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The Aftermath of *Bailey v. United States*: Should Possession Replace Carry and Use Under 18 U.S.C. 924(c)(1)?

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THE AFTERMATH OF *BAILEY v. UNITED STATES*:* SHOULD POSSESSION REPLACE CARRY AND USE UNDER 18 U.S.C. § 924(c)(1)?**

*Kristin Whiting****

INTRODUCTION

Title 18, United States Code, section 924(c)(1), establishes a separate offense which enhances the punishment of a defendant

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* 116 S. Ct. 501 (1995).

** 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.

18 U.S.C. § 924(c)(1) (1996).

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who commits a violent crime or drug trafficking offense and uses or carries a firearm during or in relation to either offense.[1] The statute imposes a sentence of five to thirty years that must be served consecutively, not concurrently, with the sentence for the predicate offense.[2] The recent U.S. Supreme Court decision of *Bailey v. United States*[3] changes the interpretation of this statute and significantly narrows its application by providing a "bright-line test" that aids defense counsel.[4] The decision has been viewed as a surprise pro-defendant outcome by a conservative court, and a defeat for the U.S. Justice Department's war against drugs.[5] In addition to convictions challenged on direct appeal, it has been

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[1] Title 18, United States Code, section 924(c)(1) was enacted after Representative Richard H. Poff (R-Va.) introduced it as a floor amendment in 1968. United States v. Anderson, 59 F.3d 1323, 1327 (D.C. Cir. 1995) (citing statement of Representative Poff that "[t]he prosecution for the basic felony and the prosecution under [his] substitute would constitute one proceeding out of which two separate penalties may grow"). Representative Poff stated that the purpose of the amendment was to "persuade the man who is tempted to commit a federal felony to leave his gun at home." *Id.* at 1327-28 (citing 114 CONG. REC. S22231 (1968)). The statute was later amended several times, including a modification in 1986 to add the using or carrying of firearms in relation to a drug trafficking crime. Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(A)-(E), 100 Stat. 449, 457 (1986).

[2] 18 U.S.C. § 924(c)(1). The statute imposes sentences of 10 years for using or carrying a "short-barreled shotgun, or semiautomatic assault weapon" and 30 years for "machinegun or a destructive device or . . . a firearm with a silencer or muffler." *Id.* Second or subsequent § 924(c)(1) convictions are subject to a mandatory term of 20 years, "and if the firearm is a machinegun or destructive device, or was equipped with a silencer or muffler, to life imprisonment without release." *Id.*

[3] 116 S. Ct. 501 (1995).

[4] David B. Byrne, Jr. et al., *Recent Decisions*, 57 ALA. LAW. 114, 116 (1996).

[5] Joan Biskipic, *Court Reverses Drug Convictions: Active Use of Firearm Needed for Additional Sentence, Justices Rule*, WASH. POST, Dec. 7, 1995, at A3. It has been argued, however, that mandatory sentences for offenses accompanied by a gun are not effective in deterring either the "flow of illegal drugs" or the "overall level of serious crime." MATTHEW G. YEAGER, DO MANDATORY PRISON SENTENCES FOR HANDGUN OFFENDERS CURB VIOLENT CRIME?: TECHNICAL REPORT ONE FROM THE UNITED STATES CONFERENCE OF MAYORS 2 (1976).

noted that due to the Supreme Court's decision in *Bailey*, hundreds of prisoners are now eligible for 28 U.S.C. § 2255 relief[6] for harsh consecutive sentences stemming from § 924(c)(1) convictions under the pre-*Bailey* interpretation of "use."[7] Aside from the retroactive effect of the decision, *Bailey* also clearly challenges the future of § 924(c)(1).

This Note will analyze the retroactive effect of *Bailey*, particularly in the U.S. Court of Appeals for the Second Circuit,[8] and will recommend a proposal to amend § 924(c)(1) to replace "uses or carries" with "possession" of a firearm during or in relation to a violent crime or drug trafficking offense. In doing so, Part I of this Note will first place the issue in context by providing a brief history of § 924(c)(1). Part II will discuss the Supreme Court's decision in *Bailey*. Part III will then analyze how the Second Circuit is handling the post-*Bailey* deluge, which it does in most cases, by stretching the law to uphold the pre-*Bailey* sentence.

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[6] Title 28, United States Code, section 2255 enables a prisoner in custody to collaterally attack his or her sentence on the ground that the sentence imposed was unconstitutional, contrary to United States law, handed down by a court without proper jurisdiction, over the legal maximum or otherwise subject to attack. 28 U.S.C. § 2255 (1994 & Supp. 1996).

[7] David B. Smith, *Resources, Research and Results: Reflections on* Bailey v. United States, 11 CRIM. JUST. 40 (1996). The United States Sentencing Commission reported that 1973 defendants were sentenced under § 924(c)(1) in the fiscal year ending September 30, 1995. *Id.* at 41. A total of 10,000 people are estimated to be in prison under § 924(c)(1). Stephanie Stone, *Eastern District of Virginia Rules Bailey Gun 'Use' Applies Retroactively*, WEST'S LEGAL NEWS, Jan. 10, 1996, at 3038, *available in* 1996 WL 257913. *See* 143 CONG. REC. S379, 405 (referring to Sentencing Commission statistics estimating that more than 9000 armed felons were convicted under § 924(c) from April 1991 to October 1995).

[8] The U.S. Court of Appeals for the Second Circuit is one of the leading jurisdictions in terms of § 924(c) case law and has been noted along with the Third Circuit and District of Columbia Circuit for adhering to a traditional interpretation of "use" under § 924(c)(1), even before *Bailey v. United States*. Jamilla A. Moore, *These Are Drugs. These Are Drugs Using Guns. Any Questions? An Analysis of the Diverse Applications of 18 U.S.C. Section 924(c)(1)*, 30 CAL. W. L. REV. 179, 185 (1993). This Note primarily focuses on cases decided by the Second Circuit and the district courts in New York, but incorporates differences and similarities of views among other federal circuit courts where relevant.

Specifically, this Note will discuss the various means by which the Second Circuit upholds pre-*Bailey* sentences, including the use of harmless error,[9] the *Pinkerton* theory of liability[10] and, finally, the concept of "sentencing packages" which the Second Circuit has relied on to resentence defendants with enhanced terms of imprisonment even after the § 924(c) conviction has been retroactively reversed pursuant to *Bailey*.[11] This Note concludes that in light of the strained interpretation of § 924(c)(1) and the ad hoc use of the Sentencing Guidelines, § 924(c)(1) should either be amended to include possession where the firearm is in close proximity to the drugs or, in the alternative, abolished altogether and the matter referred to the sentencing commission.

I. LEGISLATIVE HISTORY OF § 924(C)

The language of § 924(c) has been amended eight times by six public laws since 1968.[12] The statute has been subject to

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[9] The Second Circuit upholds sentences on the ground that even if the jury instruction was erroneous as to "use," the evidence was sufficient for the jury to convict under the "carry" prong of § 924(c)(1). *See* United States v. Pimentel, 83 F.3d 55 (2d Cir. 1996); United States v. Giraldo, 80 F.3d 667 (2d Cir. 1996).

[10] The Second Circuit upholds post-*Bailey* convictions on the ground that, even if the defendant was wrongfully convicted of aiding and abetting, which requires some act to facilitate the crime, the convictions can be upheld if the jury could have found that the using or carrying of the firearm was reasonably foreseeable by the defendant. *See Giraldo*, 80 F.3d at 677; United States v. Masotto, 73 F.3d 1233, 1241 (2d Cir. 1996); *Pimentel*, 83 F.3d at 58.

[11] The Second Circuit imposes a two-level enhancement for possession of a weapon related to the underlying drug trafficking conviction under the U.S. Sentencing Guidelines. FEDERAL SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (1995). *See, e.g.*, United States v. Bermudez, 82 F.3d 548, 550 (2d Cir. 1996); *Giraldo*, 80 F.3d at 677. The two-level enhancement could raise the sentence as much as 60 to 100 months. *See infra* note 157 (discussing the effect of a two-level sentencing enhancement).

[12] Section 924(c) was amended several times between 1984 and 1994. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102(c)(2), 108 Stat. 1796, 1998 (1994) (adding a semi-automatic weapon to the list of firearms punishable by 10 years imprisonment); Crime Control Act of 1990, Pub. L. No. 101-647, § 1101, 104 Stat. 4789, 4829 (1990) (adding imprisonment for 10 years if the firearm is a short barreled rifle or a

piece-meal tinkering depending on the public policy of the moment which has led to incongruent results and the ultimate need for the *Bailey* decision.

Enacted in the wake of the assassinations of Robert Kennedy and Martin Luther King, Jr., the Federal Gun Control Act of 1968[13] ("Gun Control Act") aimed to prevent gun distributors from selling to buyers across state lines, to aid in the enforcement of state gun control laws and to prohibit the sale of firearms to certain classes, including convicted felons and drug users.[14] The enhanced punishment for using or carrying a gun in relation to a crime first appeared as an amendment to the Gun Control Act of 1968.[15]

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short barreled shotgun, and adding destructive device wherever machinegun appears); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 6212, 102 Stat. 4181, 4360 (1988) (replacing the previous definition of a drug trafficking offense, "'violation of Federal law involving distribution, manufacture, or importation of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. [§] 802)'" with "'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.)'"); *id.* § 6460, 102 Stat. 4181, 4373 (increasing term of sentence from 10 to 30 years for a machinegun, from 10 to 20 years for second or subsequent conviction and from 20 years to life imprisonment without release for a second or subsequent conviction involving a machinegun); Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, § 104(a)(2)(A)-(E), 100 Stat. 449, 457 (1986) (amending statute to reach the carrying or using of a firearm during or in relation to a drug trafficking offense and imposing more severe penalties for machineguns or firearms equipped with a silencer or muffler); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005, 98 Stat. 2138, 2138-39 (1984) (substituting minimum sentencing of one to 10 years for a first offense with a mandatory determinate sentence of five years and replacing a minimum range of five to 25 years for a second conviction, with a mandatory sentence of 10 years).

[13] Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224 (1968).

[14] GERALD D. ROBIN, VIOLENT CRIME AND GUN CONTROL 9-20, 85 (1991).

[15] The amendment to the Gun Control Act was introduced from the floor by Representative Poff. 114 CONG. REC. S22231-48 (1968). For further discussion of the legislative history of § 924(c)(1), see Thomas Clare, Smith v. United States *and the Modern Interpretation of 18 U.S.C. Section 924(c): A Proposal to Amend the Federal Armed Offender Statute*, 69 NOTRE DAME L. REV. 815 (1994); Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use A Firearm,"* 73 WASH.

The original version read as follows:

(c) Whoever-

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

(2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.[16]

Unlike the version today that applies only to carrying or using a firearm during or in relation to a drug trafficking or violent crime, the original version applied to both the use of a gun to commit any felony and the unlawful carrying of a gun during the commission of any felony.[17] Therefore, as long as the defendant had a permit for the gun, the defendant who carried the gun during

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U. L.Q. 1159 (1995); Moore, *supra* note 8, at 181; 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 U.S.C. Section 924(c)(1)*, 30 DUQ. L. REV. 39, 40 (1990).

[16] Federal Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224 (codified as amended at 18 U.S.C. § 924(c)(1) (1988)). During the congressional debates relating to the act, Senator Murphy stated that the law "will make every criminal and would-be criminal think twice before using or even carrying a firearm." Cunningham & Fillmore, *supra* note 15, at 1191 n.157 (citing 114 CONG. REC. S27141, 27144 (1968)) (statement of Senator Murphy). The Supreme Court in *Bailey* argued that the original version of § 924(c) illustrated that Congress intended a narrower meaning of "use," concluding that "uses to commit" would not cover nearby storage of a gun. Bailey v. United States, 116 S. Ct. 501, 507 (1995).

