a transaction that occurred in the living room); *United States v. Theodoropoulos*, 866 F.2d 587 (3rd Cir. 1989) (holding that the presence in plain view of a loaded firearm evidenced the defendant's need for security and therefore constituted use).

that the scope of use may have been enlarged beyond what Congress originally intended.<sup>26</sup>

C. *SMITH V. UNITED STATES*: THE SUPREME COURT SPEAKS ON  
§ 924(c)(1)

The Supreme Court first considered the scope of § 924(c)(1) in *Smith v. United States*,<sup>27</sup> a case where the Court attempted to resolve a split in the circuits over whether the term “use” was to be defined broadly enough to bring guns used as barter in drug deals within the purview of the statute.<sup>28</sup> The defendant in *Smith* was convicted under § 924(c)(1) after he offered an undercover police officer a MAC-10 machine gun in exchange for a two ounces of cocaine.<sup>29</sup> The defendant appealed his case to Supreme Court arguing that § 924(c)(1)’s penalty only covers situations in which the firearm was used as a weapon.<sup>30</sup>

Writing for the majority, Justice O’Connor concluded that a defendant who trades a firearm for drugs does in fact “use” it during and in relation to a drug trafficking crime within the meaning of § 924(c)(1).<sup>31</sup> In arriving at this conclusion, Justice O’Connor rejected the defendant’s contention that the statute only referred to situations wherein the firearm was used as a weapon.<sup>32</sup> Instead, she reasoned that the term “use,” not defined by the statute, should be construed “in accord with its ordinary or natural meaning.”<sup>33</sup> The majority then concluded that the defendant “used” his firearm within the ordinary or natural meaning of the word.<sup>34</sup> “By attempting to trade his MAC-10 for the drugs, he ‘used’ or ‘employed’ it as an item of barter to obtain cocaine; he ‘derived service’ from it because it was

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<sup>26</sup> Crane, *supra* note 14, at 301.

<sup>27</sup> 508 U.S. 223 (1993).

<sup>28</sup> Compare *United States v. Harris*, 959 F.2d 246, 262 (D.C. Cir. 1992) (per curiam) (holding that the § 924(c)(1) “use” requirement is broad enough to cover guns used as barter in drug transactions because the introduction of guns into the crime scene, whether used for protection or as a medium of exchange, heightens danger to society) with *United States v. Phelps*, 877 F.2d 28, 30 (9th Cir. 1989) (holding that trading a gun for drugs does not constitute use of a firearm under the statute since Congress directed the statute at people carrying a firearm as an offensive weapon for a specific criminal act).

<sup>29</sup> *Smith*, 508 U.S. at 226.

<sup>30</sup> *Id.* at 227.

<sup>31</sup> *Id.* at 241.

<sup>32</sup> *Id.* at 229.

<sup>33</sup> *Id.* at 228-29. The majority cited two sources in interpreting the ordinary meaning of “use.” The definitions include: “to convert to one’s service” or “to employ,” WEBSTERS NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 2806 (2d ed. 1949); “to make use of; to convert to one’s service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of,” BLACK’S LAW DICTIONARY 1541 (6th ed. 1990).

<sup>34</sup> *Smith*, 508 U.S. at 229.

going to bring him the very drugs he sought."<sup>35</sup> Although Justice O'Connor's majority decision limited the Court's holding to the narrow case of firearms used for barter in drug transactions, the decision nonetheless implied that the "use" requirement be interpreted broadly.<sup>36</sup>

Justice Scalia, in dissent, argued that "to use an instrumentality ordinarily means to use it for its intended purpose."<sup>37</sup> He consequently asserted that the ordinary meaning of "using a firearm" is using the firearm as a weapon.<sup>38</sup> Justice Scalia then declared that the majority's interpretation produced a "strange dichotomy," since using a firearm for any purpose necessarily includes carrying a firearm, thereby blurring the line between the two prongs of the statute.<sup>39</sup> Justice Scalia also noted that under the 1984 version of the statute, Congress clearly wanted to deter the use of firearms which facilitated violent crime.<sup>40</sup> Thus, the purpose of § 924(c)(1) was not being served if the statute reached situations where a defendant did not use or intend to use the firearm in violent manner.<sup>41</sup> As a result, Justice Scalia concluded that the defendant's use of a firearm as an item in commerce did not constitute "use" under the meaning of § 924(c)(1).<sup>42</sup>

The *Smith* court's implication of a broadly-defined use requirement opened the door to an expansive interpretation of § 924(c)(1)

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<sup>35</sup> *Id.*

<sup>36</sup> For example, the Court stated that the statute's language "sweeps broadly, punishing any 'use' of a firearm, so long as the use is 'during and in relation to' a drug trafficking offense." *Id.* The Court stated that the phrase "in relation to" clarified that the presence or involvement of the firearm cannot be the result of accident or coincidence, but rather must have some purpose or effect with respect to the predicate offense. *Id.* at 238. The Court then broadly defined this requirement, stating that the firearm "at least must 'facilitate, or have the potential of facilitating' the drug trafficking offense." *Id.* (quoting *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985) (Kennedy, J.). Justice Blackmun concurred in *Smith* in order to highlight the majority's interpretation of the "in relation to" language. He interpreted the phrase to require more than mere furtherance or facilitation of the predicate crime. *Smith*, 508 U.S. at 241. (Blackmun, J., concurring). However, because Justice Blackmun agreed that a reasonable construction of the phrase includes trading a weapon for drugs, he felt it unnecessary to define the exact contours of the language under § 924(c)(1). *Id.* (Blackmun, J., concurring).

<sup>37</sup> *Smith*, 508 U.S. at 242 (Scalia, J., dissenting). Justices Stevens and Souter joined in Justice Scalia's dissent. *Id.* at 241.

<sup>38</sup> *Id.* at 245-46 (Scalia, J., dissenting).

