Active Employment Standard: Much-Needed Clarification for Determining Liability for Use of a Weapon during the Commission of a Drug-Related Crime, The

Tiffany Gulley Becker

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.
The "Active Employment" Standard: Much-Needed Clarification for Determining Liability for "Use" of a Weapon During the Commission of a Drug-Related Crime

*Bailey v. United States*¹

I. INTRODUCTION

In *Bailey v. United States*,² the Supreme Court reduced the confusion caused by an era of contradiction among the circuits regarding the standard necessary to maintain a conviction for "us[ing]" a firearm "during and in relation to" a drug-trafficking crime.³ Until the instant decision, abundant conflict existed as to what was required to sustain a conviction under 18 U.S.C. § 924(c). In its seeming departure from an earlier authorization of a broad definition of "use," the Supreme Court altered its course and provided a new and clearer test for criminal liability under this section. In so doing, the Court settled the ultimate question debated so intensely in the circuit courts of appeal and emerged with a more workable standard.

II. FACTS AND HOLDING

Roland J. Bailey and Candisha Summerita Robinson were convicted separately of "using" or "carrying" a firearm "during and in relation to the commission of a drug trafficking crime" in violation of 18 U.S.C. § 924(c)(1)⁴ which provides for a consecutive five-year minimum prison term.⁵ Both Bailey and Robinson contested their convictions on the section 924(c) charge, maintaining that there was insufficient evidence to establish that firearms were actually "used" in the commission of their drug trafficking crimes as required by 18 U.S.C. § 924(c)(1).⁶ Their appeals were consolidated and provide the factual basis for the instant case.

2. *Id.*
4. 18 U.S.C. § 924(c)(1) (1994) provides in pertinent part: "Whoever, during and in relation to any ... drug trafficking crime ... uses or carries a firearm, shall, in addition to the punishment for such ... drug trafficking crime, be sentenced to imprisonment for five years."
6. *Id.* at 503-04.
A. United States v. Bailey

Bailey’s arrest resulted from a traffic stop in May of 1989. His failure to produce a driver’s license prompted officers to direct Bailey to get out of the car. As he left the vehicle, the police observed Bailey push something between the seat and the front console of the passenger compartment. An ensuing search exposed one round of ammunition and 30 grams of cocaine. During an inspection of Bailey’s trunk after the arrest, officers uncovered a bag containing a loaded 9-mm pistol and cash.

Prosecutors charged Bailey with using and carrying a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1) in addition to other counts. At trial, the prosecution presented expert testimony explaining that firearms are often used by drug dealers to protect themselves and their assets, including drugs and cash.

The jury convicted Bailey on all counts. In addition to his sentence for the other counts, Bailey received a consecutive five-year imprisonment term per 18 U.S.C. § 924(c)(1). In the Court of Appeals for the District of Columbia Circuit, Bailey asserted that there was insufficient evidence to support the section 924(c)(1) conviction. Such a conviction requires the prosecution to prove that the firearm was "used" during and in relation to a drug trafficking crime. He contended that the loaded 9-mm pistol in the locked trunk of his car could not be classified as being "used" during the drug offense.

7. Id. at 503. Officers observed that the vehicle Bailey was driving did not have a front license plate or inspection sticker. Id.
8. Id.
9. Id.
10. Id.
11. Id. at 503-04.
14. Id.
15. Id.
17. Id. at 1115.
18. Id.
A panel of the Court of Appeals for the District of Columbia upheld Bailey’s conviction, asserting that the jury could have reasonably inferred that the gun involved in this case had been used by Bailey to facilitate the sales of narcotics by protecting the drugs and the assets derived from the sale of those drugs. The court noted that this was not an instance where the high-caliber weapon’s presence is "coincidental or entirely ‘unrelated’ to the crime." Judge Douglas Ginsburg dissented. He asserted that precedent within the circuit required a different result. Citing United States v. Bruce and United States v. Derr with disapproval, Judge Ginsburg agreed with the result reached by the majority, but felt that it represented a prohibited departure from previous case law.

B. United States v. Robinson

Candisha Robinson’s arrest occurred in June of 1991, following a controlled buy of crack cocaine by an undercover officer. The rock of cocaine purchased during the buy was retrieved by Robinson from the bedroom of her apartment. Police executed a search warrant after a second controlled buy. Upon examination of a locked trunk in the bedroom of the apartment, officers discovered an unloaded .22-caliber Derringer, 10.88 grams of crack cocaine, and a marked twenty-dollar bill from an earlier controlled purchase.

Among several other counts, Robinson was indicted for using or

19. Id. at 1119.
20. Id. at 1118.
21. Id. at 1119 (internal citation omitted).
22. Bailey, 995 F.2d at 1119-21 (Ginsburg, J., dissenting).
23. Id. at 1121 (citing United States v. Derr, 990 F.2d 1330 (D.C. Cir. 1993), and United States v. Bruce, 939 F.2d 1053 (D.C. Cir. 1991)).
24. Bruce, 939 F.2d 1053 at 1056.
26. Bailey, 995 F.2d at 1120-21. See also infra text accompanying notes 111-17.
27. Bailey, 116 S. Ct. at 504.
28. Id.
29. Id.
30. Id.
31. Candisha Robinson was also convicted of: Count I—distributing crack cocaine; Count II—distributing crack within 1,000 feet of a public school; Count III—possession with intent to distribute 5 or more grams of cocaine base; Count IV—possession with intent to distribute 5 or more grams of cocaine base within 1,000 feet of a school; Count V—using or carrying a firearm in the course of the offenses charged in Counts III and IV; and Count VI—knowingly making available for use a building, room or enclosure for the purpose of using, storing, manufacturing or
carrying a firearm in violation of section 924(c)(1).\textsuperscript{32} As in Bailey's case, the prosecution presented expert testimony regarding the general use of firearms by drug dealers for protection.\textsuperscript{33} The jury convicted Robinson on all counts and, like Bailey, in addition to her sentence for drug trafficking violations, she received a five year consecutive prison term for the firearms charge.\textsuperscript{34}