[17] Cunningham & Fillmore, *supra* note 15, at 1191.

the commission of a felony would not be subject to the § 924(c)(1) sentencing enhancement.[18] In addition to this loophole, the original version has also been criticized as ineffective because it failed to ban parole under the § 924(c)(1) sentence, and was applied by the court as a cumulative sentencing provision rather than a separate substantive offense.[19]

In 1984, § 924(c) was amended upon the enactment of section 1005 of the Comprehensive Crime Control Act.[20] This amendment merged the separate sections of use and carry,[21] revising the statute as follows:

> (c) Whoever, during and in relation to any crime of violence, including a crime of violence 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, be sentenced to imprisonment for five years. In the case of his second or subsequent conviction under this subsection such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the

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[18] Cunningham & Fillmore, *supra* note 15, at 1191.

[19] Clare, *supra* note 15, at 822 (citing Simpson v. United States, 435 U.S. 6 (1978) and Busic v. United States, 446 U.S. 398 (1980)) (proposing that enhancement for the firearm related substantive crime merged with and displaced any separate enhancement under § 924(c)).

[20] Pub. L. No. 98-473, § 1005, 98 Stat. 2138, 2138-39 (1984).

[21] Legislative history is scarce as to why sections § 924(c)(1) and (c)(2) were combined. "Carrying," however, was distinguished from "using a gun" in the following Senate Report excerpt:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for carrying a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose . . . .

Cunningham & Fillmore, *supra* note 15, at 1195 (quoting S. REP. NO. 225, at 314 n.10, *reprinted in* 1984 U.S.C.C.A.N. 3492 n.10).

> 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 in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.[22]

Although the statute was broadened by the deletion of "unlawful" so that a felon with a gun permit could not escape the scope of § 924(c), it significantly narrowed the application of § 924(c) by punishing the use of a firearm "during or in relation to a violent crime"[23] rather than punishing the use of a firearm "to commit any felony."[24] The legislature cured the problem of concurrent sentencing that arose under the prior version by adding the language "in addition to the punishment for such crime of violence" to ensure that an offense under this section would be treated distinctly from the underlying offense.[25] Finally, the statute imposed definite mandatory minimum terms of imprisonment that replaced the judge's discretion under the former version.[26]

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[22] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005, 98 Stat. 2138, 2138-39. The government argued in *Bailey* that "carry" and "use" should be understood as overlapping because the 1984 amendment stripped the terms of their original meanings. Bailey v. United States, 116 S. Ct. 501, 508 (1995).

[23] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005, 98 Stat. 2138.

[24] Federal Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1223. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2138, 2138-39 (applying also to "carrying" which was formerly "carrying during any crime of violence"); United States v. Feliz-Cordero, 859 F.2d 250, 254 (2d Cir. 1988) (referring to the significance of "during and in relation to"); Cunningham & Fillmore, *supra* note 15, at 1194.

[25] The original version of § 924(c), which allowed for more flexible sentencing, provided for imprisonment of not less than one year nor more than 10 years for the use of a firearm to commit any felony which may be prosecuted in a court of the United States. Federal Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1223; Clare, *supra* note 15, at 824.

[26] Clare, *supra* note 15, at 824. The 1984 amendment to § 924(c) provided for a mandatory five-year term of imprisonment for using a gun during and in

Two years later, in 1986, section 104 of the Firearm Owners' Protection Act of 1986[27] amended § 924(c) to include mandatory minimum sentences for drug trafficking crimes.[28] The amendment also provided for a ten-year prison term for carrying or using a machinegun or firearm with a silencer or muffler and a twenty-year term for carrying or using such firearms upon a second or subsequent conviction.[29] Section 924(c)(2) was also added to Title 18, United States Code in 1986, which defined a drug trafficking crime as "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."[30] Section 924(c)(3) defined a violent crime as a felony that "has an element of use, attempted use, or threatened use of physical force against the person or property of another, or by its nature, involved a substantial risk that physical force against the person or

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relation to any crime of violence and a term of 10 years for a second or subsequent conviction under § 924(c); whereas the earlier version provided for a term ranging from one to 10 years for a first time offender and five to 25 years upon a second or subsequent § 924(c) conviction. Clare, *supra* note 15, at 823-24.

[27] Pub. L. No. 99-308, § 104(a)(2)(A)-(E), 100 Stat. 449, 456-57 (1986).

[28] *Id.* (amending § 924(c) by inserting "or drug trafficking crime" before "in which the firearm was used or carried"). *See* Moore, *supra* note 8, at 181 (suggesting that the addition of drug trafficking crime was consistent with the report of the United States Attorney General's Task Force on Violent Crime which recommended the application of § 924(c) to all federal felonies). Despite the tougher provisions in this legislation relating to crime-related gun use, it was a significant victory for the National Rifle Association which spent nearly $1.6 million to campaign against the ban of interstate gun sales. ROBIN, *supra* note 14, at 24. While a last minute attempt by Congress preserved the prohibition on interstate gun sales, the legislation removed the ban on interstate transportation of guns and loosened certain recordkeeping requirements. ROBIN, *supra* note 14, at 24.

[29] Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(A)-(E), 100 Stat. 449, 456-57 (amending § 924(c) by striking the period at the end of the first sentence and inserting, "and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for ten years").

[30] *Id.* The Controlled Substances Act, codified at 21 U.S.C. § 801 et seq., was later amended to include possession with intent to distribute drugs in the definition of a drug trafficking crime. Cunningham & Fillmore, *supra* note 15, at 1198.

property of another may be used in the course of committing the offense."[31]

Subsequent amendments in 1988, 1990 and 1994 have redefined a drug trafficking crime, expanded types of firearms covered by the statute and increased penalties up to life imprisonment without release.[32] Of these recent amendments, the expanded definition of drug trafficking crime, incorporating possession with intent to distribute a controlled substance, has posed problems in determining how one would "use" a firearm in relation to such a passive offense.[33]

Although there were numerous attempts to amend § 924(c)(1) to replace carrying or using a firearm with possession of a firearm even before *Bailey*,[34] *Bailey* has spurred a strong reaction among

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[31] Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104(A)(2), 100 Stat. 449, 456-57.

[32] *See* Crime Control Act of 1990, Pub. L. No. 101-647, §1101, 104 Stat. 4789, 4829 (adding a 10-year sentence if the firearm is a short-barreled rifle or shotgun and including "or destructive device" wherever machinegun appears); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (defining drug trafficking crime 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. App. § 1901 et seq.)); *id.* § 6460, 102 Stat. 4181 (increasing penalties from 10 to 30 years for machineguns, from 10 to 20 years for a second or subsequent conviction and from 20 years to life imprisonment without release for a second or subsequent conviction involving a machinegun). *See also* Clare, *supra* note 15, at 824-25 (discussing the legislative history of § 924(c) and the effect of the 1986 amendment); Cunningham & Fillmore, *supra* note 15, at 1198-99 (discussing remarks by Senator Biden regarding the addition of "possession with intent to distribute" to definition of drug trafficking crime).

[33] *See* United States v. Robinson, 779 F. Supp. 606, 609 (D.D.C. 1991) (citing United States v. Bruce, 939 F.2d 1053 (D.C. Cir. 1991)). The district court distinguished the instances of a gun found in a residence in *Bruce* from a gun found in a crack house in *Robinson*. *Id.* at 609 n.5. Although later reversed by the Supreme Court in *Bailey*, the district court concluded that in the later instance a gun may be "used" because the possession and distribution in a crack house are intertwined. *Id.* at 609.

[34] Even before *Bailey*, there were many proposals to amend § 924(c) to include possession, all of which have failed. *See, e.g.*, H.R. 1488, 104th Cong., 1st Sess. (1995) (introduced by Representative Barr (R-Ga.)); S. 2305, 102d Cong., 2d Sess. (1992) (introduced by Senator Thurmond (R-S.C.)); S. 1241,

many legislators and law enforcement agents who believe that the Supreme Court erred in its interpretation.[35] The decision is considered an invitation to amend the statute to include possession of a firearm.[36] In 1996 and 1997, several bills have been introduced in the House and Senate for such an amendment.[37]

102d Cong., 1st Sess. (1991) (introduced by Senator Biden (R-N.J.)); S. 1970, 101st Cong., 1st Sess. (1990) (introduced by Senator Gramm (R-Tex.)); H.R. 2709, 101st Cong., 2d Sess. (1989) (introduced by the Bush administration). *See also* Cunningham & Fillmore, *supra* note 15, at 1198-01 (discussing unsuccessful attempts to add possession). Although successful at the state level, Senator D'Amato (R-N.Y.) has unsuccessfully attempted to amend § 924(c) to include a sentence enhancement for those who knowingly possess a firearm during or in relation to a state crime. *See* 140 CONG. REC. H5930 (daily ed. July 20, 1994); 140 CONG. REC. S6078 (daily ed. June 19, 1994); 139 CONG. REC. S15386 (daily ed. Nov. 9, 1993) (failing to be enacted despite recommendation of House and Senate); 137 CONG. REC. S8846 (daily ed. July 11, 1991).

[35] *Violent and Drug Trafficking Crimes: Hearing of the Senate Judiciary Committee*, 104th Cong., 2d Sess. (Sept. 18, 1996), *available in* LEXIS, Legis Library, Allnws File (statement of Senator DeWine (R-Ohio)) [hereinafter *Hearing* (Sept. 18, 1996)]. *See* 143 CONG. REC. S379, 405 (statement of Senator Helms (R-N.C.) introducing Senate Bill 43, a bill to throttle criminal use of guns, to "correct[] the Supreme Court's blunder"); 143 CONG. REC. S. 1659, 1663 (statement of Senator Leahy (R-Vt.) introducing Senate Bill 362 which would replace "carry or use" with "possession" and correct the *Bailey* decision); 142 CONG. REC. S1976, 1977 (introduction of Senate Bill 1612 by Senator Helms for Senators Dole, Hatch, Thurmond, Faircloth, Gramm and Feinstein which aims to crack down on "gun toting thugs" and correct the Supreme Court's "error of judgement leading to the early release of hundreds of criminals").

[36] *Hearing* (Sept. 18, 1996), *supra* note 35 (statement by Senator Helms). *But see* Bailey v. United States, 116 S. Ct. 501, 508 (1995) (stating that if Congress had intended to include a meaning of "use" of a firearm other than active employment, it could have used "possession" as it has in other gun related legislation).

[37] *See* S. 43, 105th Cong., 1st Sess. (1997); S. 362, 105th Cong., 1st Sess. (1997); H.R. 3454, 104th Cong., 2d Sess. (1996) (proposing "to provide enhanced penalties for discharging or possessing a firearm during a crime of violence or drug trafficking crime, and for discharging or using a firearm to cause serious bodily injury during such a crime"); S. 1945, 104th Cong., 2d Sess. (1996) (aiming to broaden the scope of certain firearm offenses); H.R. 4181, 104th Cong., 2d Sess. (1996) (providing for increased mandatory minimum sentences for criminals possessing firearms); H.R. 3698, 104th Cong., 2d Sess.

Despite the view that *Bailey* did not properly consider the legislative intent of § 924(c)(1), there is no consensus about what should be the intent of the statute.[38] Legislators face the problem of how to properly draft an amendment of § 924(c)(1) that targets possession which is related to the underlying offense and exempts punishment where a gun is found before or after the commission of the underlying offense, but has no clear relation to the offense.[39] Possession "during or in relation to" the underlying offense would alleviate inconsistencies by reaching instances where guns were readily accessible for use in relation to the crime through the well established doctrine of "constructive possession."[40]

II. *BAILEY V. UNITED STATES*

Until the Supreme Court decided *Bailey*, the circuit courts were split over what "use" under § 924(c)(1) meant.[41] Many circuit courts made no distinction between "use" and "carry," and essentially construed the statute to cover any possession of a firearm in relation to a violent crime or drug trafficking offense.[42] This included possession of a weapon that was physically available

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(1996) (Anti-Gang and Youth Violence Control Act of 1996, Title III) (enhancing penalties for discharging or possessing a gun during a crime of violence or drug trafficking crime).