<sup>39</sup> *Id.* (Scalia, J., dissenting).

<sup>40</sup> *Id.* at 246 (Scalia, J., dissenting).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 243, n.1 (Scalia, J., dissenting). Justice Scalia illustrated his view by contending that the objective falsity requirement for a perjury conviction could not be satisfied if a witness responded "No" when asked if he had ever used a firearm, even though he had once sold an antique rifle to a collector. *Id.*

that could further Congress' war against drugs and violent crime.<sup>43</sup> It also lent support to the similarly broad standards previously utilized by the circuit courts to interpret the scope of conduct within the purview of § 924(c)(1).<sup>44</sup> However, because the *Smith* decision failed to give an express opinion on the breadth of the statute or resolve the inconsistencies in the lower courts, it remained to be seen whether the courts would continue to utilize § 924(c)(1) to deter violent and drug trafficking crimes.<sup>45</sup> As a result, the issue was ripe for the Supreme Court's consideration<sup>46</sup> in *United States v. Bailey*.<sup>47</sup>

### III. FACTS AND PROCEDURAL HISTORY

#### A. BAILEY'S ARREST, TRIAL, AND PANEL APPEAL

On May 2, 1988, two District of Columbia Metropolitan police officers stopped Roland J. Bailey's vehicle after noticing that Bailey was driving without a front license plate or inspection stickers.<sup>48</sup> After Bailey handed one of the officers an identification card instead of a driver's license, the officer ordered Bailey to get out of his car.<sup>49</sup> While Bailey was exiting the vehicle, the officer saw Bailey push something between the front seat and the console that separated the front two seats.<sup>50</sup> Consequently, the officers searched the passenger compartment of the car and found one round of .380-caliber ammunition and a brown leather pouch containing a total of thirty grams of cocaine packaged separately in 27 plastic bags.<sup>51</sup> After arresting Bailey, the officers unlocked and searched the trunk of the car, in which, among several bags of clothing, the officers recovered a loaded nine millimeter Smith and Wesson pistol and roughly \$2,500 in cash.<sup>52</sup> The government indicted Bailey for (1) possession with intent to distribute five grams or more of cocaine, in violation of 21 U.S.C. § 841(a); (2) using or carrying a firearm during and in relation to a drug-trafficking offense, in violation of 18 U.S.C. § 924(c)(1); and (3) possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g).<sup>53</sup>

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<sup>43</sup> Crane, *supra* note 14, at 305.

<sup>44</sup> See *supra* notes 24-26 and accompanying text.

<sup>45</sup> Crane, *supra* note 14, at 305.

<sup>46</sup> Moore, *supra* note 22, at 198-200 (calling for the Supreme Court to adopt a definite standard for § 924(c)(1) prosecutions).

<sup>47</sup> *Bailey v. United States*, 116 S. Ct. 501 (1995).

<sup>48</sup> Brief for Petitioners at 1, *Bailey v. United States*, 116 S. Ct. 501 (1995) (Nos. 94-7448, 94-7492).

<sup>49</sup> *Id.* at 1-2.

<sup>50</sup> *Id.* at 2.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*



At trial, Detective Charles DiDomenico, an experienced narcotics expert, testified that the cocaine found in Bailey's trunk was packaged in \$50 bags and intended for street sale.<sup>54</sup> He also testified that drug dealers often carry firearms not only to protect themselves, but also to "protect their assets, drugs and money."<sup>55</sup> The jury found Bailey guilty and, in addition to the concurrent terms of 51 months each for the first and third charges, the court sentenced him to a mandatory 60 months pursuant to § 924(c)(1).<sup>56</sup>

On appeal, Bailey argued that the Court should reverse his § 924(c)(1) conviction because the evidence was insufficient for the jury to find that he "used" the gun "during and in relation to" a drug trafficking crime, as required by the statute.<sup>57</sup> The majority panel of the court of appeals rejected Bailey's argument, reasoning that the requirements of the statute were satisfied if the gun in any way facilitated Bailey's commission of his drug trafficking offense.<sup>58</sup> The court ruled that such facilitation could include the mere presence of the gun to provide protection in connection with Bailey's drug trafficking offense.<sup>59</sup> In addition, the majority stated that the jury could reasonably infer that the money in the trunk was derived from several already-completed transactions.<sup>60</sup> Consequently, the court held that the jury could have reasonably concluded that Bailey used the gun to protect an earlier possession and distribution of drugs, and therefore could have concluded that Bailey "used" the gun "during and in relation to" a drug trafficking offense.<sup>61</sup>

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<sup>54</sup> Brief for the United States at 3, *Bailey v. United States*, 116 S. Ct. 501 (1995) (Nos. 94-7448, 94-7492).

<sup>55</sup> Brief for Petitioners at 3, *Bailey v. United States*, 116 S. Ct. 501 (1995) (Nos. 94-7448, 94-7492).

<sup>56</sup> *United States v. Bailey*, 995 F.2d 1113, 1114 (D.C. Cir. 1993).

<sup>57</sup> *Id.* at 1118. Bailey argued for reversal on the strength of *United States v. Derr*, 990 F.2d 1330 (D.C. Cir. 1993), and *United States v. Bruce*, 939 F.2d 1053 (D.C. Cir. 1991). Both of these cases involved guns that were found in close proximity to drugs. In each case, the court held that while such evidence might sufficiently show an intention to use the gun in a future act of distribution, it was not sufficient to demonstrate "use" during and in relation to the predicate offense of possession with intent to distribute.

<sup>58</sup> The Court of Appeals distinguished the case at bar from *Derr* and *Bruce* on the ground that those cases involved future drug distributions, whereas the present case involved Bailey's potential use of a gun in a transaction that had already occurred. *Bailey*, 995 F.2d at 1118.

<sup>59</sup> *Id.* at 1116.