Robinson moved for a judgment of acquittal on the section 924(c)(1) conviction, alleging insufficiency of evidence that the firearm was "used" in relation to the drug trafficking crime.\textsuperscript{35} The district court denied the motion for judgment of acquittal, holding that there was sufficient evidence for the jury to convict on the section 924(c)(1) charge.\textsuperscript{36} The district court judge asserted that the jury could "legitimately infer that the Defendant had access to the gun in the trunk, and could use the gun to protect the stash of drugs and the proceeds of drug sales should the need arise."\textsuperscript{37}

Robinson then appealed her section 924(c)(1) conviction to the Court of Appeals for the District of Columbia.\textsuperscript{38} Like Bailey, she urged that the firearm at issue was not "used" during and in relation to a drug trafficking crime.\textsuperscript{39} She averred that the weapon was found in a closet, unloaded, in a locked trunk, and was in no way involved in the predicate drug offenses.\textsuperscript{40} Unlike Bailey's appeal, a divided panel of the court reversed Robinson's conviction.\textsuperscript{41} In so holding, the court professed that the "mere proximity of distributing cocaine base (crack cocaine). United States v. Robinson, 779 F. Supp. 606, 607 (D.D.C. 1991), rev'd, 997 F.2d 884 (D.C. Cir. 1993), reh'g granted and judgment vacated, United States v. Bailey, 4 F.3d 1004 (D.C. Cir. 1993) (en banc), on reh'g, United States v. Bailey, 36 F.3d 106 (D.C. Cir. 1994) (en banc), rev'd, United States v. Bailey, 116 S. Ct. 501 (1995).

32. Bailey, 116 S. Ct. at 504.

33. \textit{Id.} The expert also testified that the type of gun involved in Robinson's case, a Derringer, was "a 'second gun,' i.e., a type of gun a drug dealer might hide on his or her person for use until reaching a 'real gun'." \textit{Id.}

34. \textit{Id.}


36. \textit{Id.} at 610.

37. \textit{Id.} The court noted that "the fact that the premises was a base for the distribution of crack cocaine permits the inference that the gun was used to facilitate the possession with intent to distribute." \textit{Id.}


39. \textit{Id.} at 886.

40. \textit{Id.}

41. \textit{Id.} at 891.
a gun to drugs is not, and has never been, sufficient to support a conviction under section 924(c) in this circuit." Judge Henderson dissented from this result. She concluded that "[b]ecause it is an ongoing offense, the jury could permissibly conclude that a gun found on the premises was being used 'during and in relation to' that offense."  

C. The En Banc Hearing

Bailey's and Robinson's cases were consolidated for the purpose of en banc reconsideration. With the aim of resolving the apparent inconsistencies in the cases' results and refining the open-ended, multi-factor test used by the circuit to determine the requisite nexus between the drug offense and the use of a firearm, a majority of the Court of Appeals for the District of Columbia voted to hear the consolidated action en banc.

In an opinion authored by Judge Douglas Ginsburg, the Court of Appeals for the District of Columbia abandoned the open-ended test previously used in the circuit in favor of a new two-factor test. To sustain a section 924(c)(1) conviction, "the Government need only point to evidence that the firearm in question was in proximity to the drugs, drug paraphernalia, or drug proceeds and was accessible to the defendant from the site of the drugs, drug paraphernalia, or drug proceeds involved in his or her predicate drug trafficking offense." The court found the requisite proximity and accessibility in both cases and upheld both convictions.

Again, however, the court was sharply divided. Among the dissenting opinions filed was one by Judge Wald, and another by Judge Williams, which was joined by Judges Silberman and Buckley. Judge Wald rejected the use of a bright line test for the "use" prong of section 924(c)(1) and would prefer to permit juries and judges "to rely on all relevant factors." Judge Williams believed the majority created too broad a test and that it would

42. Id. at 890.
43. Robinson, 997 F.2d at 891 (Henderson, J., dissenting).
44. Id. at 896.
46. Id.
47. Id.
48. Id. at 118.
49. Id.
50. Bailey, 36 F.3d at 118 (Wald, J., dissenting).
51. Bailey, 36 F.3d at 120 (Williams, J., dissenting).
52. Bailey, 36 F.3d at 120 (Wald, J., dissenting).
incorrectly encompass "mere possession." He advocated an "active employment standard" which would require more than "possession with a contingent intent to use."  

D. Bailey v. United States

The Supreme Court granted certiorari to clarify the meaning of "use" under section 924(c)(1). The Court rejected the appellate court's newly developed two-factor test which limited the inquiry to accessibility and proximity. Justice O'Connor wrote for the unanimous Court and reversed the lower court's ruling that the defendants in the consolidated case "used" a firearm in relation to their drug trafficking offenses.

The Court held that "[t]o sustain a conviction under the 'use' prong of section 924(c)(1), the Government must show that the defendant actively employed the firearm during and in relation to the predicate crime."