[38] *Hearing* (Sept. 18, 1996), *supra* note 35.

[39] *Hearing* (Sept. 18, 1996), *supra* note 35 (statement of Kevin Di Gregory, referring to the problem posed by Senate Bill 1945 introduced by Senator DeWine which punishes the use or carrying of a firearm "in close proximity to illegal drugs or drug proceeds, in close proximity to the location of the arrest or in close proximity to the location of the drug selling").

[40] *See Hearing* (Sept. 18, 1996), *supra* note 35 (statement of Deputy Assistant Attorney General Kevin Di Gregory). A possession standard would also provide consistency with the U.S. Sentencing Guidelines which provide a two-level enhancement for possession of a firearm at the time of the drug trafficking offense. *See* FEDERAL SENTENCING GUIDELINES MANUAL, *supra* note 11, § 2D1.1(b)(1).

[41] *Bailey*, 116 S. Ct. at 505. *See* Moore, *supra* note 8, at 182-93 (discussing the ready access doctrine of "use" followed by the Second and Third Circuits and the drug fortress theory of "use" followed by the Fifth and Sixth Circuit prior to the *Bailey* decision).

[42] *Bailey*, 116 S. Ct. at 505.

to a defendant or possession of a weapon that, if the need arose, was intended to be used by a defendant.[43] Defendants, for example, who stored guns in their homes, were convicted of § 924(c) violations whether or not they actively used or carried the gun.[44]

The confusion within the United States Court of Appeals for the District of Columbia Circuit[45] and its conflicting interpretation with other circuit courts[46] led the United States Supreme Court to

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[43] United States v. Fermin, 32 F.3d 674, 678 (2d Cir. 1994) (convicting defendant under § 924(c) for a firearm found in the closet); United States v. Torres, 901 F.2d 205, 217-18 (2d Cir.) (convicting defendant under § 924 (c)(1) for firearm underneath a mattress), *cert. denied*, 498 U.S. 906 (1990); United States v. Alvarado, 882 F.2d 645, 654 (2d Cir. 1989) (convicting defendant for a firearm locked inside a safe), *cert. denied*, 493 U.S. 1071 (1990); United States v. Meggett, 875 F.2d 24, 29 (2d Cir.) (convicting defendant under § 924(c) for guns found in a nightstand, dresser, behind chair and against wall), *cert denied sub nom.* Bradley v. United States, 493 U.S. 858 (1989). After *Bailey*, six Second Circuit decisions were vacated and remanded by the Supreme Court for reconsideration. *See* Santos v. United States, 116 U.S. 1038 (1996); Colon v. United States, 116 S. Ct. 900 (1996); Vasquez v. United States, 116 S. Ct. 691 (1996); Arroyo v. United States, 116 S. Ct. 663 (1995); Mariette v. United States, 116 S. Ct. 667 (1995); Lanier v. United States, 116 S. Ct. 667 (1995). Of the above six, four were vacated by the Second Circuit and remanded for resentencing. Martin Flumenbaum & Brad Karp, *Performance in the U.S. Supreme Court*, N.Y. L.J., Sept. 27, 1996, at 3.

At the Hearing of the Senate Judiciary Committee on Violent and Drug Trafficking Crimes, Professor David Zlotnick referred to Minnesota cases in which defendants were convicted under § 924(c)(1) where guns found in defendants house had no proven relation to the drug crime. *Hearing* (Sept. 18, 1996), *supra* note 35.

[44] *Alvarado,* 882 F.2d at 654; *Meggett*, 875 F.2d at 29; *Torres*, 901 F.2d at 217; *Fermin*, 32 F.3d at 678. In one case, a woman was convicted under § 924(c) for "using" a gun which was found at her boyfriend's home. *Bailey Ruling May Mean Prisoner Releases in Pennsylvania, Nationwide*, WEST'S LEGAL NEWS, Mar. 28, 1996, at 2667, *available in* 1996 WL 259366 [hereinafter *Bailey Ruling*].

[45] United States v. Bailey, 36 F.3d 106, 112 (D.C. Cir. 1994) (citing inconsistent results within the District of Columbia Circuit between 1992 and 1993), *cert. granted*, 115 S. Ct. 1689, *rev'd and remanded*, 116 S. Ct. 501 (1995).

[46] *See id.* at 113-14 (citing cases in every circuit which adopt a view closer to a "proximity and accessibility" standard than to the "open-ended analysis"

grant certiorari.[47] The confusion arose when different panels of the District of Columbia Circuit affirmed Roland Bailey's, but reversed Candisha Robinson's § 924(c) conviction—both of which were based on similar facts.[48] Sitting en banc, the District of Columbia Circuit then affirmed both convictions.[49] The Supreme Court, in an opinion by Justice Sandra O'Connor, applied a plain meaning interpretation to § 924(c)(1) and found that the use of a firearm during or in relation to a violent crime or drug trafficking offense required "active employment" of such firearm.[50] Under this interpretation, both Bailey's and Robinson's convictions for using a firearm under § 924(c)(1) were reversed and the cases were remanded for an analysis under the "carry" prong of § 924(c)(1).[51]

In *United States v. Robinson*,[52] Candisha Robinson was indicted and convicted of several drug related offenses including possession with intent to distribute five or more grams of cocaine and using or carrying a firearm in the course of the offense in

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previously used by the District of Columbia Circuit). For examples of the "open ended approach" used by the District of Columbia Circuit before *Bailey*, see United States v. Derr, 990 F.2d 1330 (D.C. Cir. 1993); United States v. Morris, 977 F.2d 617 (D.C. Cir. 1992); United States v. Bruce, 939 F.2d 1053 (D.C. Cir. 1991).

[47] Bailey v. United States, 115 S. Ct. 1689, *rev'd and remanded*, 116 S. Ct. 501 (1995).

[48] United States v. Bailey, 995 F.2d 1113, *vacated*, United States v. Bailey, 4 F.3d 1004 (D.C. Cir. 1993), *on reh'g*, United States v. Bailey, 36 F.3d 106 (D.C. Cir. 1994), *cert. granted*, Bailey v. United States, 115 S. Ct. 1689, *rev'd*, Bailey v. United States, 116 S. Ct. 501 (1995), *remanded sub nom.*, United States v. Robinson, No. 92-3062, 1996 U.S. App. LEXIS 3700 (D.C. Cir. Jan. 26, 1996) (en banc); Robinson v. United States, 997 F.2d 884 (D.C. Cir. 1993), *aff'd and consolidated sub nom.* United States v. Bailey, 36 F.3d 106 (D.C. Cir. 1994) (en banc).

[49] *Bailey*, 36 F.3d. at 108.

[50] United States v. Bailey, 116 S. Ct. 501, 505 (1995).

[51] *Id.* at 509.

[52] 779 F. Supp. 606 (D.D.C. 1991), *rev'd and remanded*, United States v. Robinson, 997 F.2d. 884 (D.C. Cir. 1993), *aff'd sub nom.* United States v. Bailey, 36 F.3d 106 (D.C. Cir. 1994) (en banc), *cert. granted*, Bailey v. United States, 115 S. Ct. 1689, *rev'd*, Bailey v. United States, 116 S. Ct. 501 (1995), *remanded sub nom.*, United States v. Robinson, No. 92-3062, 1996 U.S. App. LEXIS 3700 (D.C. Cir. Jan. 26, 1996) (en banc).

violation of § 924(c).[53] Robinson was involved with two different "controlled buys" of cocaine to an undercover officer where drugs were retrieved from her bedroom closet.[54] After the second buy, the officer searched the closet and found the cocaine, the marked buy money and an unloaded pistol locked in a trunk.[55] Robinson was subsequently convicted of carrying or using a gun in relation to the drug offense under § 924(c)(1) and received a sixty-month sentence.[56] The district court denied Robinson's motion for a judgment of acquittal on the theory that "a reasonable jury could have concluded that [she] knew of, and had at least constructive possession of, the items in the trunk."[57] The District of Columbia Circuit, in a divided opinion, later reversed her conviction on the ground that § 924(c)(1) reaches only actual use, not an unsatisfied intent to use a weapon in connection with a drug trafficking offense. The District of Columbia Circuit held that "the mere proximity of the gun to the drugs was insufficient to support a conviction under § 924(c)(1)."[58] Finally, consolidating *Bailey* and *Robinson*, the court of appeals reheard the cases en banc and in a divided opinion, the majority affirmed Robinson's conviction on the basis that the government presented sufficient evidence that the

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[53] *Bailey*, 116 S. Ct. at 504; *Robinson*, 779 F. Supp. at 606.

[54] A "controlled buy" is when an undercover law enforcement officer or confidential informant buys drugs with marked currency.

[55] *Bailey*, 116 S. Ct. at 504; *Robinson*, 779 F. Supp. at 608.

[56] *Bailey*, 116 S. Ct. at 504. A prosecution expert testified at trial that guns are used by drug dealers "to protect themselves from other dealers, the police and their employees." *Id.* at 507.

[57] *Robinson*, 779 F. Supp. at 608. The court based this determination on evidence that Robinson lived at the "buy location," the lease was in her name and her admission that she owned the locker and used it for personal storage. *Id.* The court distinguished instances where a defendant is charged with possession with intent to distribute drugs and noted that such a charge requires actual use of a gun under § 924(c). The court explained that the passive nature of the possession count makes the use of a gun in relation to it difficult to determine; however, where the court finds that the drugs are kept in a crack house, as in the instant case, the possession and distribution become intertwined. *Id.* at 608-09.

[58] *Bailey*, 116 S. Ct. at 504 (citing United States v. Robinson, 997 F.2d 884 (D.C. Cir. 1993)) (noting the dissent's conclusion that the gun protected both Robinson and the drugs and, therefore, was used in connection with the sale).

gun was in the proximity of the drugs and accessible to Robinson.[59]

In *United States v. Bailey*,[60] Roland Bailey was stopped for a traffic violation, ordered out of the car because he did not have a license and arrested after the police observed him stick thirty grams of cocaine into the passenger compartment of the car.[61] After the arrest, at police headquarters, the police searched the trunk and found cash and a gun.[62] Bailey, like Robinson, was also subsequently convicted of possession with intent to distribute five grams or more of cocaine and using or carrying a firearm in relation to the offense in violation of § 924(c)(1).[63] The District of Columbia Circuit upheld the conviction on the ground that the jury could have concluded that Bailey "used" the gun in his trunk "in relation to" the possession of the cocaine because the gun "had the purpose of protecting the cash in the trunk, and . . . the drugs and money on Bailey's person."[64] Consolidated and reheard en banc, the District of Columbia Circuit again affirmed Bailey's § 924 (c)(1) conviction, finding that there was sufficient evidence to uphold a conviction of using a firearm.[65]

The Supreme Court granted certiorari to decide the correct interpretation of "use" and, ultimately, reversed Robinson's and Bailey's convictions.[66] The Supreme Court reasoned that if

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[59] United States v. Bailey, 36 F.3d 106, 118 (D.C. Cir. 1994) (rejecting the "open-ended Bruce-Morris-Derr approach" and adopting a "proximity and accessibility" approach).

[60] 995 F.2d 1113 (D.C. Cir. 1993), *aff'd on reh'g*, 36 F.3d 106 (D.C. Cir. 1994) (en banc), *cert. granted*, 115 S. Ct. 1689, *rev'd and remanded*, 116 S. Ct. 501 (1995).

[61] *Bailey*, 995 F.2d at 1113-14.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 1119. The court stated that "the Government need only 'prove a connection between the firearm and an underlying drug offense'" *Id.* at 1116 (quoting United States v. Jefferson, 974 F.2d 201, 206 (D.C. Cir. 1992)).