<sup>60</sup> *Id.* at 1117 (citing *United States v. Curry*, 911 F.2d 72, 80 (8th Cir. 1990) (stating that it is permissible to infer that large amounts of unexplained cash found in close proximity to both guns and cocaine came, at least in part, from drug sales)).

<sup>61</sup> *Id.* at 1119.

## B. ROBINSON'S ARREST, TRIAL, AND PANEL APPEAL

On July 15, 1991, undercover officer Larry Hale of the District of Columbia Metropolitan Police Department approached Veloria Robinson, the sister of petitioner Candisha Robinson, to solicit a sale of crack cocaine.<sup>62</sup> Veloria took Hale to petitioner Robinson's apartment in Northeast Washington.<sup>63</sup> Upon entering the apartment and informing Robinson that he wanted a "twenty," Hale observed the two sisters go into the apartment's bedroom and saw Candisha hand Veloria a rock of crack cocaine.<sup>64</sup> Veloria then gave the rock to Hale in exchange for \$20 in marked money.<sup>65</sup>

The next evening, Hale returned to petitioner Robinson's apartment where he purchased another "twenty" from a man named Kwarme Parker, who said that he lived in the apartment with Robinson.<sup>66</sup> About thirty minutes after the purchase, the police executed a search warrant at Robinson's apartment which led to the discovery of a locked foot-locker in the bedroom closet.<sup>67</sup> The foot-locker contained, among other things, an unloaded .22-caliber Derringer, two rocks of crack cocaine weighing a total of 10.88 grams, and the marked \$20 bill which Hale had used to purchase the crack the previous day.<sup>68</sup>

Candisha Robinson was subsequently indicted on six counts, including using or carrying a firearm on July 16, 1991, during and in relation to a drug-trafficking offense in violation of 18 U.S.C. § 924(c)(1).<sup>69</sup> At trial, a government expert testified that a Derringer, like the one recovered from the footlocker, was a "second gun" which

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<sup>62</sup> Brief for Petitioners at 4, *Bailey v. United States*, 116 S. Ct. 501 (1995) (Nos. 94-7448, 94-7492).

<sup>63</sup> Brief for the United States at 4, *Bailey v. United States*, 116 S. Ct. 501 (1995) (Nos. 94-7448, 94-7492).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> The five other counts of Robinson's indictment included: (1) distributing crack cocaine on July 15, 1991, in violation of 21 U.S.C. § 841(a)(1); (2) distributing crack cocaine within 1000 feet of a public school on July 15, 1991, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2; (3) possession of five or more grams of cocaine on July 16, 1991, with intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(iii), and 18 U.S.C. § 2; (4) possession of five or more grams of cocaine within 1000 feet of a public school on July 16, 1991, with intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2; and (5) knowingly making available for use a building, room, or enclosure for the purpose of using, storing, manufacturing, or distributing cocaine on or about July 16, 1991, in violation of 21 U.S.C. § 856(a) and 18 U.S.C. § 2. Brief for Petitioners at 5-6, *Bailey v. United States*, 116 S. Ct. 501 (1995) (Nos. 94-7448, 94-7492).

drug dealers typically hide on their bodies until they are able to get to a "real gun" that has more firepower.<sup>70</sup> The expert further asserted that drug dealers generally use guns in order to protect themselves from "stickup boys,"<sup>71</sup> rival gangs, lower-level employees and the police.<sup>72</sup>

Testifying on her own behalf, Robinson acknowledged that she leased the apartment and received rent contributions from her sister Veloria, Kwarme Parker (Veloria's boyfriend), and Sharine McKinney.<sup>73</sup> She also testified that she owned the footlocker which contained the gun and drugs, but denied any knowledge of their existence.<sup>74</sup> Although she admitted having knowledge that Parker was selling drugs, she denied any knowledge that he sold drugs out of her apartment.<sup>75</sup> Finally, she denied her presence in the apartment on the evening of July 15, 1991, when Hale's first drug purchase occurred.<sup>76</sup>

Following her conviction on all six counts, Robinson submitted a post-verdict motion for judgment of acquittal directed solely at the § 924(c)(1) count.<sup>77</sup> The district court denied this motion, reasoning that because Robinson's apartment was a base for the distribution of crack cocaine, the jury could legitimately infer that she used the gun to protect the on-going possession of the drugs sold on her premises.<sup>78</sup>

On appeal, the United States Court of Appeals for the District of Columbia reversed Robinson's conviction on the § 924(c)(1) count.<sup>79</sup> The court observed that § 924 failed to criminalize mere possession of firearms during and in relation to a drug trafficking offense.<sup>80</sup> Furthermore, the court stated that the proximity of a gun to drugs did not support a conviction under the statute.<sup>81</sup> The court even ruled that the future intention to use a firearm in connection with trafficking drugs fell outside the statute unless the individual actually "uses"

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<sup>70</sup> *Id.* at 5.

<sup>71</sup> "Stickup boys" are those who attempt to rob a dealer following a sale of drugs. *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Brief for the United States at 5-6, *Bailey v. United States*, 116 S. Ct. 501 (1995) (Nos. 94-7448, 94-7492).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 6.

<sup>77</sup> *Id.* Petitioner had made a similar mid-trial motion for acquittal aimed at the same "uses or carries" count, which the district court denied. *Id.*

<sup>78</sup> *United States v. Robinson*, 779 F. Supp. 606, 608-09 (D.D.C. 1991).

<sup>79</sup> *United States v. Robinson*, 997 F.2d 884 (D.C. Cir. 1993).

<sup>80</sup> *Id.* at 887.