III. LEGAL BACKGROUND

A. Legislative History

Title 18 U.S.C. § 924(c) was originally enacted as part of the Gun Control Act of 1968. Legislative history reveals that one of the rationales advanced in support of the mandatory minimum sentence provision was "to

53. Id. at 124 (Wald, J., dissenting).
54. Id. at 121 (Williams, J., dissenting).
57. Id. at 506.
58. Id. at 509.
59. Id. (emphasis added). The Court remanded both cases to determine whether the convictions could be upheld on the "carry" prong of section 924(c)(1), because the Court of Appeals failed to address the issue. Id.
60. Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224 (1968). The statute read in pertinent part: "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." Id.; For other treatments of the development of section 924(c), see Thomas A. Clare, Note, Smith v. United States and the Modern Interpretation of 18 U.S.C. § 924(c): A Proposal to Amend the Federal Armed Offender Statute, 69 NOTRE DAME L. REV. 815, 819-26 (1994); Peter N. Witty, Note, Plain Language, Congressional Intent, and Common Sense, 71 NOTRE DAME L. REV. 799, 803-05 (1996).
persuade the man who is tempted to commit a Federal felony to leave his gun at home.\textsuperscript{61}

Section 924(c) was first amended as part of the Comprehensive Crime Control Act (CCCA) of 1984.\textsuperscript{62} The mandatory sentence provision was raised from one year to five.\textsuperscript{63} Congress replaced the term "any felony" with "any crime of violence." Additionally, the "use" and "carry" provisions, formerly stated in separate subsections, were merged into one provision.\textsuperscript{64} Congress also changed the requirement that the firearm be "used to commit" the offense.\textsuperscript{65} This language was replaced with the "during and in relation to" criterion.\textsuperscript{66}

Examples provided by the Senate Report of "use" of a firearm included "pointing it at a teller or otherwise displaying it whether or not it is fired."\textsuperscript{67} In explaining on the "carry" prong of the statute, the Senate Report's commentary included in a footnote:

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 or to make his escape . . . Moreover, the requirement that the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{61} 114 CONG. REC. 22, 231 (1968) (floor amendment proposed by Representative Poff).
\item \textsuperscript{62} Pub. L. No. 98-473, § 1005(c), 98 Stat. 2138-2139 (1984). In pertinent part, § 924(c) then read: 
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.
\item \textit{Id.}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{See} Brief for Respondent, Bailey v. United States, Robinson v. United States, Nos. 94-7448, 94-7492, 1995 WL 453993, at *29 (U.S. July 31, 1995).
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.}
\end{itemize}
It has been argued that this explanation of the "carry" prong of the statute necessitates a narrow construction of the "use" prong. If "carrying" only constitutes an intent to use, then "use," by implication, requires something more.

This section was again altered in 1986 as part of the Firearms Owners' Protection Act. In recognition of the strong and dangerous connection between guns and drugs, Congress added to the predicate offenses upon which section 924(c) liability could be based. In addition to "crimes of violence," Congress attempted to "provide an important new weapon against narcotics traffickers" by adding "or drug trafficking crime" to section 924(c)(1). This amendment did not provide any direct advancement in the on-going effort to understand the requirements for "use" liability under section 924(c).

The last change to section 924(c) was made in 1988 as part of The Anti-Drug Abuse Act of 1988. A paragraph was added to define the term "drug trafficking crime" and to expand section 924(c)'s application to include possessory offenses with the intent to distribute. Also, Congress increased the penalty for section 924(c) violations.

In light of the considerable mandatory sentence carried by this provision, it is surprising that the legislative history on this provision is so

71. H.R. Rep. No. 99-495 at 10 (1986), 1986 U.S.C.C.A.N. 1327, 1346. Petitioners in the instant case suggested that the refusal of a proposed "self-defense" exception evidences a narrow interpretation of the "use" prong by Congress. "[T]he committee's recognition that a felon who was carrying the weapon could often invoke the defense by claiming 'that he was only carrying the weapon for defense against other felons,' and citing 'the fact that he did not actually use the weapon.'" Brief for Petitioners, Bailey v. United States, Robinson v. United States, Nos. 94-7448, 94-7492, 1995 WL 390610, at *30 (U.S. Jun 30, 1995).
73. Id.
75. Clare, supra note 60, at 825 asserts:
   The current version of the statute imposes a five year mandatory minimum penalty for the first offense. If the firearm is a short-barrelled shotgun or short-barrelled rifle, the sentence is ten years. If the firearm is a machine gun or equipped with a silencer, section 924(c) mandates a 30-year term. A second conviction under section 924(c) triggers a 20-year sentence or life imprisonment if the second conviction involved a machine gun or silencer.
sparse. Congress has provided no definition for the word "use" as it applies to section 924(c). The lack of a narrowly-defined explanation of the term has led to much controversy regarding what is actually sufficient for "use" liability under section 924(c), resulting in widely divergent outcomes in the circuit courts of appeal. With a provision that requires a mandatory punishment of five years and, for repeat offenders with certain circumstances, life imprisonment, the courts have been left to forge their own path as to what constitutes "use" under this provision.