[65] United States v. Bailey, 36 F.3d 106, 117 (D.C. Cir. 1994). The court found that the evidence satisfied the "proximity and accessibility" test because the gun was near the drugs and accessible to Bailey when he handled either the cash or the drugs. *Id.*

[66] United States v. Bailey, 116 S. Ct. 501, 509 (1995). The Supreme Court remanded *Bailey* and *Robinson* for a determination of whether either defendant

Congress had intended to include possession of a gun under § 924(c)(1), it could have easily done so, and pointed to legislation relating to guns incorporating the term "'possess.'"[67] Agreeing with the dissenting opinion of the court of appeals, the Supreme Court refused to interpret "use" as a "'simpl[e] possession with a floating intent to use.'"[68] The Supreme Court concluded that applying a test of proximity and accessibility would produce "'the ultimate result . . . that possession amounts to 'use' because possession enhances the defendant's confidence.'"[69]

The Supreme Court ultimately held that "§ 924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense."[70] In an effort to guide the lower courts, the Supreme Court stated that the new standard of use as "active employment," includes "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm."[71] The Supreme Court also noted that "use" does not mean "storage" or the "mere possession of a firearm . . . at or near the site of the drug crime" and that the "inert presence of a firearm, without more, is not enough to trigger § 924(c)(1)."[72]

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carried a gun in relation to the drug trafficking offense under § 924(c). *Id.*

[67] *Id.* at 506 (citing "gun-crime statutes" sections 922(g), (j), (k), (o)(1) and 930(a)-(b) which use the term "possess"). The Supreme Court also noted that the legislature was aware of the distinction between "active use" and "'intended use,'" citing § 924(d)(1) which provides for forfeiture of a weapon if it is "'used'" or "'intended to be used'" in certain crimes. *Id.* at 507, 509.

[68] *Id.* at 506 (quoting United States v. Bailey, 36 F.3d 106, 121 (D.C. Cir. 1994) (Williams, J., dissenting)).

[69] *Id.* (quoting United States v. Bailey, 36 F.3d 106, 124-25) (D.C. Cir. 1994) (Williams, J., dissenting)). Finally, the Supreme Court noted other ways to punish those who possess a firearm during or in relation to a drug trafficking offense, such as charging the defendant under the "carry" prong of § 924(c)(1) or applying section 2D1.1(b)(1) of the U.S. Sentencing Guidelines. *Id.* at 509.

[70] *Id.* at 505.

[71] *Id.* at 508.

[72] *Id.*

III. POST-*BAILEY*: THE RETROACTIVE EFFECT OF *BAILEY V. UNITED STATES*

Recent cases in the Second Circuit and New York district courts characterize the problems which have arisen in the handling of appeals of § 924(c) convictions based on the definition of "use" clarified by the Supreme Court in *Bailey*.

The New York courts, like many others, have stretched the law by manipulating several different legal principles to obtain virtually the same result as the pre-*Bailey* cases. Specifically, the courts have invoked legal principles including "harmless error," under which the court of appeals has indulged in fact-finding to uphold the erroneous "use" convictions under the "carry" prong of § 924(c)(1);[73] the "automobile exception" to the carry prong of § 924(c)(1);[74] the *Pinkerton* doctrine of liability;[75] and finally, the concept of "sentencing packages" which the courts have relied on to enhance the defendant's original sentence after the

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[73] Although the Second Circuit has found jury instructions regarding "use" under § 924(c) to be harmless error where the evidence would have satisfied a conviction under the "carry" prong, some circuits have remanded the issue for a new trial. *See* United States v. Pimentel, 83 F.3d 55, 59-60 (2d Cir. 1996) (finding improper "use" instruction harmless because evidence was sufficient to convict under "carrying"); United States v. Giraldo, 80 F.3d 667, 678 (2d Cir. 1996) (finding erroneous "use" instruction harmless because it "would have been correct" for conviction under "carry" prong); *cf.* United States v. Miller, 84 F.3d 1244, 1260-61 (10th Cir. 1996) (remanding case for retrial under "carry"); United States v. Robinson, 96 F.3d 246, 250-51 (7th Cir. 1996) (finding that despite "wealth of evidence" provided by government regarding active using and carrying, case must be reversed and remanded for a new trial because it cannot be determined whether the jury convicted on a proper basis); United States v. Douglas, 82 F.3d 1315, 1328 (5th Cir.) (remanding case because the "liberal pre-*Bailey* instructions" of "use" may have affected the jury verdict, despite finding the evidence sufficient to convict under "carry"), *cert. denied*, 117 S. Ct. 241 (1996).

[74] *See, e.g., Giraldo*, 80 F.3d at 677-78.

[75] *See, e.g.*, United States v. Masotto, 73 F.3d 1233, 1241 (2d Cir. 1996); *Pimentel*, 83 F.3d 55 at 58.

post-*Bailey* vacatur.[76] Further, there is disparity in the retroactive effect of *Bailey* depending on whether the challenge is brought pursuant to 28 U.S.C. § 2255 or on direct appeal, as well as uncertainty about whether charges dismissed pursuant to a plea agreement may be reinstated pursuant to a post-*Bailey* challenge.[77]

Although it could be argued that these problems are specific to the retroactive effect of *Bailey* and therefore will have a short term effect on the state of the law in this area, these appellate decisions are precedent setting and foreshadow an exception-riddled treatment of *Bailey*. Instead of stretching the law to obtain a just result, the court should adhere to the Supreme Court's narrow treatment of § 924(c)(1) because doing so will force the legislature to act to correct any misinterpretation of the legislative history by the *Bailey* court.

A. The "Automobile Exception" to Carry

The post-*Bailey* findings of harmless error—that defendant carried but did not "use" the gun—have produced some inconsistent results, specifically when a drug-dealing defendant had the gun in an automobile.[78] It is clear that after *Bailey*, the Second Circuit, along with many others, is defining "carry" more broadly.[79] The following are examples of cases where the court found on appeal that the defendant's conduct did not satisfy the post-*Bailey*

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[76] *See, e.g.*, United States v. Bermudez, 82 F.3d 548, 550 (2d Cir. 1996); *Giraldo*, 80 F.3d at 677.

[77] *See, e.g.*, Rodriguez v. United States, 933 F. Supp. 279 (S.D.N.Y. 1996); United States v. Gaither, 926 F. Supp. 50 (M.D. Pa. 1996) (mem.).

[78] *See, e.g., Giraldo*, 80 F.3d at 676-78 (finding that gun in car brought to buy location and within easy reach of defendant was sufficient evidence to uphold conviction under "carry" prong); United States v. Riascos-Suarez, 73 F.3d 616, 623 (6th Cir. 1996) (finding gun transported in vehicle and "within reach and immediately available for use" sufficient evidence of "carrying" under § 924(c)); United States v. Farris, 77 F.3d 391, 395-96 (11th Cir. 1996) (finding evidence that car was used as "drug distribution center" and that defendant knew gun was in glove compartment adequate to uphold "carry" conviction).

[79] See United States v. Miller, 84 F.3d 1244, 1259 (discussing First, Second, Sixth, Seventh, Ninth and Eleventh Circuit cases which apply a broader interpretation of "carry" after *Bailey*).

interpretation of "use," but upheld the conviction under the "automobile exception" to "carry"; holding any error in the jury instruction to be harmless, despite the fact that the firearm was hidden and not on the person of the defendant.

In *United States v. Giraldo*,[80] a Second Circuit case interpreting *Bailey*, federal agents, with the help of a cooperating defendant, arrested Giraldo, Fermin and Tellez in a parking lot while they were attempting to sell two kilograms of cocaine.[81] After the arrest, the car in which the drugs were kept was searched at police headquarters and a gun was found hidden in the change dish between the two front seats.[82] Defendants were charged with and convicted of distributing and conspiring to distribute narcotics and using or carrying a firearm during and in relation to narcotics trafficking in violation of § 924(c)(1).[83] The defendants appealed their convictions on the basis that there was insufficient evidence to uphold the § 924(c)(1) convictions.[84] The court of appeals reversed the convictions of Giraldo and Tellez, but affirmed Fermin's conviction under § 924(c)(1).[85] Under the "use" prong of § 924(c)(1), the court found that none of the defendants "actively employed" the firearm as defined in *Bailey*.[86] However, under the "carry" prong of § 924(c)(1), the court found that Fermin, the owner and driver of the car, carried the gun that was hidden in the change dish.[87] The court upheld Fermin's § 924(c)(1) conviction on the basis that the jury could infer that Fermin knew the contents of the car because he was the custodian of the car and he held the keys, registration and insurance documents.[88]

Other circuits have also adopted various forms of the automobile exception. The United States Court of Appeals for the First

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[80] 80 F.3d 667 (2d Cir. 1996).
[81] *Id.* at 672.
[82] *Id.*
[83] *Id.* at 671.
[84] *Id.*
[85] *Id.* at 680.
[86] *Id.* at 675.
[87] *Id.*
[88] *Id.* at 677.

Circuit convicted a defendant for carrying a gun in violation of § 924(c)(1) where a gun was found on a boat that was used to transport drugs. The court held that "[t]he evidence was sufficient for a reasonable jury to infer that the loaded gun was within easy reach of defendant."[89] Likewise, the Sixth Circuit held that a defendant was "carrying" a gun which was found on the driver's side of the dashboard console with drugs, stating that "the firearm was within reach and immediately available for use."[90] The Seventh Circuit has also found that evidence of a firearm in a vehicle which was "on [defendant's] person or within his reach, available for immediate use" is sufficient to support a conviction for "carrying" a firearm under § 924(c)(1).[91] Finally, the Eleventh Circuit has also upheld a conviction under the "carry" prong where a gun was found in the glove compartment of a co-conspirator's car which was used to bring drugs to the buy location where defendant was arrested, even when the defendant was in the back seat of the car.[92]

These decisions show that the Second Circuit, as well as other courts, are making a distinction between a gun that is stored and a gun which has been moved and placed for transport in a car. One may question, however, whether hiding a gun in the change compartment, as in *Giraldo*, is more worthy of punishment than hiding a gun in a closet, as in *Robinson*. The result of such treatment is that running a crack house is more favorable to a drug trafficker than selling drugs from a car in a parking lot. Absent a compelling public policy, different punishment is unjustified in these two instances when a gun is equally available to the defendant during a drug transaction. An argument could be made that like

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[89] United States v. Ramirez-Ferrer, 82 F.3d 1149, 1154 (1st Cir.), *cert. denied*, 117 S. Ct. 405 (1996).

[90] United States v. Riascos-Suares, 73 F.3d 616, 623 (6th Cir.), *cert. denied*, 117 S. Ct. 136 (1996).

[91] United States v. Baker, 78 F.3d 1241, 1247 (7th Cir. 1996).

[92] United States v. Farris, 77 F.3d 391, 395-96 (11th Cir.) (relaxing requirement that gun must be immediately available for use and convictions under § 924(c)(1) where defendant was in the back seat of the car and the gun was located in the glove compartment of the front seat), *cert. denied*, 117 S. Ct. 241 (1996). *See Use of Firearm In Relation to Drug Trafficking Offense—'Carry' Prong*, MASS. LAW. WKLY., May 6, 1996, at 4.

the automobile exceptions in the context of searches and seizures under the Fourth Amendment, there is less expectation of privacy and greater danger to the public where illegal conduct occurs in an automobile rather than in a residence.[93] However, this does not advance the purpose of § 924(c)(1) which is to keep guns out of drug transactions, nor does it address the potential danger to nearby tenants and their families who, unlike a passerby on the street, are trapped in their homes near the dangerous conduct.[94]

B. The Pinkerton Theory of Liability Applied to Using and Carrying a Firearm Under § 924(c)(1)

Although some circuits are undecided about whether a defendant may be convicted of aiding and abetting under § 924(c)(1), the Second Circuit has convicted defendants under both a *Pinkerton* theory of liability[95] and an aiding and abetting theory.[96] Because the recent decision of *Medina v. United*

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[93] *See* California v. Carney, 471 U.S. 386 (1985) (finding lesser expectation of privacy in a car compared to a home or office); Michigan v. Long, 463 U.S. 1032 (1983) (extending the rationale of *Terry v. Ohio*, 392 U.S. 1 (1968)). *Long* allowed the search for weapons in the passenger compartment of an automobile without probable cause. *Long*, 463 U.S. at 1051.