<sup>81</sup> *Id.* at 890.

the firearm for that purpose.<sup>82</sup>

The court then defined an open-ended test that listed numerous factors to prove actual use, including the number, type, and accessibility of the firearm, the proximity of the firearm to the drugs, and whether the firearm was loaded or previously had been used.<sup>83</sup> In applying these factors to Robinson's case, the court held that an unloaded .22-caliber Derringer found in a locked footlocker in a bedroom closet, without ammunition anywhere in the apartment, could not reasonably support a jury determination of actual "use" under the statute.<sup>84</sup>

### C. THE D.C. CIRCUIT'S CONSOLIDATED EN BANC DECISION

In order to resolve the inconsistencies in the application of § 924(c) in the *Bailey* and *Robinson* cases, the Court of Appeals for the D.C. Circuit consolidated the two cases and reheard them *en banc*.<sup>85</sup> Upon reconsideration, a divided court upheld both convictions.<sup>86</sup> Writing for the five judge majority, then Judge Ginsburg rejected the open-ended, multi-factor test utilized by Robinson's first appellate panel to determine the sufficiency of evidence supporting a conviction under § 924(c)(1).<sup>87</sup> Judge Ginsburg wrote that in addition to producing inconsistent results, the open-ended test required courts to invade the province of the jury by weighing numerous factors and determining the specific relevance of individual facts in order to determine the sufficiency of the evidence.<sup>88</sup>

In place of the open-ended test, the court employed a standard for assessing the sufficiency of evidence that resembled the "proximity and accessibility" standards used by other circuits.<sup>89</sup> The court stated that in order to obtain a conviction under the new standard, "the Government need only point to evidence that the firearm in question was *in proximity* to the drugs, drug paraphernalia, or drug proceeds *and was accessible* to the defendant from the site of the drugs, drug paraphernalia, or drug proceeds involved in his or her predicate drug trafficking offense."<sup>90</sup> The court then ruled that using a gun to protect one's drugs, drug paraphernalia, or the proceeds from one's drug

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<sup>82</sup> *Id.* at 887.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 888.

<sup>85</sup> *United States v. Bailey*, 36 F.3d 106, 109 (D.C. Cir. 1994) (*en banc*).

<sup>86</sup> *Id.* at 118.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 111-12.

<sup>89</sup> *Id.* at 113. *See supra* notes 25-26 and accompanying text.

<sup>90</sup> *Id.* at 118 (emphasis added).

sales clearly violates the statute.<sup>91</sup> Applying this interpretation, the court held that both Bailey and Robinson "used" firearms during or in relation to their respective drug trafficking offenses and consequently affirmed both trial court convictions.<sup>92</sup>

Judge Wald dissented, stating that the proximity and accessibility test diminished the prospect of accurate assessment as to whether a gun was used to facilitate the predicate drug offense.<sup>93</sup> Judge Wald also asserted that the accessibility of the gun to the site of the drugs was irrelevant, since under the statute, it is the defendant who must use the gun, and not some "phantom defendant who is positioned where the drugs are."<sup>94</sup>

Judge Williams, joined by Judges Silberman and Buckley, also dissented, asserting that the majority's "'proximity' plus 'accessibility' test" merely diluted the meaning of "use" by essentially defining it as "simply possession with a floating intent to use."<sup>95</sup> In place of the majority's test, Judge Williams suggested that the wording, history and context of the statute called for a bright line test requiring actual active use rather than "possession with a contingent intent to use."<sup>96</sup>

The Supreme Court of the United States granted certiorari<sup>97</sup> in order to clarify the meaning of "use" under § 924(c)(1).<sup>98</sup>

#### IV. THE SUPREME COURT OPINION

The Supreme Court reversed the decision of the D. C. Circuit Court of Appeals.<sup>99</sup> Writing for a unanimous court, Justice O'Connor concluded that "use" under § 924(c)(1) requires that the defendant actively use the firearm in a way that makes it an operative factor in the predicate offense.<sup>100</sup> Pursuant to this interpretation, the Court held that the evidence was insufficient to support either Bailey's or Robinson's conviction for "use" of a firearm under the statute.<sup>101</sup>

In reaching its conclusion, the Court recognized the difficulties in interpreting the word "use."<sup>102</sup> The Court stated that the circuit

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<sup>91</sup> *Id.* at 115.

<sup>92</sup> *Id.* at 118.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 119.

<sup>95</sup> *Id.* at 121.

<sup>96</sup> *Id.*

<sup>97</sup> *Bailey v. United States*, 115 S. Ct. 1689 (1995).

<sup>98</sup> *Bailey v. United States*, 116 S. Ct. 501, 503 (1995).

<sup>99</sup> *Id.* at 509.

<sup>100</sup> *Id.* at 505.

<sup>101</sup> *Id.* at 509.

<sup>102</sup> *Id.* at 505. As an example of these different meanings, the Court considers the paradoxical statement: "I use a gun to protect my house, but I've never had to use it." *Id.*

court correctly required that “use” connotes more than mere possession of a firearm, but erred in its standard of evaluating whether the involvement of a firearm amounted to more than mere possession.<sup>103</sup> The Court asserted that the ultimate result of defining facilitation and use through a proximity and accessibility standard is that “possession amounts to ‘use’ because possession enhances the defendant’s confidence.”<sup>104</sup> Therefore, “nearly every possession of a firearm by a person engaged in drug trafficking would satisfy the standard.”<sup>105</sup>

In its subsequent determination that the government must show active employment of a firearm in order to establish “use” under § 924(c)(1), the Court looked to the language, context, and history of the statute.<sup>106</sup> In looking to the language of § 924(c)(1), the Court considered not only the bare meaning of the word “use,”<sup>107</sup> but also its placement in the statutory scheme.<sup>108</sup> Assuming that Congress intended each of the terms in its statutes to have particular, non-superfluous meanings, the Court focused on the statute’s reference to two specific types of conduct with a firearm: using and carrying.<sup>109</sup> The Court asserted that “[w]hile a broad reading of ‘use’ undermines virtually any function for ‘carry,’ a more limited, active interpretation of ‘use’ preserves a meaningful role for ‘carries’ as an alternative basis for a charge.”<sup>110</sup>

Turning to the context of the statute, the Court subscribed to the assumption that “using a firearm” should not have a different meaning in § 924(c)(1) than it does in § 924(d).<sup>111</sup> In § 924(d), Congress provided for the forfeiture of a firearm that is “used” or “intended to be used” in particular crimes.<sup>112</sup> Because Congress provided separate

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<sup>103</sup> *Id.* at 506.