B. Confusion Among the Circuits

Courts had differed widely as to the evidence required to sustain a conviction under section 924(c). The Bailey court itself cited many contradictions both in the tests for "use" and the results of those tests. Some circuits had maintained that mere possession of a firearm in tandem with a drug trafficking offense can constitute "use" for section 924(c) purposes. The Ninth Circuit had taken this approach. In United States v. Stewart, in an opinion authored by now-Justice Kennedy, the court explained situations where mere possession could constitute use. When a firearm serves to protect the defendants or their drugs or to intimidate others, the firearm is said to have had a role in the crime, and then there is a violation of section 924(c) regardless of whether the gun is actually displayed or discharged. In that case, defendant's conviction was upheld where he had an UZI in the trunk of his car during an arrest occurring immediately in front of his home. The house was found to contain drug manufacturing equipment. The Ninth Circuit applied this reasoning again in United States v. Torres-Rodriguez, where the evidence was held sufficient to uphold the section 924(c) conviction where defendant had a .357 Magnum in between the mattress and boxspring of her bed along with drug paraphernalia and cash. The application of section 924(c) in Stewart and Torres-Rodriguez permits conviction where a weapon is strategically placed and serves to "embolden" the defendant. This "emboldening" theory permits an inference by the jury

Parole, probation, and suspended sentences remain forbidden.

(internal citations omitted).

77. Bailey, 116 S. Ct. at 505.
78. See infra notes 79-83.
79. 779 F.2d 538, 540 (9th Cir. 1985).
80. Id. at 540.
81. Id. at 539.
82. 930 F.2d 1375 (9th Cir. 1991).
83. Id. at 1379-80.
that maintaining the weapon near the drugs or drug money where it is accessible to the defendant signifies that the defendant has "used" the weapon for purposes of the statute. This interpretation allows for conviction based on inferred or passive "use" as opposed to its actual use during and in relation to the drug trafficking crime.

Other circuits had insisted that possession alone is insufficient.\(^8^4\) The First Circuit in United States v. Castro-Lara\(^8^5\) required that there be "some facilitative nexus between the weapon and the criminal activity."\(^8^6\) However, although the court required more than mere possession, it held that "use . . . to lend courage . . . will suffice to invoke the statute."\(^8^7\) Despite the fact that the gun upon which the conviction was based was unloaded, never flaunted, and found in a briefcase in a locked trunk of a car, the court held that the weapon's proximity to ammunition, cash and anticipated location of drug delivery was sufficient evidence to support the jury's finding that it was "used" for purposes of section 924(c).\(^8^8\) The court deemed sufficient that the firearm was "available for use" during and in relation to the drug crime.\(^8^9\)

Another First Circuit case, United States v. McFadden,\(^9^0\) maintained that more than possession was required to sustain a section 924(c) conviction. This case involved an 18-year-old student/defendant charged with dealing small amounts of crack cocaine.\(^9^1\) The transaction with undercover officers occurred in the entry way to the home.\(^9^2\) When the defendant fled and locked himself in his bedroom, officers entered forcefully and found an unloaded shotgun as well as cash under his mattress.\(^9^3\) The court upheld the conviction, recognizing maintenance of a secret fortress is not a present use but, instead that it evidences intent regarding possible future use.\(^9^4\) This was sufficient to uphold the conviction.\(^9^5\)

Then-Chief Judge of the First Circuit, now Justice Breyer, dissented from the result in McFadden.\(^9^6\) Breyer was disturbed that the line between "use" and "possession" had become too blurred. He urged that "at some point, the

\(84\) See infra notes 85-99.
\(85\) 970 F.2d 976 (1st Cir. 1992).
\(86\) Id. at 983.
\(87\) Id.
\(88\) Id. at 982-83.
\(89\) Id. at 983.
\(90\) 13 F.3d 463 (1st Cir. 1994).
\(91\) Id. at 465.
\(92\) Id.
\(93\) Id.
\(94\) Id.
\(95\) Id.
\(96\) Id. at 466 (Breyer, C.J., dissenting).
risk that a defendant will actually fire or brandish or display a nearby gun 'to protect' a drug stash becomes too small to permit the jury to infer an intent to protect.' 97 Breyer's opinion illustrates that, where a gun is merely possessed by a drug trafficking offender, he or she will not go unpunished. Breyer emphasizes the importance of United States Sentencing Guideline section 2D1.1(b)(1) which provides for a two level (resulting in a 30 percent to 40 percent) sentence enhancement where a firearm was possessed by a drug offender. 98 Noting this provision, Breyer asserted that the existence of this enhancement mandates the distinction between possession and use.99

Other circuits had developed still other tests in the quest to define "use" for the purpose of section 924(c).100 The Second Circuit derived the following test in United States v. Feliz-Cordero101:

[I]n order for possession of a firearm to come within the "uses" provision of section 924(c), one of the following is required: i) Proof of a transaction in which the circumstances surrounding the presence of a firearm suggest that the possessor of the firearm intended to have it available for possible use during the transaction; or ii) The circumstances surrounding the presence of a firearm in a place where drug transactions take place suggest that it was strategically located so as to be quickly and easily available for use during such a transaction.102

The Feliz-Cordero court refused to uphold the section 924(c) conviction where the firearm in question was found in a bedroom dresser drawer.103

The Third Circuit expressed accord with the outcome in Feliz-Cordero in United States v. Theodoropoulous.104 The court used the same test stated above; however, the court held that the presence in plain view of a loaded firearm, even in premises that are not heavily fortified with elaborate security devices, is evidence that the conspirators may have felt some need for security from which a jury could infer that the weapon was an integral part of the conspiracy and was 'used' therein.105

97. Id. at 470.
98. Id. at 467.
99. Id. at 468.
100. See infra notes 101-10 and accompanying text.
101. 859 F.2d 250 (2d Cir. 1988).
102. Id. at 254.
103. Id.
104. 866 F.2d 587 (3d Cir. 1989).
105. Id. at 596-97.
Another doctrine adopted by some circuits is the "drug fortress theory." As expressed by the Fifth Circuit in United States v. Wilson,\(^{106}\) "in fortress type cases, the sheer volume of weapons and drugs makes reasonable the inference that the weapons involved were carried in relation to the predicate drug offense since they 'increase[] the likelihood [the drug offense will] succeed.'\(^{107}\) However, the court in Wilson noted that, if the conditions do not qualify as a drug fortress, "something more than strategic proximity of drugs and firearms is necessary to honor Congress's concerns."\(^{108}\)