[94] *See* United States v. Anderson, 59 F.3d 1323, 1327-28 (D.C. Cir. 1995) (quoting statement of Representative Poff, 114 CONG. REC. S22231 (1968)).

[95] The *Pinkerton* theory of liability is used to find a co-conspirator liable for any crime committed by another party to the agreement where he or she could have reasonably foreseen the criminal conduct, such as where the crime committed by the other party was the object of the conspiracy or the natural consequence of the unlawful agreement. *See* Pinkerton v. United States, 328 U.S. 640 (1946) (finding that defendant conspired to violate Internal Revenue Code, despite the fact that defendant did not assist in the actual commission of the offense).

[96] Aiding and abetting is a form of accomplice liability that holds a defendant accountable for the actions of a primary party where it is proven that the defendant intentionally assisted the primary party in the unlawful conduct. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 410 n.2 (1994) (citing People v. Carter, 330 N.W.2d 314, 322 (1982)) (suggesting that aiding and abetting is a derivative offense). According to the *Manual of Model Criminal Jury Instructions for the Ninth Circuit*, "it is not clear whether it is possible to aid and abet this crime" (referring to § 924(c)); MANUAL OF MODEL CRIMINAL

States[97] requires an act in furtherance of the substantive crime to convict a defendant of aiding and abetting in the unlawful conduct,[98] the courts have increasingly relied on the much looser *Pinkerton* theory of liability which allows for the conviction of a co-conspirator under the standard of reasonable foreseeability.[99] The Second Circuit has stretched the law to uphold the pre-*Bailey* standard of "use" by applying this theory of liability to co-conspirators, thereby producing inconsistent results.[100]

The *Pinkerton* theory of liability was initially mentioned in the post-*Bailey* context by the Second Circuit in *Giraldo*.[101] In its discussion of the § 924(c)(1) convictions of Giraldo and Tellez, the Second Circuit stated that "'a person cannot be said to 'carry' a firearm without at least a showing that the gun is within reach during the commission of the drug offense.'"[102] However, where the gun was shown to be "within reach of one defendant, but not within reach of the other defendants, the others may also be found

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JURY INSTRUCTIONS FOR THE NINTH CIRCUIT, ch. 8, § 8.19U (July 1996). The U.S. Court of Appeals for the Eighth Circuit has held that a defendant may be vicariously liable for the acts of others under § 924(c) if the government can prove that the carrying or using of the firearm was "reasonably foreseeable" and "in furtherance of the offense." MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT, ch. 6, § 6.18.924c (1996) (citing United States v. Friend, 50 F.3d 548, 554 (8th Cir. 1995); United States v. Lucas, 932 F.2d 1210, 1220 (8th Cir.), *cert. denied*, 502 U.S. 869 (1991) (suggesting that government must prove that using or carrying of the firearm was reasonably foreseeable by defendant and in furtherance of the drug conspiracy).

[97] 32 F.3d 40 (2d Cir. 1994), *aff'd*, 74 F.3d 413 (2d Cir. 1996).

[98] *Id.* at 46.

[99] *See, e.g.*, United States v. Giraldo, 80 F.3d 667 (2d Cir. 1996); United States v. Massotto, 73 F.3d 1233 (2d Cir.), *cert. denied*, 117 S. Ct. 54 (1996); United States v. Pimentel, 83 F.3d 55 (2d Cir. 1996).

[100] *See* Paese v. United States, 927 F. Supp. 667, 673 (S.D.N.Y. 1996). *See also Hearing* (Sept. 18, 1996), *supra* note 35 (statement of Prof. Zlotnick, suggesting that an amendment to include mandatory minimum sentences for possession under § 924(c)(1) would not comport with the goal of the statute because it would reach participants who are "swept" into the crime).

[101] *Giraldo*, 80 F.3d at 676. *See supra* Part III.A (discussing *United States v. Giraldo*).

[102] *Giraldo*, 80 F.3d at 676 (quoting United States v. Feliz-Cordero, 859 F.2d 250, 253 (2d Cir. 1988)).

liable for carrying under a *Pinkerton* or an aiding and abetting theory."[103] The Second Circuit found that there was insufficient evidence to support an aiding and abetting charge because no evidence was presented that Tellez, who rode in the back seat, "knew that there was a gun in the car, or that he performed any act to facilitate or encourage its presence."[104] Likewise, Giraldo, who sat in the front passenger seat and could have put his hand on the gun, could not be convicted on an aiding and abetting charge because no evidence was presented that he knew the gun was present.[105] The Second Circuit noted the inconsistency in the affirmation of the driver's (Fermin's) conviction under the carry prong, and the reversal of the passengers' (Giraldo's and Tellez') convictions and suggested that if the jury had been given a *Pinkerton* instruction, the outcome could have been different.[106]

After the decision in *Giraldo*, the *Pinkerton* theory of liability was charged to the jury in connection with a § 924(c) violation in *United States v. Masotto*.[107] Masotto was charged with and convicted of various Racketeer Influenced and Corrupt Organizations Act ("RICO") violations, arson, robbery and using and carrying a gun during two different truck robberies.[108] Masotto formed a "crew" which he aided through his connection with the Gambino family by protecting them from competition, providing storage for hijacked trucks and helping to distribute goods stolen from the trucks.[109] On appeal, Masotto contended that under *Medina*, the jury must find that a defendant "performed some act that directly facilitated or encouraged the use or carrying of a firearm" to convict under § 924(c).[110] He argued that the district court erred by instructing the jury that they could find him guilty

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[103] *Id.* (citing Pinkerton v. United States, 328 U.S. 640, 646-48 (1946)).

[104] *Id.* at 667. *See* United States v. Medina, 32 F.3d. 40, 46 (2d Cir. 1994) (finding that an aiding and abetting conviction under § 924(c) must be predicated on a facilitating act).

[105] *Giraldo,* 80 F.3d at 667.

[106] *Id.* at 676.

[107] 73 F.3d 1233 (2d Cir. 1996).

[108] *Id.* at 1235-36.

[109] *Id.* at 1236.

[110] *Id.* at 1239; United States v. Medina, 32 F.3d 40, 45 (2d Cir. 1994).

of violating § 924(c) under a *Pinkerton* theory of liability.[111] The appellate court upheld Masotto's § 924(c) conviction, reasoning that the holding of *Medina* was limited to an aiding and abetting charge and did not preclude a finding of guilt under a *Pinkerton* theory of liability.[112] The court explained that "[a] conspirator can be held responsible for substantive crimes committed by his co-conspirators to the extent those offenses were reasonably foreseeable consequences of acts furthering the unlawful agreement, even if he did not himself participate in the substantive crimes."[113] The evidence was sufficient to sustain the finding that the using and carrying of a gun by crew members was foreseeable by Masotto because testimony was introduced that Masotto knew that the crew members carried guns during truck robberies and because there was proof that the guns were actually used in furtherance of the conspiracy to commit robbery.[114]

More recently, in *United States v. Pimentel*,[115] the defendant was convicted of conspiracy to traffic narcotics, distribution of and possession with intent to distribute narcotics and possession and use of a firearm during and in relation to a drug trafficking crime in violation of § 924(c).[116] The evidence showed that Morell, a co-manager of the Cruz organization, was dealing in heroin and training Pimentel to succeed him as a manager.[117] On the night in question, Morell found customers and phoned Berroa, also a co-manager, to bring heroin to him at a certain location.[118] The organization used an automobile with a secret compartment "which opened toward the back seat of the car" and held "drugs, money

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[111] *Masotto*, 73 F.3d at 1239.

[112] *Id.* at 1240.

[113] *Id.* at 1239; *see* United States v. Romero, 897 F.2d 47, 51 (2d Cir. 1990), *cert. denied*, 498 U.S. 1092 (1991). In *Romero*, a co-conspirator's § 924(c) conviction was upheld under a *Pinkerton* theory of liability. Evidence that ammunition was found around the apartment, that other defendants frisked the informants and that a "triggerman" was stationed in the closet supported the jury's finding that the use of the gun was foreseeable by the co-conspirator. *Id.*

[114] *Masotto*, 73 F.3d at 1242.

[115] 83 F.3d 55 (2d Cir. 1996).

[116] *Id.* at 57.

[117] *Id.*

[118] *Id.*

and a gun."[119] Pimentel accompanied Berroa in the car and sat in the front seat.[120] Berroa and Pimentel met up with Morell, who collected cash from a customer and then got into the car with them.[121] Morell ordered Berroa to open the compartment, placed the money there and took out drugs which he gave to the customer.[122] Following the transaction, all three were arrested and, upon a search of the car, heroin, money and a .38 caliber gun were found.[123]

Pimentel appealed his conviction on the ground that the evidence was insufficient to support the § 924(c) count and that the instructions to the jury on that count were erroneous in light of *Bailey*.[124] The Second Circuit affirmed the lower court's decision and found that "whether or not Pimentel himself could open the compartment or reach the gun," there was sufficient evidence to convict Pimentel of "carrying" under a *Pinkerton* theory of liability.[125] The Second Circuit stated that Morell's testimony that Pimentel was a member of the Cruz organization, that the "[g]un was routinely kept in the compartment with the money and drugs for the purposes of protecting the drugs," that he was training Pimentel and that Pimentel "had reason to believe the gun was in the compartment" that night, was sufficient to support the jury's inference that the transport of the gun was foreseeable by Pimentel.[126] On a *Pinkerton* theory of liability, "the evidence was ample to support Pimentel's conviction of carrying a firearm in violation of § 924(c)."[127]

These cases show a further attenuation of the law by using an "availability-plus-foreseeability" standard under the carry prong in order to reach instances that fell under "use" before *Bailey*. This is

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[119] *Id.* at 58.

[120] *Id.* at 57.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at 58. The court also held that despite the flawed instructions as to "use," the evidence was sufficient to convict under "carry." *Id.* at 60.

[126] *Id.* at 58-59.

[127] *Id.* at 59.

specifically egregious after the court in *Medina* clearly held that some act facilitating the § 924(c)(1) violation must be shown to convict under an aiding and abetting charge.[128] Where no act is facilitating the carrying or using of a gun, other than the knowledge that the gun is available for use, the Second Circuit is essentially punishing the constructive possession of the weapon—a standard in direct conflict with the bright-line test of *Bailey*.[129]

C. *Post-Bailey Sentencing Concerns: Plea Agreements, Resentencing and Consecutive Sentencing Problems*

In addition to the circumvention of the narrow "use" test in *Bailey* via the automobile exception to "carry" and the increased reliance on the *Pinkerton* theory of liability, the post-*Bailey* cases have also given rise to inconsistent treatment of defendants sentenced pursuant to a plea agreement, as compared to those sentenced upon conviction at trial. In general, the successful post-*Bailey* plea contestor collaterally attacking his or her sentence may be released from the remainder of his or her sentence because the plea agreement is void due to the change in the law, whereas the successful post-*Bailey* petitioner challenging his or her conviction upon direct appeal will be subject to a resentencing where his or her sentence may be completely refigured. Further confusion results depending on whether the defendant is proceeding on direct appeal or raising a § 2255 habeas petition, and if charged with similar gun conduct in both state and federal court, whether the sentences should be imposed concurrently or consecutively.

1. *Bailey's Retroactive Effect on Plea Agreements*

Although it is clear that a § 924(c)(1) conviction may be vacated under a retroactive application of *Bailey*, it is undecided whether charges dropped pursuant to a plea agreement based on a

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[128] United States v. Medina, 32 F.3d 40, 45-46 (2d Cir. 1994).