<sup>104</sup> *Id.* (citing *United States v. Bailey*, 36 F.3d 106, 121 (D.C. Cir. 1994) (en banc) (Williams, J., dissenting)).

<sup>105</sup> *Id.* (citing *United States v. McFadden*, 13 F.3d 463, 469 (4th Cir. 1994) (Breyer, C.J., dissenting)). The Court explained that if Congress had intended the statute to encompass all situations involving mere possession, it would not have used the “use or carry” language. *Id.* This conclusion, the Court stated, is readily supported by the frequent use of the term “possess” in gun-crime statutes. *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> “Use” is variously defined as “to convert one’s service,” “to employ,” “to avail oneself of,” and “to carry out a purpose or action by means of.” *Id.* (citations omitted).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 507.

<sup>110</sup> *Id.* at 506.

<sup>111</sup> *Id.* Support for this assumption came from *Smith v. United States*, 113 S. Ct. 2050, 2057 (1993) (stating that an ambiguous statutory provision is often “clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law”).

<sup>112</sup> 18 U.S.C. § 924(d) (1994).

terms in § 924(d) for the forfeiture of firearms that are actually used and those are that are merely intended to be used, the Court reasoned that if Congress had intended to broaden the application of § 924(c)(1) beyond actual use, it would have so specified.<sup>113</sup>

The Court then examined the amendment history of § 924(c) to support its conclusion that Congress intended the terms "use" and "carry" to have distinct meanings.<sup>114</sup> This examination highlighted the statute's original language, which separated the "use" and "carry" provisions into separate clauses and modified the terms with "uses . . . to commit" and "carries unlawfully."<sup>115</sup> The Court posited that the phrase "uses to commit" indicated that Congress originally intended to reach only those situations in which a firearm was actively employed.<sup>116</sup>

The Court then compared the original statute to the current language, which contains "uses" and "carries" in the same clause without modification,<sup>117</sup> and subsequently rejected the government's argument that Congress, through the amendment, stripped the terms of the qualifications that originally made them distinct and thereby intended their meanings to overlap.<sup>118</sup> Instead, the Court asserted that if Congress had intended to deprive "use" of its active connotations, it could have simply substituted "possession," a more appropriate term.<sup>119</sup>

The Court next described activities that fall within "active employment" of a firearm, including "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm."<sup>120</sup> Even a defendant's making reference to a firearm that is in his or her possession could satisfy the requirements of the statute.<sup>121</sup> However, the Court stated that "if a gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not 'used.'"<sup>122</sup>

The Court readily accepted that its active-employment interpretation of "use" significantly narrows the scope of § 924(c)(1).<sup>123</sup> However, it noted that the government can still charge offenders who mix gun and drugs with the "carry" prong of the statute, which reaches

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<sup>113</sup> *Bailey*, 116 S. Ct. at 507.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 508.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 509.

some offenders not covered by the “use” prong.<sup>124</sup>

Having determined that under § 924(c)(1), “use” denotes active employment of a firearm in relation to a drug trafficking offense, the Court subsequently concluded that the evidence was insufficient to uphold the conviction of either Bailey or Robinson, as neither case presented evidence that the guns found had been actively employed.<sup>125</sup> As a result, the Court reversed both convictions.<sup>126</sup> Because the Court of Appeals failed to consider whether the “carry” prong of the statute reached the defendants’ conduct, the Court remanded both cases for consideration of upholding the convictions on that ground.<sup>127</sup>

## V. ANALYSIS

The unanimous opinion authored by Justice O’Connor in *United States v. Bailey* correctly concluded that Congress intended 18 U.S.C. § 924(c)(1) only to reach those situations where a defendant actively employs a firearm in a manner that makes that firearm an operative factor in an underlying crime of violence or drug trafficking crime.<sup>128</sup> Despite this correct conclusion, the O’Connor opinion contained two flaws. The Court’s contention that *Bailey* is consistent with *Smith v. United States*, a previous O’Connor decision which explored the scope of § 924(c)(1) in the context of guns used as barter in a drug transaction, is an attempt to nullify the Court’s previous implication that the scope of § 924(c)(1) is broad and far-reaching without admitting the errors of that interpretation.<sup>129</sup> In addition, the Court’s suggestion that prosecutors look to the broader “carry” prong of the statute invites prosecutors and lower courts to re-expand the scope of the statute to reach the very conduct that the *Bailey* court properly excluded.<sup>130</sup> Astute statutory construction, however, should not yield punishment under the statute in situations where a gun is merely stored in proximity to a drug transaction and is accessible during that transaction.<sup>131</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 505.

<sup>129</sup> See *Smith v. United States*, 508 U.S. 223, 236 (1993) (implying a broad interpretation of § 924(c)(1) while holding that using a gun for barter in a drug transaction is “using” the gun under the meaning of the statute).

<sup>130</sup> See *Bailey*, 116 S. Ct. at 509.

<sup>131</sup> *Id.* at 507 (proposing that “carrying” be interpreted as keeping a gun hidden in defendant’s clothing during a drug transaction).