The Eighth Circuit had also adopted this position on "use." In United States v. Matra,\(^{109}\) the court subscribed to the "drug fortress theory" arguing "[j]ust as weapons are kept at the ready to protect military installations against potential enemy attack so too may weapons be kept at the ready to protect a drug house, thereby safeguarding and facilitating illegal transactions."\(^{110}\)

As evidenced by the cases above, the definition of "use" and the requisite conduct for liability was far from uniform throughout the country. The D.C. Circuit, prior to Bailey, had adopted yet another test for "use."

**C. D.C. Circuit Approach**

The D.C. Circuit had adopted a multi-factor test markedly different from the other circuits. In cases which involved a question as to whether the firearm was "used" or merely possessed for protective purposes, the D.C. Circuit weighed many factors.

In United States v. Bruce,\(^{111}\) defendant had drugs and a brown bag containing a four-shot Derringer in a coat's pockets (which he was not wearing).\(^{112}\) Factors the court considered when overturning Bruce's conviction were the size of the weapon and the nature of the predicate offense.\(^{113}\) The court noted that protection of future distribution is not enough to satisfy the "use" prong of the statute.\(^{114}\)

---

106. 884 F.2d 174 (5th Cir. 1989); see also United States v. Pace, 10 F.3d 1106 (5th Cir. 1993).
107. Wilson, 884 F.2d at 177 (citing United States v. Robinson, 857 F.2d 1006, 1010 (5th Cir. 1988)).
108. Id. at 177.
109. 841 F.2d 837 (8th Cir. 1988).
110. Id. at 842.
111. 939 F.2d 1053 (D.C. Cir. 1991).
112. Id. at 1054.
113. Clare, supra note 60, at 840-41.
114. Id.
The D.C. Circuit next addressed the issue of "passive use" in United States v. Derr. In this case the firearm was found pursuant to a search warrant in a locked closet in defendant's bedroom. An unloaded gun was found in close proximity to drugs, drug paraphernalia, cash and other personal items. The court overruled Derr's section 924(c) conviction, examining additional and different factors. These included the accessibility of the weapon, the proximity of the gun to the drugs, and whether the gun was loaded.

The Circuit became increasingly divided over the issue in the Bailey and Robinson cases. Split panels in these cases provided strong arguments regarding the "passive use" of firearms in conjunction with drug offenses. In Bailey, Ginsburg's dissent pointed to the factual similarities to Bruce and Derr. Although he believed that both Bailey's and Robinson's cases were instances of "use," under circuit precedent, he could not advocate upholding the convictions. He asserted that the cases were too analogous to warrant a disparate result. Judge Henderson, dissenting in Robinson, argued that the Bruce-Derr line of precedent also did not apply to Candisha Robinson's case, arguing factual dissimilarities.

After the Bailey and Robinson cases, the results reached by the D.C. Circuit appeared to be clearly inconsistent and the bases for the disparate outcomes were questionable. The multi-factored, open-ended approach taken in the Bruce-Derr line of cases was simply not workable. Among all the factors examined: "the size of the firearm, the number of firearms found at the scene, the status of the weapon as loaded or unloaded, the proximity of the firearm to the narcotics, and any evidence of defendant's past use of the firearm in connection with the drug trade." This approach was inconsistent with the broad reading of the statute by other circuits and was a cumbersome test resulting in inharmonious results. The consolidated action was perfectly suited to an en banc hearing to clarify the test in the D.C. Circuit.

In United States v. Bailey, the court overruled its line of precedent in what had become known as the Bruce-Morris-Derr approach. Citing intrusion into the province of the fact finder, inconsistent results, and conflict

115. 990 F.2d 1330 (D.C. Cir. 1993).
116. Id. at 1332.
117. Id. at 1338-39.
118. Bailey, 995 F.2d at 1120.
119. Robinson, 997 F.2d at 891.
120. Clare, supra note 60, at 842.
121. Clare, supra note 60, at 843-44.
122. 36 F.3d 106 (D.C. Cir. 1994).
123. Id. at 111.
with other circuits, the en banc panel rejected the open-ended, multi-factor test. The court adopted a test evaluating solely defendant's accessibility to the weapon and the weapon's proximity to the drugs, paraphernalia and money.

The two dissents filed in that case disagreed with the limited test. Judge Williams closely examined the legislative history of section 924(c) and surrounding provisions to discern the intent of Congress. He contrasted section 924(c)’s "use" prerequisite with section 924(d)’s forfeiture provision. Section 924(d) provides for the forfeiture of firearms "used in any knowing violation" or "intended to be used" in the listed offenses. Williams took this to mean that had Congress wanted to punish "intended use" with section 924(c) liability, it knew how to express that idea. After careful examination of legislative history and the prior Supreme Court decision dealing with the interpretation of "use," he determined that more must be required to sustain a finding under section 924(c).

Judge Wald also filed a dissenting opinion, indicating that the newly-adopted two-factor test was too restrictive. Wald noted that the fact finder should be permitted to look at all relevant evidence in making its determination on "use."