[129] *See* Byrne et al., *supra* note 4, at 114. The effect of this interpretation has been noted as imposing strict liability for co-conspirators under § 924(c). *See* Paul Silvio Berra Jr., Comment, *Co-Conspirator Liability Under 18 U.S.C. § 924(c): Is It Possible to Escape?*, 1996 WIS. L. REV. 603.

§ 924(c)(1) charge may be reinstated once the § 924(c)(1) conviction is vacated.[130] The district courts have initially refused to extend the reasoning of *United States v. Reguer*[131] to allow reinstated charges after the plea agreement is successfully challenged on *Bailey* grounds.[132]

Reguer outlines the government's argument and the general principles considered by the court in seeking to reinstate dismissed counts pursuant to a plea agreement that has been breached. The district court held that where the defendant's conviction under a plea agreement was vacated due to a change in law, the previously dismissed counts could be restored by the government on the theory that the statute of limitations on these counts was tolled, or that the defendant breached the plea agreement.[133] Under the former theory, the court held that the traditional purposes of the statute of limitations did not apply where the lapse in instituting the charges was due to a plea agreement that was accepted by the defendant after he had sufficient time to prepare for trial.[134] The court relied

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[130] *Bailey Ruling*, *supra* note 44, at 2667. Another factor which is discussed in the following section is that in many cases the original sentence, although vacated pursuant to *Bailey*, is enhanced under the U.S. Sentencing Guidelines. Because approximately the same amount of time is being served after the resentencing, the courts may be reluctant to resurrect the dismissed counts because the bargain has remained substantially similar to the original plea agreement.

[131] 901 F. Supp. 525 (E.D.N.Y. 1995) (reinstating charges dismissed pursuant to plea agreement based on the theory that the statute of limitations was tolled or, in the alternative, that defendant breached the plea agreement by collaterally attacking the sentence).

[132] United States v. Gaither, 926 F. Supp. 50 (M.D. Pa. 1996) (disagreeing with reasoning of *Reguer* and concluding that charges dismissed pursuant to a *Bailey* plea could not be reinstated on either contract or tolling theory); United States v. Rodriguez, 933 F. Supp. 279 (S.D.N.Y. 1996) (distinguishing *Reguer* on the ground that defendant could not be returned to her original position and charges may therefore not be reinstated).

[133] *Reguer*, 901 F. Supp. at 525.

[134] *Id.* at 526. *See* United States v. Marion, 404 U.S. 307, 322 (1971) (stating that the "[s]tatute of limitations provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced"); Williams v. McMann, 436 F.2d 103 (2d Cir. 1970) (prohibiting defendant from being charged and sentenced on original count

heavily on the fact that the government acted promptly to reinstate the charge and distinguished other cases where the government acted delinquently.[135] The court also found that, alternatively, the original count could be reinstated on contract theory, under which vacating the plea constituted a revocation of acceptance.[136] The court further stated that the government dismissed the outstanding counts in reliance on the plea agreement and that when the defendant voided his plea, the government may rescind its agreement to dismiss the pending charges.[137]

In the context of appeals raised after *Bailey*, this issue first arose in *United States v. Gaither*,[138] in which the defendant successfully challenged his pre-*Bailey* § 924(c)(1) conviction under the plea agreement and the government sought to reinstate a dismissed count of possession of a firearm by a convicted felon under 18 U.S.C. § 924(g)(1).[139] Applying principles of contract law, the court found that because the "defendant's indictment, plea and incarceration were improper under *Bailey*, . . . his decision to seek release [was therefore] entirely proper and not a breach of the plea agreement."[140] The court excused the defendant's performance under the plea agreement on the tort theory of "supervening impracticability" or "prevention by government regulation or order."[141] The government also claimed, relying on *Reguer*, that because it was not responsible for the delay in the reversed sentence, the reinstatement of the original counts was not barred by

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would encourage gamesmanship), *cert. denied*, 402 U.S. 914 (1971).

[135] *Reguer*, 901 F. Supp. at 526. *See* United States v. Liguori, 430 F.2d 842, 851 (2d Cir. 1970) (Lombard, J., concurring) (stating that "[i]f the government elects to continue with the prosecution of Liguori it must do so promptly"). *See also* United States v. McCarthy, 445 F.2d 587, 591 (7th Cir. 1971) (holding that reinstatement of charges not allowed where government waited three years).

[136] *Reguer*, 901 F. Supp. at 529.

[137] *Id.*

[138] 926 F. Supp. 50 (M.D. Pa. 1996) (mem.).

[139] *Id.* at 51. *See* 18 U.S.C. § 924(g)(1) (possession of a firearm by a convicted felon).

[140] *Gaither*, 926 F. Supp. at 51-52.

[141] *Id.* at 52 (quoting RESTATEMENT (SECOND) OF TORTS §§ 261, 264 (1967)).

the statute of limitations.[142] The *Gaither* court disagreed with *Reguer*, however, and found that the principles underlying the statute of limitations did not support a tolling of the statute of limitations in a criminal case. Despite the "diligence and good faith by the government," time to recharge the defendant had lapsed.[143]

In New York, this issue was discussed in *Rodriguez v. United States,*[144] in which the defendant pled guilty to various narcotics law offenses and to a § 924(c) count.[145] Pursuant to the plea, the government agreed to dismiss the counts of conspiracy to violate certain other narcotics laws, including possession with intent to distribute heroin.[146] After the Supreme Court's decision in *Bailey*, the defendant petitioned for her sentence to be vacated under 28 U.S.C. § 2255.[147] The government agreed that the evidence supported a reversal of the § 924(c) conviction but argued that the defendant's motion to vacate was a "tacit repudiation of the Plea Agreement" nullifying the plea agreement and allowing the government to reinstate the dismissed indictments.[148] The court noted that the plea agreement should be governed by contract law and found no de facto breach because the defendant upheld her promise to plea to the two counts in the agreement, and the agreement was silent on the defendant's right to bring a collateral attack after sentencing.[149] The district court was persuaded by

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[142] *Id. See Reguer*, 901 F. Supp. at 527 (stating that although the time lapse might affect the defense of the case, the resulting prejudice is not the government's fault).

[143] *Gaither*, 926 F. Supp. at 53 (stating that the policy behind the statute of limitations is to protect the accused from prejudice which might arise due to passage of time). *But see* United States v. Barron, 940 F. Supp. 1489, 1496 (D. Alaska 1996) (finding that when a defendant collaterally attacks his sentence imposed pursuant to a plea agreement, he "opens himself up to conviction and sentence on all counts, including those previously dismissed"); United States v. Viera, 931 F. Supp. 1224, 1227-29 (M.D. Pa. 1996) (disagreeing with *Gaither* and finding reinstatement of dismissed charges proper because "defendant's successful postconviction challenge is a breach of the [plea] agreement").

[144] 933 F. Supp. 279 (S.D.N.Y. 1996).

[145] *Id.* at 280.

[146] *Id.*

[147] *Id.*

[148] *Id.* at 281.

[149] *Id.*

Gaither and held that the charges under the plea agreement must stand because the parties could not be restored to their original positions.[150] Although plea agreements are generally governed by principles of contract law, the *Rodriguez* court noted that the outcome may differ when constitutional rights are involved.[151]

The court distinguished *Reguer*, in which the government was allowed to reinstate a dismissed indictment after the defendant's conviction under the plea agreement was vacated due to a change in law, on the ground that Reguer, unlike Rodriguez, was able to be returned to his original position before the plea, because his conviction had only resulted in probation and a fine.[152] Unlike Reguer, at the time Rodriguez challenged her § 924(c) conviction, she had already been incarcerated for more than half of her 123-month sentence.[153] The court held that this "severe detriment" to the defendant cannot be erased and that if restoration of the former indictment was allowed, the government "would have . . . the sizeable benefit of Rodriguez's incarceration without obligating [it] . . . to provide anything in return."[154]

The few post-*Bailey* cases addressing the issue of reinstated charges have been hesitant to read any implied terms into the plea agreement, however, the issue remains unclear.[155] The government should include a provision regarding the effect of the collateral attack to secure the opportunity to reinstate charges dismissed pursuant to the agreement.[156] In circumstances like post-*Bailey* appeals, when the court is dealing with a defendant

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[150] *Id.* at 283. The court also relied on *United States v. Youngworth*, No. C-CR-89-81, 1989 U.S. Dist. LEXIS 12817, at *10 (W.D.N.C. Oct. 26, 1989), which found that charges could not be reinstated where defendant has already served nearly a year of prison time. *Id.* at 282-83.

[151] *Rodriguez*, 933 F. Supp. at 281.

[152] *Id.* at 282. *See* United States v. Reguer, 901 F. Supp. 525, 529 (E.D.N.Y. 1995).

[153] *Rodriguez*, 933 F. Supp. at 282.

[154] *Id.* at 283.

[155] *See* United States v. Viera, 931 F. Supp. 1224, 1227-29 (M.D. Pa. 1996); United States v. Barron, 940 F. Supp. 1489, 1496 (D. Alaska 1996) (disagreeing with the reasoning of *Gaither* and finding that charges dismissed pursuant to a plea may be reinstated upon a post-*Bailey* vacatur).

[156] *Rodriguez*, 933 F. Supp. at 281.

who has been erroneously incarcerated, it appears reluctant to open the door to further prosecution.

2. *The "Sentencing Package"*

Although there will be fewer § 924(c) convictions after *Bailey*, there will likely be a corresponding increase in the number of applications for increased sentences under section 2D1.1(b)(1) of the U.S. Sentencing Guidelines,[157] which allows the court to increase the sentence of a defendant by two levels for possession of a gun.[158] Resentencing a defendant under the U.S. Sentencing

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[157] The Sentencing Guidelines are intended to institute more certainty in sentencing by providing uniform guidelines which judges must apply. If the defendant is not convicted under § 924(c), the government may seek to impose a two-level enhancement for possession of a firearm at the time of the underlying drug offense. Depending on the seriousness of the underlying offense, this could increase a defendant's sentence by as much as 100 months. The offense level is adjusted according to the type and quantity of controlled substance involved. The sentence is then figured by incorporating the offense level with the defendant's criminal history category. For example, if a defendant was convicted of a drug trafficking crime falling in the highest offense level of 38 and fits the criminal history category of level I, an original sentence of between 235 and 293 months would be imposed under the Sentencing Guidelines. Raising this original sentence by two levels would increase the original sentence to between 292 and 365 months. *See* FEDERAL SENTENCING GUIDELINES MANUAL, *supra* note 11, cover tbl., § 2D1.1, at 80, 82 tbl.

[158] Andrea Wilson, *Annual Eleventh Circuit Survey: January 1, 1995-December 31, 1995: Federal Sentencing Guidelines*, 47 MERCER L. REV. 851, 867-68 (1996). It has been questioned whether *Bailey* would also apply to sentencing under the U.S. Sentencing Guidelines where possession of a gun enhances the level of the offense. David B. Byrne Jr. & Wilber G. Silberman, *Recent Decisions,* 57 ALA. LAW. 249, 250 (1996). It has also been proposed that § 924(c) should be thrown out altogether and that the guidelines range should be used to increase the sentence, without the mandatory minimum imposed by § 924(c)(1). *See Hearing* (Sept. 18, 1996), *supra* note 35 (statement of Prof. Zlotnick). Using the guidelines would allow the sentence to fit the crime: longer terms of imprisonment where the defendant is a major drug trafficker and shorter terms for low-level participants. *Hearing* (Sept. 18, 1996), *supra* note 35 (statement of Prof. Zlotnick). Such a flexible approach would also avoid the danger that higher mandatory minimums under § 924(c)(1) would dissuade prosecutors from charging a lower-level defendant for the gun possession.