## A. BAILEY WAS CORRECTLY DECIDED

By rejecting the lower court's proximity and accessibility standard, and instead requiring the prosecution to show evidence of active employment of a firearm in order to gain a conviction for "using" the firearm under § 924(c)(1), the Court established a narrow interpretation of the statute that only punishes conduct that Congress intended to be within the statute's reach.<sup>132</sup> Congress' intent that § 924(c)(1) only punish active employment is evidenced by looking to common canons of statutory interpretation, as well as the statute's amendment history.<sup>133</sup>

Pursuant to a common canon of construing statutory language, courts assume that Congress intended each of its statutory terms to have a particular, non-superfluous meaning.<sup>134</sup> Focusing on the statute's prohibition of two separate types of conduct, namely "using" and "carrying" firearms, *Bailey* properly asserted that the broad definition of "use" under the proximity and accessibility standard "undermines virtually any function for 'carry.'"<sup>135</sup> On the other hand, *Bailey*'s active-employment definition of "use" sufficiently differentiates the conduct reached by the two prongs of the statute, thereby giving "use" and "carry" their requisite non-superfluous meanings.<sup>136</sup>

The *Bailey* decision also properly ruled that if Congress intended to strip the term "use" of its active connotations, it would have done so by punishing a criminal's "possession of" or "intention to use" a firearm.<sup>137</sup> When drafting § 924(c)(1), Congress was well aware of these terms and their potential for use in the statute, as Congress has previously employed such terms in statutes regarding firearms.<sup>138</sup> Because Congress chose to punish actual use in § 924(c)(1), courts should define the term in a manner that connotes more than mere possession or intention to use.<sup>139</sup> The appellate court's proximity and accessibil-

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<sup>132</sup> *Id.* at 505.

<sup>133</sup> *Id.*

<sup>134</sup> *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (1879). *See also Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994) (stating that judges should hesitate "to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense").

<sup>135</sup> *Bailey*, 116 S. Ct. at 507.

<sup>136</sup> *Id.* The Court illustrated the viability of the active employment standard by demonstrating that a defendant can use a firearm without carrying it when he puts the gun on display during a drug transaction, and a defendant can carry a firearm without using it when he hides the gun in his clothing during a drug transition. *Id.*

<sup>137</sup> *Id.* at 508-09.

<sup>138</sup> One need not look far to find an example of such statutory language, as 18 U.S.C. § 924(d), the very next subsection of the same statute, provides for the forfeiture of a firearm that is "used" or "intended to be used" in certain crimes. *Id.* at 507 (emphasis added).

<sup>139</sup> *Id.* at 506.

ity standard failed in this regard by erasing any line distinguishing actual use from either possession or intention to use.<sup>140</sup> Conversely, the standard set forth in *Bailey* draws a clear distinction between the passive possession or future intention to use a firearm that Congress excluded from punishment under § 924(c)(1) and the active employment which the statute was intended to reach.<sup>141</sup>

In addition to the arguments brought forth by the Court in *Bailey*, the statute's legislative history, as evidenced by both the 1984 and 1990 amendments, also supports the active employment standard.<sup>142</sup> The 1984 amendment history, which addressed the congressional intent regarding "use" of a firearm in connection with violent crime, suggested that mere proximity of a firearm to drugs or drug-related activity is insufficient to establish a conviction under § 924(c)(1).<sup>143</sup> Instead, the prosecution must show some evidence that the defendant actively employed the firearm.

[T]he section was directed at persons who choose to carry a firearm as an offensive weapon for a specific criminal act . . . Moreover, the requirement that the firearms use or possession be 'in relation to' the crime would preclude [the statute's] application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.<sup>144</sup>

The adoption of the 1990 amendment, which created a scale that mandated increasingly longer penalties for the use of increasingly more destructive weapons,<sup>145</sup> implied that Congress intended to reduce the amount of violence associated with the underlying crimes of violence and drug-trafficking. Therefore, if the courts interpret "use" to include conduct where the defendant does not use the firearm in a violent manner, then the statute will punish beyond its intended scope.<sup>146</sup> By narrowing the scope of § 924(c)(1) and requiring that a defendant actively employ the weapon, the Court limited those punished by the statute to those persons who have raised the level of vio-

<sup>140</sup> *Id.* at 508. Under the proximity and accessibility standard, a gun stored in a closet during a drug transaction is "used" since its mere presence increases the owner's confidence thereby facilitating the crime. *Id.* However, storage of a firearm in this manner, without a more active employment, cannot reasonably be distinguished from mere possession or an intention to use the firearm in the future. *Id.*

<sup>141</sup> *Id.* at 508-09.

<sup>142</sup> 18 U.S.C. § 924(c)(1)-(2) (1984), amended by 18 U.S.C. § 924(c)(1) (1994); 18 U.S.C. § 924(c)(1) (1990), amended by 18 U.S.C. § 924(c)(1) (1994).

<sup>143</sup> Moore, *supra* note 22, at 182.

<sup>144</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, reprinted in 1984 U.S.C.C.A.N. (98 Stat.) 3491, 3492 n.10.

<sup>145</sup> See *supra* note 15 and accompanying text.

<sup>146</sup> *Smith v. United States*, 508 U.S. 223, 245-46 (1993) (Scalia, J., dissenting).

lence associated with their underlying offense.<sup>147</sup>

B. *BAILEY V. SMITH*: COMPARING AND CONTRASTING TWO O'CONNOR OPINIONS

The effect of the Supreme Court's decision in *Bailey* was to narrow the scope of § 924(c)(1) in order to prevent the statute's "use" prong from reaching the broad range of conduct defined by standards such as the D.C. Circuit's proximity and accessibility standard.<sup>148</sup> However, because the 1994 Supreme Court decision in *Smith v. United States* implied that the statute should reach such conduct, it was not surprising that some circuit courts defined "use" in such a broad fashion.<sup>149</sup>

The Court argued that the broad language in *Smith* merely expanded the definition of "use" to include situations where a firearm was actively employed in a capacity other than as a weapon, and lower courts incorrectly inferred that the statute reached any conduct involving a firearm that facilitates an underlying drug trafficking crime.<sup>150</sup> However, the language and dynamics of the *Smith* decision suggest that the Court in that case defined "use" broadly, bringing conduct like that outlined in the D.C. Circuit's proximity and accessibility standard within the purview of the statute.<sup>151</sup>

Although the *Smith* opinion limited its holding to the narrow case of firearms used for barter in drug transactions, the language in the decision nevertheless guided the lower courts to broadly construe the statute by strongly implying that the "use" requirement be interpreted in such a fashion.<sup>152</sup> For example, the majority declared that "the word 'use' is 'expansive' and extends to situations where the gun is not actively employed."<sup>153</sup> Furthermore, the Court declared that the statute's language "sweeps broadly, punishing any 'use' of a firearm, so long as the use is 'during and in relation to' a drug trafficking offense."<sup>154</sup> The Court then broadly defined the requirement, stating that the firearm "at least must 'facilitate, or have the potential of faci-

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<sup>147</sup> *Id.* (Scalia, J., dissenting).