D. The Supreme Court on Section 924(c) in Smith v. United States

The Supreme Court addressed the meaning of "use" within section 924(c) in Smith v. United States in an effort to determine whether the trading of a gun for drugs constituted "use" as required by the statute. The Court held that, since there was no definition provided in the statute, the plain and ordinary meaning of "use" would control.

124. Id.
125. See 36 F.3d at 118 (Wald, J., dissenting); 36 F.3d at 120 (Williams, J., dissenting).
126. Id. at 122.
127. Id. at 123.
129. Bailey, 36 F.3d at 123.
130. Id.
131. Bailey, 36 F.3d at 119.
133. See generally Clare, supra note 60.
134. Smith, 508 U.S. at 228.
Smith v. United States is an important decision for section 924(c) analysis. Although specifically disclaiming an intent to do so, the Smith Court defined the outer limits of the statutory language. In the process of endorsing a broad interpretation of the "during and in relation to" language, the Smith decision effected two significant results. First, the court established a very low threshold for conviction under section 924(c). Secondly, the Smith decision opened the door for an increased use of section 924(c) to reach nontraditional theories of firearm use.\(^1\)

Smith seemed to resolve the conflict in the circuits in favor of a broad interpretation of "use"; however, as seen in Bailey, that reading of Smith proved erroneous. In Bailey, the Court retreated sharply on its apparent broad reading of the term "use," requiring "active employment" of the weapon before liability would attach under section 924(c).

IV. INSTANT DECISION

The unanimous opinion in Bailey was written by Justice O'Connor.\(^1\) After the recitation of the facts and procedural history of the consolidated case,\(^1\) the Court immediately acknowledged the split within the District of Columbia Circuit and amongst all the Circuits as to the proper test for sufficient "use" in a section 924(c)(1) conviction.\(^1\) After a brief inventory of the confused results in section 924 cases,\(^1\) the Court set out the choice between petitioner's proposed standard of active employment and the Government's endorsement of the two-factor test adopted by the lower court.\(^1\) Immediately, the Court revealed its preference for the "active employment" standard.\(^1\)

The Court then dealt with some of the inherent ambiguities in differing applications of the word "use." For illustrative purposes, the Court set forth the following contradictory assertion: "I use a gun to protect my house,

---

135. Clare, supra note 60, at 833.
137. Id. at 503-05.
138. Id. at 505.
140. Bailey, 116 S. Ct. at 505.
141. Id.
142. Id.
but I've never had to use it." The court noted that it would have to investigate the surrounding language of the statute and other sentencing provisions to determine the meaning of "use" in context. The Court expressed accord with the lower court's assertion that "use" intimates more than possession; however, it rejected the proximity and accessibility standard. The opinion pointed to several other provisions in gun crime statutes that refer to "possession," noting that the decision to employ the word "use" required something more. The Court cited prior dissenting opinions in section 924(c)(1) cases while pointing out the shortcomings of the District of Columbia Circuit's newly formulated test. It found that the proximity and accessibility standard did not adequately delineate instances where a firearm was merely possessed, as opposed to "used," in accord with congressional intent.

After concluding that the threshold test for "use" under section 924(c)(1) must be more rigorous than the Court of Appeals' two-factor test, the Court set out to further define the additional proof required to sustain a section 924(c)(1) conviction. It turned to the canons of statutory interpretation for guidance, examining the plain meaning as well as "placement and purpose in the statutory scheme." The Court analyzed the "use" prong of the statute in light of the "carry" prong and concluded that Congress intended that these provisions address different conduct. The Court noted that an expansive definition of "use" would swallow the "carry" prong, rendering it redundant. The new "active employment" standard adopted by the Court provides the "use" and "carry" prongs of the statute with distinct and independent meanings.

143. Id.
144. Id. at 506.
145. Id.
146. Id. See, e.g., 18 U.S.C. §§ 922(g), 922(j), 922(k), 922(o)(1), 930(a), 930(b) (1994). Bailey, 116 S. Ct. at 506.
148. Id. See McFadden, 13 F.3d at 469 (Breyer, C.J., dissenting); Bailey, 36 F.3d at 121 (Williams, J., dissenting).
149. Bailey, 116 S. Ct. at 506.
150. Id.
151. Id.
152. Id.
153. Id.
154. Id. at 507. The Court notes that under the new definition "a firearm can be used without being carried, e.g., when an offender has a gun on display during a transaction . . .; and a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction." Id.
Additional justification was given for the new standard through the examination of a firearm forfeiture statute. The Court noted that, in that statute, Congress defined for forfeiture purposes guns that were "'used' in commission of a crime and those 'intended to be used.'" The Court relied on this provision to demonstrate that, had Congress chosen to make a similar provision in section 924(c)(1), similar language would have been used. The Court stated that this fact strengthens its position that Congress did not aim to punish "intended use" in section 924(c)(1).

The Court next examined the original text of the provision as well as subsequent amendments. Finding that the original text punished "uses to commit" added support to the Court's position that "use" and "carry" connote distinct meanings. Upon examination of the 1984 amendment, the Court concluded that it did not affect the "active connotations" present in the previous form of the statute.

The Court then further clarified the new "active employment" standard by giving concrete examples of what did and did not constitute "use" under section 924(c)(1). "[B]randishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire a firearm" were listed as clear cut instances of "use." The Court noted that "a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a 'use,' just as the silent, but obvious and forceful presence of a gun on a table can be a 'use.'"

Placement for protection alone was delineated by the Court as insufficient for "use" under the statute. The Court likened this to "storage" and found it indistinguishable from possession.