Guidelines section 2D1.1(b)(1) has produced various results depending on whether the resentencing is raised pursuant to a direct appeal or a § 2255 habeas petition. In the case of a direct appeal, the result might differ depending on whether the circuit court explicitly remanded resentencing to the district court, and in the instance of a § 2255 petition, whether the defendant consented to or contested the resentencing.[159] Although most courts seem to employ the sentencing package theory for cases on direct appeal, the question of how to treat § 2255 petitions is unclear and has not yet reached the circuit courts.[160]

In both *United States v. Bermudez*[161] and *United States v. Giraldo*,[162] defendants' sentences were vacated after a post-*Bailey* analysis of "use." Both, however, were remanded for resentencing

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Although innovative, this approach would directly oppose the purpose of the U.S. Sentencing Guidelines which are intended to provide less judicial discretion and more certainty in sentencing.

[159] *See, e.g.*, United States v. Bermudez, 82 F.3d 548 (2d Cir. 1996); United States v. Giraldo, 80 F.3d 667 (2d Cir. 1996); *Rodriguez*, 933 F. Supp. at 284 n.2, 285 n.3 (distinguishing *Giraldo* and *Bermudez* on the ground that the two-level enhancement was raised in the context of a direct appeal and distinguishing cases which have resentenced upon a § 2255 petition on the ground that the parties either stipulated to the enhancement or that no objection was made by the petitioner). *See* United States v. Seibert, Nos. Crim. 91-00324-01 & Civ A 96-0851, 1996 WL 221768, at *4 (E.D. Pa. Apr. 26, 1996); Sanabria v. United States, 916 F. Supp. 106, 115 (D.P.R. 1996).

[160] *Rodriguez*, 933 F. Supp. at 284. Defendants have also challenged resentencing, alleging that it violates the double jeopardy clause of the Fifth Amendment by imposing multiple punishments for the same offense. *See* U.S. CONST. amend. V (no person "shall be subject for the same offence to be twice put in jeopardy for life or limb"). Although the double jeopardy claim has been struck down, resentencing which results in a greater sentence than that vacated is still an open question. *See* Woodhouse v. United States, 934 F. Supp. 1008 (C.D. Ill. 1996) (dismissing double jeopardy challenge on ground that once defendant attacked the "sentence package" he no longer had a reasonable expectation in the finality of any part of the sentence); United States v. Crowder, 947 F. Supp. 1183 (E.D. Tenn. 1996); *see also* David Heckelman, *Voided Conviction Can Lead to Stiffer Sentence for Drug Dealer*, CHI. DAILY L. BULL. July 29, 1996, at 1.

[161] 82 F.3d 548 (2d Cir. 1996).

[162] 80 F.3d 667 (2d Cir. 1996).

under the U.S. Sentencing Guidelines section 2D1.1(b)(1).[163] The Second Circuit has reasoned that because the government could not have moved for an enhancement under § 924(c)(1) due to double counting principles, it should be allowed to pursue the enhancement under the guidelines after the § 924(c)(1) conviction has been reversed.[164] A sentencing judge may, therefore, "increase the sentence on a specific count where the original sentence was imposed as part of a 'package' that included a mandatory consecutive sentence which was subsequently found to be invalid."[165]

In contrast to the recently settled opinions of *Bermudez* and *Giraldo* in which the defendant has directly appealed the § 924(c)(1) conviction, confusion has arisen about whether a district court has the proper jurisdiction to resentence when the defendant challenges the § 924(c)(1) conviction by way of a § 2255 petition. Several district courts have found that they lack a jurisdictional basis to resentence upon a successful collateral attack.[166] In *Rodriguez v. United States*,[167] the court stated that it must act under specific federal statutory authority to resentence the defendant after his § 924(c)(1) count had been vacated.[168] The court may resentence pursuant to 18 U.S.C. § 3582(c), which allows resentencing to comport with Federal Rule of Criminal

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[163] *Bermudez*, 82 F.3d at 550; *Giraldo*, 80 F.3d at 677. *See* FEDERAL SENTENCING GUIDELINES MANUAL, *supra* note 11, § 2D1.1(b)(1) n.3 (providing a two-level increase "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense").

[164] *See, e.g.*, United States v. Hernandez, 85 F.3d 1023, 1032 (2d Cir. 1996); United States v. Howard, 998 F.2d 42, 48 (2d Cir. 1993). *See also* FEDERAL SENTENCING GUIDELINES MANUAL, *supra* note 11, § 2K2.4, at 168 cmt. 2 ("Where a sentence [for a violation of § 924(c)(1)] is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use, or discharge of a . . . firearm . . . is not to be applied in respect to the guideline for the underlying offense.").

[165] *Bermudez*, 82 F.3d at 550 (quoting United States v. Gelb, 944 F.2d 52, 59 (2d Cir. 1991)).

[166] *See* Rodriguez v. United States, 933 F. Supp. 279 (S.D.N.Y. 1996); Dossett v. United States, 931 F. Supp. 686 (D.S.D. 1996); Warner v. United States, 926 F. Supp. 1387 (E.D. Ark. 1996).

[167] 933 F. Supp. 279 (S.D.N.Y. 1996).

[168] *Id.* at 283 (citing United States v. Blackwell, 81 F.3d 945, 947 (10th Cir. 1996)).

Procedure 35 or to resentence on the challenged count under 28 U.S.C. § 2255.[169] Federal Rule of Criminal Procedure 35, however, only applies when the defendant has provided substantial assistance or upon motion of the court within seven days.[170] As to § 2255 jurisdiction, only a "prisoner in custody" may petition to contest a sentence, and here, only the § 924(c)(1) conviction was before the court, leaving it no basis to modify the underlying convictions.[171] The *Rodriguez* court addressed the "sentencing package" theory and found that by challenging the § 924(c)(1) conviction, the defendant does not bring the "entire sentencing package before the court."[172] The difference, the court reasoned, was that on direct appeal all sentences are before the appellate court and are not yet final, as compared to a § 2255 collateral attack in which the sentences are final, and only a specific sentence on a specific count is before the district court.[173]

The courts are split on this issue even within the United States District Court for the Southern District of New York. Subsequent to the *Rodriguez* decision, two Southern District cases have addressed whether the court has jurisdiction to resentence a defendant pursuant to a post-*Bailey* vacatur.[174] Decided in the same month, one case adopted the reasoning of *Rodriguez* and the other specifically rejected it.[175]

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[169] *Id.*

[170] *Id. See* FED. R. CRIM. P. 35(a)-(c) (1996).

[171] *Rodriguez*, 933 F. Supp. at 284.

[172] *Id.* "The flaw in this theory is that in this instance a federal sentence is not general or transactional. It is a specific consequence of a specific violation of a specific federal statute." *Id.* (quoting United States v. Henry, 709 F.2d 298, 310 (5th Cir. 1983) (plurality opinion)).

[173] *Id.*

[174] Reyes v. United States, 944 F. Supp. 260 (S.D.N.Y. 1996); Vasquez v. United States, 943 F. Supp. 365 (S.D.N.Y. 1996).

[175] *Reyes*, 944 F. Supp. at 264 n.4; *Vasquez*, 943 F. Supp. at 368-69. In *Reyes*, the court disagreed with Judge Kram's opinion in *Rodriguez* and found that the district court may "'correct' not only, a sentence imposed under § 924, but also a 'truly interdependent sentence' imposed" on another count. *Reyes*, 944 F. Supp. at 264 (citing McClain v. United States, 676 F.2d 915, 918 (2d Cir.), *cert. denied*, 459 U.S. 879 (1982)). However, the *Reyes* court decided that the sentencing issue should be decided de novo, allowing the defendant to seek additional downward departures and adjustments. *Id.* In *Vasquez*, however, the

The district court in *Rodriguez* pointed out that "an appellate court has yet to decide whether a successful § 2255 *Bailey* petitioner can be resentenced on other counts."[176] The district courts that have allowed resentencing have justified their jurisdiction on the basis of inherent authority over the original sentencing intention[177] that a "package" of a certain number of years was imposed for all convictions.[178] The disparity in opinions is so divergent that the district courts within New York take opposing stances on this issue, resulting in no uniformity in how a *Bailey* defendant will be treated even in the same state. Because a two-level enhancement could mean several additional years of imprisonment, this issue must be promptly addressed by the Second Circuit.

3. *State and Federal Jurisdiction: Concurrent v. Consecutive Sentencing Under § 924(c)(1)*

A further area of confusion is whether the mandatory federal minimum sentence under § 924(c)(1) must run concurrently with

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court followed *Rodriguez*, concluding that it had no jurisdiction to resentence defendant because only the § 924(c) count was before the court. *Vasquez*, 943 F. Supp. at 369.

[176] *Vasquez*, 943 F. Supp. at 365 (noting that the district courts were evenly divided on the issue). The court agreed with the following cases: Warner v. United States, 926 F. Supp. 1387 (E.D. Ark. 1996); Gardiner v. United States, No. CRIM 4-89-1269(1), 1996 U.S. Dist. LEXIS 6158 (D. Minn. May 3, 1996); Beal v. United States, 924 F. Supp. 913, 197 (D. Minn. 1996). The court disagreed with the following cases: Mixon v. United States, 926 F. Supp. 178 (S.D. Ala. 1996); Pedretti v. United States, No. 3:96-CV-0146/91-CR-358, 1996 U.S. Dist. LEXIS 6315 (N.D.N.Y. Apr. 25, 1996).

[177] *See* Woodhouse v. United States, 934 F. Supp. 1008 (C.D. Ill. 1996); Merritt v. United States, 930 F. Supp. 1109 (E.D.N.C. 1996); *Mixon*, 926 F. Supp. at 178; *Pedretti*, 1996 U.S. Dist. LEXIS 6315, at *5. In *Pedretti*, upon defendant's § 2255 motion, the court vacated the § 924(c) conviction but found power to reevaluate the sentencing scheme. *Id.* at *4. The court said it derived such power from the language of § 2255 and the court's inherent authority to implement interdependent sentences, the intentions of which were frustrated by the post-*Bailey* vacatur. *Id.* at *5.

[178] *See* McClain v. United States, 676 F.2d 915, 917-18 (2d Cir.), *cert. denied*, 459 U.S. 879 (1982).

a state sentence for similar conduct.[179] Although the Supreme Court in *United States v. Gonzales*,[180] recently decided that the plain language of § 924(c)(1) mandates that a federal judge must impose a sentence under that section consecutively to a previously imposed state sentence, it did not address whether a state judge would be required to do the same after a federal sentence had been imposed under § 924(c)(1).[181] Much like the issues of resentencing after *Bailey*, the effect of the Supreme Court's decision in *Gonzales* imposes discrepancies in the treatment of § 924(c)(1) defendants, depending on how they advance procedurally.

In *Gonzales*, members of the Albuquerque police department posed as drug dealers and offered to sell drugs to defendants in what is termed a "reverse sting" operation.[182] Following trial in the U.S. District Court for the District of New Mexico, defendants Gonzales, Hernandez-Diaz, Leon and Perez were convicted of conspiracy to possess and distribute marijuana, possession with intent to distribute marijuana and using or carrying of a firearm during a drug trafficking crime.[183] The defendants had been previously convicted and sentenced for the same conduct in state court.[184] Defendants appealed their convictions on several grounds including that the "district court erred in ruling that they are to serve their sentence for this crime consecutive to the completion of their state sentences arising out of the same conduct."[185]

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[179] The statute states that the term of imprisonment under § 924(c)(1) shall not "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." 18 U.S.C. § 924(c)(1).

[180] No. 95-1605, 1997 LEXIS 1489 (U.S. Mar. 3, 1997).

[181] *Id.* at *18.

[182] United States v. Gonzales, 65 F.3d 814, 816 (1995), *rev'd and remanded*, No. 95-1605, 1997 LEXIS 1489 (U.S. Mar. 3, 1997).

[183] *Id.* at 817. Defendant was charged with violation of 21 U.S.C. § 841(a)(1), (b)(1)(D) and § 846. The defendant was also charged with 18 U.S.C. § 2 and § 924(c)(1).