<sup>148</sup> *Bailey v. United States*, 116 S. Ct. 501 (1995).

<sup>149</sup> *Smith v. United States*, 508 U.S. 223 (1993). The *Smith* Court held that the definition of "use" under § 924(c)(1) was broad enough to reach guns used as barter in a drug transaction. See *supra* note 28 and accompanying text.

<sup>150</sup> See *Bailey*, 116 S. Ct. at 508.

<sup>151</sup> See *Smith*, 508 U.S. at 223.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 229 (citing *United States v. Long*, 905 F.2d 1572 (D.C. Cir. 1990)).

<sup>154</sup> *Id.* The Court stated that the phrase "in relation to" clarified that the presence or involvement of the firearm cannot be the result of accident or coincidence, but rather must have some purpose or effect with respect to the predicate offense. *Id.* at 238.

tating' the drug trafficking offense."<sup>155</sup>

The broad definition of "use" was strengthened by Justice Blackmun's concurrence in *Smith*.<sup>156</sup> Justice Blackmun believed that § 924(c)(1) required that a firearm do more than merely facilitate a crime of violence or drug trafficking crime in order to constitute "use in relation to a predicate offense."<sup>157</sup> The fact that Justice Blackmun highlighted this belief in a separate concurring opinion implied that the majority intended mere facilitation to constitute "use of a firearm" within the meaning of § 924(c)(1).<sup>158</sup>

The *Smith* court's broad definition of "use" was further evidenced by Justice Scalia's dissent.<sup>159</sup> Justice Scalia wrote that by failing to narrow the definition of "use" in a meaningful fashion, the majority interpreted the term to mean "use for any purpose."<sup>160</sup> He then asserted that the majority's broad interpretation of § 924(c)(1) failed to adequately distinguish penalizing under the "use" prong of the statute from penalizing under the "carry" prong.<sup>161</sup>

The *Bailey* court, by establishing a narrow definition of use, not only limited *Smith*'s holding to its facts, but actually negated, albeit correctly, the *Smith* court's expansive definition of "use."<sup>162</sup> Thus, although the decision in *Bailey* is consistent with the fact-specific holding in *Smith*,<sup>163</sup> the *Bailey* court's contention that *Smith*'s interpretation of use "adhered to an active meaning of the term" is an attempt to nullify the *Smith* court's broad interpretation without admitting the

<sup>155</sup> *Id.* (citing *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.)); accord *United States v. Ocampo*, 890 F.2d 1363, 1371-72 (7th Cir. 1989).

<sup>156</sup> *Smith*, 508 U.S. at 241 (Blackmun, J., concurring).

<sup>157</sup> *Id.* at 241 (Blackmun, J., concurring). Despite disagreeing with the majority's standard, Justice Blackmun agreed that a reasonable construction of the phrase included trading a weapon for drugs. *Id.* Therefore, he felt it unnecessary to define the exact contours of the language under § 924(c)(1). *Id.*

<sup>158</sup> *Id.* (Blackmun, J., concurring).

<sup>159</sup> *Id.* at 241-47 (Scalia, J., dissenting). Justices Stevens and Souter also joined in the dissent. *Id.*

<sup>160</sup> *Id.* at 246 (Scalia, J., dissenting). Responding to the dissent's argument, the majority denied expanding the phrase "using a firearm" to "use for any purpose whatever," but instead asserted that the term was broad enough to include using a firearm for trade and as a weapon. *Id.* at 236. The majority's contention that use did not mean "use for any purpose" loses credibility when read in the context of the rest of the decision, wherein the Court purported to punish any use of a firearm that facilitated or had the potential of facilitating an underlying drug trafficking offense. *Id.* at 229-38 (Scalia, J., dissenting).

<sup>161</sup> *Id.* (Scalia, J., dissenting). Justice Scalia felt that interpreting "use" to mean "use as a weapon" would have narrowed the term's definition in a meaningful way, thereby producing a reasonable dichotomy between the two prongs of the statute. *Id.* at 245-46 (Scalia, J., dissenting).

<sup>162</sup> See *Bailey v. United States*, 116 S. Ct. 501 (1995).

<sup>163</sup> *Id.* at 508 (expressly stating that *Bailey* is not inconsistent with *Smith*).

faults of that interpretation.<sup>164</sup> Instead, the *Bailey* Court should have been honest and explicitly stated its intention to veer away from *Smith's* broad interpretation of "use", rather than forcing lower courts to infer the *Bailey* court's true intention.