The Court then confronted situations where the defendant had "conceal[ed] a gun nearby to be at the ready for an imminent confrontation." Although it found this to be a closer case, the Court
refused to extend its definition to include this circumstance. It recognized the intuitive complexities with determining how "at the ready" the firearm would have to be.

Acknowledging that the new definition would limit the application of the statute, the Court pointed to alternatives available to prosecutors when guns are found during drug offenses, but were not "used" in the commission of the predicate offense. The Sentencing Guidelines provide for sentence enhancement when guns are possessed during some drug crimes.

In summation, the Court stressed the importance of defining "use" so as not to diminish the necessity of the "carry" prong of the statute. Applying the new "active employment" test to the facts of Bailey's and Robinson's cases, the Court found that the evidence was insufficient to support either conviction and reversed both judgments. The cases were remanded, however, because the Court of Appeals failed to make a determination as to whether the "carry" prong of the statute was satisfied.

168. Id.

169. Id. at 509. The Court posited questions like "How 'at the ready' was the firearm? Within arm's reach? In the room? In the house? How long before the confrontation did he place it there? Five minutes or 24 hours?" Id.

170. Id. at 509.


173. Id.

174. Id. Many courts have recognized the new significance of § 924(c)'s "carry" prong since the decision in Bailey. In instances where the evidence would be insufficient to show "use," many courts have upheld convictions based on the "carry" prong, or remanded the case for factual findings on this basis. For examples, see United States v. Range, 94 F.3d 614, 616 (11th Cir. 1996); United States v. Barnhardt, 93 F.3d 706, 710 (10th Cir. 1996) (upholding the conviction because in the course of defendant's plea, he admitted to having carried the weapon); United States v. Melendez, 90 F.3d 18, 21 (2d Cir. 1996) (vacating conviction but remanding to determine applicability of "carry" prong); United States v. Hernandez, 80 F.3d 1253, 1258 (9th Cir. 1996); United States v. Ramirez-Ferrer, 82 F.3d 1149, 1154 (1st Cir. 1996) (upholding conviction pursuant to the carry prong where the firearm was carried on a boat); United States v. Manning, 79 F.3d 212, 216 (1st Cir. 1996) (upholding firearm conviction where there was ample evidence that defendant carried gun in a briefcase); United States v. Farris, 77 F.3d 391, 395 (11th Cir. 1996); United States v. Riascos-Suarez, 73 F.3d 616, 623 (6th Cir. 1996); United States v. Morris, 929 F. Supp. 993, 1001 (S.D. Miss. 1996) (vacating defendant's conviction based on misleading jury instruction, but remanding for new trial pursuant to the "carry" prong of the statute); United States v. Kristofferson, 926 F. Supp. 939, 942 (N.D. Cal. 1996); United States v. Canady, 920 F. Supp. 402, 405 (W.D.N.Y. 1996) (upholding defendant's conviction based on the "carry" prong).
The decision in Bailey has been applied retroactively and many convictions have been vacated.175

V. COMMENT

Considering the magnitude of the penalty associated with section 924(c), the decision in Bailey is a helpful and much-needed clarification of the standard for what is required to sustain a section 924(c) "use" conviction. The new "active employment" standard will provide prosecutors and defendants with a clearer illustration of what constitutes "use" of a firearm for purposes of section 924(c).\(^{176}\) Confusion, however, continues to surround the "carry" prong of the statute.\(^ {177}\)

After the decision in Smith,\(^ {178}\) the Court seemed to be endorsing the expansive reading of the statute that had been used in many of the circuits. In citing the ordinary meaning of the word "use," it appeared as though any service derived from the firearm by the defendant would be considered "use" for purposes of the statute. Courts and commentators alike believed that a more expansive reading of section 924(c) was warranted by the Court's decision.\(^ {179}\)

The Court in Bailey made a seeming "about face" and restricted the interpretation of the provision. In the context of the language of the statute, and other provisions dealing with the combination of drugs and firearms, the

\(^{(10\text{th} \text{ Cir. 1996})}\). \textit{11\text{th Circuit}}: United States v. Jones, 74 F.3d 275, 276 (11th Cir. 1996); United States v. King, 73 F.3d 1564, 1567 (11th Cir. 1996).

\textit{But see also} United States v. Ulloa, 94 F.3d 949, 956 (5th Cir. 1996) (affirming defendant's conviction, holding that the Bailey decision did not change Fifth Circuit law as to whether bartering drugs for firearms constitutes "use" under section 924(c) over dissenting opinions); United States v. Cannon, 88 F.3d 1495, 1509 (8th Cir. 1996) (upholding convictions where weapons were to be traded for drugs noting that the decision in Bailey does not reverse the decision in Smith which held barter to be a form of "use"); United States v. Rivas, 85 F.3d 193, 195 (5th Cir. 1996) (affirming defendant's conviction pursuant to a plea of guilty); United States v. Price, 76 F.3d 526, 529 (3d Cir. 1996) (upholding defendant's conviction on aiding and abetting a section 924(c) violation); United States v. Muriel, 919 F. Supp. 66, 69 (D.R.I. 1996) (holding defendant ineligible to withdraw a guilty plea because of new clarification provided by Bailey).

\(^{176}\) See Witty, \textit{supra} note 60, at 802 (arguing that the decision in Bailey bolsters the minority position allowing multiple section 924(c) convictions arising under a single drug offense).

\(^{177}\) See \textit{supra} note 174 for examples of cases applying this portion of the statute.

\(^{178}\) See \textit{supra} notes 132-35 and accompanying text.