[184] *Id.*

[185] *Id.* at 819. Defendants were successful on their other grounds of appeal including: 1) the application of section 3a1.2(b) of the U.S. Sentencing Guidelines which adds three levels for assaulting an officer in a manner creating

The Tenth Circuit found that it must "venture into the thicket of legislative history" because the plain meaning of "any other term of imprisonment" in § 924(c)(1) would lead to an absurd result.[186] The court illustrated that if "any other term of imprisonment" applied to state as well as federal sentences, the defendant would be required to serve the state sentence for the predicate offense, the five years for the § 924(c)(1) offense and the time for the underlying federal offense, resulting in "more than double the custodial price that Congress and the Guidelines set for committing the total criminal conduct engaged in by the defendants."[187] The court noted that the legislative history indicated that the § 924(c) sentence be served prior to "any other offense" and that this would be impossible if the defendant was already serving a state sentence.[188] The court also relied on the purpose of U.S. Sentencing Guidelines section 5G1.3(b) to credit for "guidelines purposes" defendants who have already served time for the same conduct in another jurisdiction.[189] It stated that a result that imposed consecutive terms of state and federal imprisonment would render useless section 5G1.3(b), and held that the sentences should run concurrently.[190]

The Supreme Court, in an opinion by Justice O'Connor, reversed the Tenth Circuit's decision and held that the plain language of § 924(c)(1) "forbids a federal district court to direct

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a substantial risk of serious bodily injury when the defendant knows or has reason to believe that the person assaulted is a police officer; and 2) the sufficiency of the evidence for their convictions for possession with intent to distribute marijuana. *Id.* at 818.

[186] *Id.* at 820 (citing Unruh v. Rushville State Bank, 987 F.2d 1506, 1508 (10th Cir. 1993)).

[187] *Id.* at 821.

[188] *Id.*

[189] *Id.* (citing United States v. Johnson, 40 F.3d 1079, 1082 (10th Cir. 1994)). U.S. Sentencing Guidelines section 5G1.3(b) states that "if . . . the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment." *See* FEDERAL SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5G1.3(b).

[190] *Gonzales*, 65 F.3d at 821.

that a term of imprisonment under the statute run concurrently with any other term of imprisonment, whether state or federal."[191] Referring to *Webster's Dictionary*, the Supreme Court noted that the term "any" should be given an expansive definition.[192] In reaching its conclusion, the Court specifically rejected looking at the legislative history of § 924(c)(1) and relied solely on the "straight forward statutory command" which forbids the term of imprisonment imposed under § 924(c)(1) from running concurrently with any other term of imprisonment.[193] Disagreeing with the court of appeals which relied on the Senate report comments accompanying the 1984 amendment to § 924(c), the Supreme Court stated that the legislative history only "muddied the waters."[194] The report stated that "the committee intends that the mandatory sentence under the revised subsection 924(c) be served prior to the start of the sentence for the underlying offense."[195] In defending its plain language interpretation of the statute, the Supreme Court stated that the court of appeals in relying on such legislative history both "invented the problem and devised the wrong solution."[196]

As noted by the dissenting opinion of Justice Stevens, the outcome of the majority's decision "turns on the happenstance of whether the state or federal prosecution was concluded first."[197] Agreeing with Justice Stevens, Justice Breyer likewise pointed out that a defendant who was convicted for using or carrying a firearm under § 924(c)(1) and also under a similar state statute would be treated more harshly than a defendant who was sentenced first in federal court.[198] As both dissents clearly point out, the confusion in the area of federal and state consecutive sentencing has not been fully elucidated. Perhaps, like its narrow interpretation of "use" in *Bailey*, the Court is forcing the legislature to clarify the statute.

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[191] United States v. Gonzales, No. 95-1605, 1997 LEXIS 1489, at *18 (U.S. Mar. 3, 1997).

[192] *Id.* at *7.

[193] *Id.* at *7, 9.

[194] *Id.* at *9.

[195] *Id.* at *9-10.

[196] *Id.* at *14.

[197] *Id.* at *19.

[198] *Id.* at *24.

Unfortunately defendants who are subjected to harsh consecutive sentences under § 924(c)(1) bear the brunt of this problem.

The common ground relating to the sentencing concerns raised after *Bailey* in the areas of plea agreements, sentencing packages and federal and state consecutive terms is that defendants are being punished differently for the same conduct, depending on how they advance procedurally. In addition, because the U.S. Sentencing Guidelines provide a sentence enhancement for possession of a firearm related to a drug trafficking offense, even a defendant whose sentence is vacated under *Bailey* will be punished. The stretching of the law to reach criminal gun use equivalent to possession, in combination with the existence of the section 2D1.1(b)(1) sentencing enhancement, leads to the conclusion that one standard should be applied to the punishment of guns in relation to drugs. A possession standard would best serve the public policy behind § 924(c)(1) and cure the inconsistencies resulting from the unclear legislative history of the statute.

IV. THE FUTURE OF § 924(C)(1): AMENDING TO A "POSSESSION" STANDARD

> Firearms have long been an important part of American life. For many years the armed citizen-soldier was the country's first line of defense; the "Kentucky" long rifle opened the frontier; the Winchester repeater "won the West"; and the Colt revolver "made men equal." Firearms no longer play a significant role in keeping food on American tables, yet Americans own and use firearms to a degree that puzzles many observers. If our frontier has disappeared, our frontier tradition remains.[199]

Statistics show the important role of guns in the commission of crime in our country. The National Crime Survey victimization report estimated that approximately 837,278 gun crimes are

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[199] FRANKLIN E. ZIMRING & GORDON HAWKINS, THE CITIZEN'S GUIDE TO GUN CONTROL 69 (1987) (quoting the Report of the National Commission on the Causes and Prevention of Violence Task Force on Firearms and Violence).

committed per year, with over half of the victimizations by brandishing or displaying the weapon.[200] Further, convictions for federal drug offenses have increased 213% from 1980 to 1990.[201] Specific to the use of guns during drug offenses, a significant percentage of drug offenses are accomplished with guns. A study focusing on the carrying and use of a gun in the commission of criminal acts analyzed data received from questionnaires of 2000 convicted felons in state prisons and found that forty-three to forty-five percent were armed with a weapon during a drug deal and twenty-nine percent fired a gun at someone during a drug deal.[202]

In light of this problem, two methods of addressing the criminal use of guns are currently employed: one prohibits the procurement of firearms by the criminal class and the other deters the use of guns by criminals by raising the cost of such use.[203] While the second approach, accomplished by mandatory sentencing, is advocated by both liberals and conservatives, there is disagreement over who should be punished under these sentences.[204] The basis of the dispute stems from the characterization of the conduct as a "crime problem" or a "gun problem."[205] Conservatives endorse mandatory sentences for those who "use" a firearm in relation to a crime, an ad hoc response, while liberals target the "possession" of the gun, a preventative measure.[206] While neither side endorses

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[200] ROBIN, *supra* note 14, at 2.

[201] UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS: NATIONAL UPDATE 6 (1992).

[202] JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 80-81 tbl.4.1, 88 (1986).

[203] *Id.* at 8 (proposing that gun legislation has been ineffective because legislators have not studied the motivation behind a criminal's possession of a firearm). The use of mandatory sentencing has been criticized as ineffective for the following reasons: lower sentences are imposed for the underlying crime when an add-on sentence exists, resulting in the same sentence; overcrowding in prisons make longer sentences impractical; and the lack of deterrent value because either criminals do not think that they will be caught or the threat of guns by a drug dealer's customers and associates is greater than the possible enhanced sentence if he or she gets caught. *Id.* at 236-37.

[204] ROBIN, *supra* note 14, at 73.

[205] ROBIN, *supra* note 14, at 73.

[206] ROBIN, *supra* note 14, at 73.

the extreme positions of an absolute ban on weapons in the hands of private individuals in all circumstances or "facilitating the availability of guns to the general public,"[207] differences arise in the middle ground about how to punish or deter the criminal use of a gun without jeopardizing the rights of the "legitimate gun owner."[208]

Although the possession standard has been criticized on the ground that it will punish possession of guns found before or after the transaction, or instances where the gun is stored in the home for some legitimate purpose, the criticism overlooks the fact that the gun must still be possessed "during or in relation to the drug offense."[209] The "during or in relation" language will ensure that possession unrelated to the illegal conduct will not be punished.[210]

The problem of criminal gun use in relation to drug offenses under § 924(c)(1) stems from the fact that dealers have guns to protect drugs from thieves and customers who also have guns.[211] Part of the solution must therefore be to change the expectations of the parties who enter into these transactions. One way to do this is to make the gun conduct so costly that it will convince the criminal to leave his or her gun at home.[212] This is extremely difficult to accomplish, because the cost of leaving a gun at home may have life threatening consequences to a defendant. The term "possession" is so well defined in the law that punishment for such an offense under § 924(c) would impose one standard on gun-toting drug dealers and encompass incidents where guns are stored or in the

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[207] WRIGHT & ROSSI, *supra* note 202, at 4.

[208] WRIGHT & ROSSI, *supra* note 202, at 4. *See* ROBIN, *supra* note 14, at 87.

[209] *See Hearing* (Sept. 18, 1996), *supra* note 35 (statement of Deputy Assistant Attorney General Kevin Di Gregory).

[210] *See Hearing* (Sept. 18, 1996), *supra* note 35 (statement of Deputy Assistant Attorney General Kevin Di Gregory).

[211] WRIGHT & ROSSI, *supra* note 202, at 234-35, 237. The authors note that guns are carried for self-protection generally, and not for specific use. They conclude, therefore that the most effective intervention should be aimed at the decision to carry, not to use the firearm. WRIGHT & ROSSI, *supra* note 202, at 235.

[212] *See* WRIGHT & ROSSI, *supra* note 202, at 236.

proximity of drugs through the doctrine of constructive possession.[213] A uniform standard would send a clear signal to take the guns away from the drug crime by raising the cost to a level which might affect a defendant's decision to carry or use a gun during the transaction.

Further, a possession standard will alleviate the need for convoluted exceptions such as the "automobile exception" to carry and the increased use of the *Pinkerton* theory of liability.[214] If the gun is possessed in the proximity of the drugs, all who have the knowledge of it and could potentially use it would be punished equally: a defendant keeping a gun in the bedside table or in a closet with drugs would receive the same punishment as a defendant who puts a gun in the change compartment of a car during a drug transaction. Likewise, a possession standard would alleviate inconsistent treatment under a *Pinkerton* theory of liability such as where a defendant is found guilty when the gun was within his reach, whereas a defendant ten feet away would be acquitted.

Despite the many amendments to the statute, the legislature has not provided sufficient legislative history to guide the courts in reaching consistent and just results. Although *Bailey v. United States*[215] made significant strides in this respect, it can also be viewed as a challenge to the legislature to provide a clearer definition of the gun conduct it wishes to punish.

CONCLUSION

In light of a long history of confusion regarding the interpretation of "use" and "carry" under § 924(c)(1), *Bailey* provided a bright-line test for "use" under § 924(c)(1). Its retroactive application by district and circuit courts shows that the inconsistency the Supreme Court intended to address is being replaced by the reliance on new principles such as harmless error, the automobile exception to carry, the increased reliance on the *Pinkerton* theory of liability and disparities in resentencing under section 2D1.1(b)(1) of the

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[213] *See Hearing* (Sept. 18, 1996), *supra* note 35 (statement of Deputy Assistant Attorney General Kevin Di Gregory).

[214] *See supra* Part III.B (discussing *Pinkerton* liability under § 924(c)(1)).

[215] 116 S. Ct. 501 (1995).

U.S. Sentencing Guidelines. In many instances *Bailey* is not changing the punishment under § 924(c)(1), but rather it is stretching the law to uphold the pre-*Bailey* interpretation of "use": a possession standard. In light of these post-*Bailey* inconsistencies, the legislature should amend the statute to replace the "carrying" or "using" of a gun under § 924(c) with "possession" of a gun during or in relation to a drug trafficking offense; the standard that is already being applied circuitously.