The fact that the *Bailey* decision was unanimous illustrated that the Court had shifted gears in its reasoning since *Smith*.<sup>165</sup> Justice Blackmun's joining the opinion signified that the statute now required more than evidence of mere facilitation of the predicate crime in order for a defendant's conduct to constitute "use" under the statute.<sup>166</sup> Furthermore, Justice Scalia's agreement with the new interpretation illustrated that the "active employment" standard meaningfully narrowed the definition of "use" so as to adequately distinguish "using" a firearm from "carrying" one.<sup>167</sup> In fact, Justice O'Connor expressly stated in *Bailey* that "a more limited, active interpretation of 'use' preserves a meaningful role for 'carries' as an alternative basis for a charge."<sup>168</sup> By using the same argument put forth by Justice Scalia in his dissent in *Smith*, Justice O'Connor provided even further evidence that the Court changed its position regarding the proper breadth of scope for § 924(c)(1).<sup>169</sup>

### C. IMPLICATIONS OF *BAILEY*: FUTURE BROADENING UNDER THE CARRY PRONG?

In the course of defining the scope of § 924(c)(1), the Court considered only the "use" prong of § 924(c)(1).<sup>170</sup> However, the Court did point out that the government could employ the "carry" prong of the statute as an additional means with which to charge criminals who mix guns and drugs.<sup>171</sup> In doing so, the Court expressly stated that "the 'carry' prong of § 924(c)(1) . . . brings some offenders who

<sup>164</sup> *Id.* The Court also contended that *Smith* only ruled on whether barter came within the meaning of § 924(c)(1) and that it did not address the question of what is required for a jury to rule that a firearm had been used at all. *Id.* While the actual fact-specific holding supports this contention, the overall decision, as previously discussed, made implications regarding the overall scope of the statute. See *supra* notes 148-61 and accompanying text.

<sup>165</sup> See *Bailey*, 116 S. Ct. at 503.

<sup>166</sup> See generally *Smith v. United States*, 508 U.S. 223, 241 (1994) (Blackmun, J., concurring).

<sup>167</sup> See generally *supra* notes 145-47 and accompanying text.

<sup>168</sup> *Bailey*, 116 S. Ct. at 507.

<sup>169</sup> Compare *Smith*, 508 U.S. at 245-46 with *Bailey*, 116 S. Ct. at 507 (each speaking of the need to narrow the definition of "use" in order to provide a clear distinction between the two prongs of the statute).

<sup>170</sup> *Bailey*, 116 S. Ct. at 509. Because the Court of Appeals did not consider liability under the "carry" prong of the statute, the Court refused to rule on the issue and instead remanded the case for consideration of that basis for upholding the convictions. *Id.*

<sup>171</sup> *Id.*

would not satisfy the 'use' prong within the reach of the statute."<sup>172</sup> Although the Court properly declined to define the scope of the "carry" prong, as the issue was not before the Court, its suggestion that prosecutors employ the "carry" prong of the statute could invite prosecutors and lower courts to once again expand the scope of § 924(c)(1) by defining "carry" broadly.<sup>173</sup>

Despite this possibility of re-expansion, courts should resist interpreting the statute in a way that reaches the very conduct that the *Bailey* court excluded from coverage under the "use" prong.<sup>174</sup> Although the "carry" prong of the statute should prohibit a broader range of conduct than the "use" prong, courts must still narrow the definition of "carry" in a way that differentiates § 924(c)(1) from other statutes that prohibit "possessing" and "intending to use" a firearm.<sup>175</sup> By allowing the "carry" prong to reach conduct that falls short of active employment, § 924(c)(1) will adequately distinguish between "using a firearm" and "carrying a firearm." On the other hand, preventing the statute from reaching situations where a defendant merely stores a firearm near drugs, courts will assure that the definition of "carry" has meaning beyond "possession" or "intent to use."<sup>176</sup> Adhering to these definitional limitations leaves little room for the courts to define "carrying a firearm" in accordance with its ordinary meaning.<sup>177</sup> One workable definition of the "carry" prong, however, would punish a defendant who keeps a gun hidden in his or her clothing throughout a drug transaction.<sup>178</sup>

It remains to be seen how courts will define the carry prong of § 924(c)(1) or whether the carry prong will entirely swallow up and negate the narrow interpretation of § 924(c)(1) established by the Court in *Bailey*.<sup>179</sup> However, in light of the *Bailey* court's suggestion that prosecuting under the "carry" prong can broaden the scope of the statute's coverage, courts should be wary of expanding the scope

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See id.* at 505 (excluding from § 924(c)(1) coverage situations wherein a firearm is merely in proximity to and accessible during a drug transaction).

<sup>175</sup> Adhering to these limitations will adequately distinguish between the two statutory prongs while preventing a definition of "carry" that is synonymous with "possession" or "intent to use." *Id.* at 506-09.

<sup>176</sup> Despite the fact that such storage may increase a defendant's confidence, thereby facilitating his crime, storage is synonymous with intention to use, or in the absence of evidence showing intent, possession. *Id.* at 508.

<sup>177</sup> "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993); *see also Bailey*, 116 S. Ct. at 506.

<sup>178</sup> *Bailey*, 116 S. Ct. at 507.

<sup>179</sup> *Id.*

too far, lest they violate the rules of statutory construction adhered to by the Supreme Court while defining "use" under § 924(c)(1).<sup>180</sup>

#### VI. CONCLUSION

In a unanimous opinion written by Justice O'Connor, the *Bailey* Court correctly concluded that a defendant must "actively employ" a firearm in a manner that makes the firearm an operative factor in the predicate crime in order to violate 18 U.S.C. § 924(c)(1).<sup>181</sup> This conclusion created a narrow active-based definition of § 924(c)(1) that was in line with congressional intent. As a result, the *Bailey* decision nullified the implications of *Smith v. United States*, in which Justice O'Connor implied that Congress intended the scope of § 924(c)(1) to be broad and far-reaching. Consequently, the Court's contention that *Bailey* purported to adhere to *Smith's* precedent was an attempt to salvage its previous statutory interpretation while functionally putting that previous interpretation to rest.

Although *Bailey* limited the scope of § 924(c)(1) by narrowing the definition of "using a firearm," the Court gave the government a method by which to re-expand the statute's scope by suggesting that the government prosecute criminals under the "carry" prong of § 924(c)(1). When interpreting this prong of § 924(c)(1), however, courts should resist from expanding the statute's scope to reach situations where a gun is merely stored in proximity to a drug transaction and is accessible during that transaction.

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<sup>180</sup> See *id.* at 501.

<sup>181</sup> *Id.* at 505.