\(^{179}\) Clare, \textit{supra} note 60, at 840; \textit{contra} Robert C. Dorf, "Use" and the Irresistible Impulse to Legislate, 12 Touro L. Rev. 123, 124 (1995) ("[I]t is impossible to applaud judicial hammering of statutory 'possession' into 'use' which is contrary to legislative intent.")
Court retreated from its earlier expansive view in exchange for a clearer, more easily recognizable standard.\footnote{See Dorf, \textit{supra} note 179, at 140 (expressing hope for clarification from the Supreme Court in the "blurred" "possession-use distinction" before the decision in \textit{Bailey}).}

It is important to understand that situations previously prosecuted under section 924(c) which do not meet the "active employment" standard will not go completely unpunished. Justice Breyer's dissent in \textit{McFadden},\footnote{13 F.3d 463, 466 (Breyer, C.J., dissenting).} as well as Judge William's dissent in the en banc hearing of \textit{Bailey},\footnote{36 F.3d 106, 120 (Williams, J., dissenting).} point out that when the line between "use" and "possession" is blurred, the defendant will still receive a two-level sentence enhancement pursuant to United States Sentencing Guideline section 2D1.1(b)(1).\footnote{However, since the \textit{Bailey} decision, some courts which have reversed "use" convictions under section 924(c) have denied the government's request for resentencing hearing in light of U.S. Sentencing Guidelines Manual § 2D1.1(b)(1) (1995). See, e.g., Warner v. United States, 926 F. Supp. 1387, 1392 (E.D. Ark. 1996); Bell v. United States, 917 F. Supp. 681, 685 (E.D. Mo. 1996).} Before imposing mandatory consecutive sentencing, there should be certainty that the firearm was "used" in tandem with the drug trafficking offense.

The vast confusion surrounding the provision created a situation in which it was necessary for the Court to draw a line. The "active employment" standard ensures that there is an objective manifestation of the defendant's "use" of the firearm before imposing liability under section 924(c). Considering the inherently flexible meaning of the word "use," the Court created a standard that is most likely the easiest to administer. Therefore, situations where the claim is that the firearm "emboldened" defendant will be too attenuated to permit an inference of "use."

In setting forth its "active employment" test, the Court was careful to provide serviceable examples as to what did and did not qualify as such a "use" for the purpose of sustaining convictions. It is clear from the Court's decision that "even an offender's reference to a firearm in his possession could satisfy section 924(c)."\footnote{If a simple reference to a firearm will satisfy the statute, why would a situation in which a firearm was strategically placed for possible confrontation go unpunished?} If a simple reference to a firearm will satisfy the statute, why would a situation in which a firearm was strategically placed for possible confrontation go unpunished?

The Court reasoned that there would be a line-drawing problem if the strategic concealment were to be sufficient for liability under section 924(c), arguing that placement for later active use does not constitute "use" for purposes of the statute.\footnote{See \textit{Bailey} v. United States, 116 S. Ct. 501, 508 (1995).}
The Court also rejected the theory that, when a defendant has access to the weapon, it "emboldens" him and gives him confidence to commit crimes that he may ordinarily not.\textsuperscript{186} It is true, however, that the possession of weapons in many situations perpetuates and facilitates the drug enterprise.

The Court reminded frustrated prosecutors that they have other means available to them to pursue drug offenders who possess drugs. The sentence enhancement that results from possession of a firearm by drug traffickers can be extensive, as noted in Justice Breyer's dissent in \textit{McFadden}.\textsuperscript{187}

Commentators have recommended that Congress amend section 924(c) to provide more specifically for punishment of specified conduct.\textsuperscript{188} One such proposal advocates the punishment of all conduct where firearms are an "integral part" of the drug trafficking offense.\textsuperscript{189} If society is troubled by the strategic concealment of weapons in "drug fortress" situations, Congress should specifically address the concern in a list of prohibited conduct. For example, "it could be found under the circumstances that the defendant intended to use the gun if a contingency arose or to make his escape."\textsuperscript{190}

Considering the language of the statute in its present form, however, the Supreme Court reached a sound result by deciding to compel an objective manifestation of "use" before imposing the mandatory penalties required by section 924(c). If society is concerned with conduct involving firearms and drug trafficking that is not quite "active employment," then Congress should amend the statute to more clearly include these situations. It is important to remember that prosecutors may charge the "carry" prong of 18 U.S.C. § 924 or, alternatively, request a sentence enhancement in situations where an active employment is not apparent.

The \textit{Bailey} decision achieves its goal of increasing certainty in a murky area of the law and assures a minimal showing before the five-year mandatory sentence will be imposed.

\section*{VI. CONCLUSION}

\textit{Bailey v. United States}\textsuperscript{191} has reduced the perplexity surrounding the sufficiency of evidence required to uphold a conviction under section 924(c). The Supreme Court has taken a new approach not indicated by its prior interpretations of the provision and has required that there be an objective

\begin{thebibliography}{10}
\bibitem{186} \textit{Id.} at 508.
\bibitem{187} United States v. McFadden, 13 F.3d 463, 467 (5th Cir. 1994) (Breyer, C.J., dissenting).
\bibitem{188} See Clare, \textit{supra} note 60, at 849.
\bibitem{189} Clare, \textit{supra} note 60, at 852-53.
\bibitem{190} Clare, \textit{supra} note 60, at 853.
\end{thebibliography}
manifestation of an active use of the weapon in conjunction with the drug trafficking offense before criminal liability can be established.

While the decision fails to reach all troublesome conduct—for example, the strategic concealment of weapons remains a definite danger—Court has chosen a manageable and less clouded standard with which to judge sufficiency of the evidence in future cases.

Tiffany Gulley Becker