THE IMPLICATIONS OF BAILEY V. UNITED STATES ON THE RISE OF CONVICTED CRIMINAL CLAIMS AND THE FALL OF 18 U.S.C. § 924(c)(1)

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I. INTRODUCTION

In 1995, a unanimous United States Supreme Court significantly narrowed the scope of 18 U.S.C. § 924(c)1 in Bailey v. United States.2 The Court held that to sustain a conviction under the “use” prong of the statute, the government must show that the defendant actively employed a firearm during and in relation to a crime of violence or a drug trafficking crime.3 In reversing the District of Columbia Circuit decision, the Court held that the evidence was insufficient to support the convictions for using a firearm under § 924(c)(1).4 The Court based its holding on the determination that the language of § 924(c)(1), within its context and the legislative history behind its enactment, warranted a “conclusion that Congress intended use in the active sense of ‘to avail oneself of.’”5

The implications of the Supreme Court’s decision are two-fold. In 1995 alone, 1973 defendants were sentenced under § 924(c)(1) based on an incorrect interpretation of the law and are now eligible for relief.6 Moreover, approximately ten thousand individuals were in prison serving sentences under § 924(c)(1), which added five years to their sentences for the use of a

1. Section 924(c)(1) of Title 18 of the United States Code states:

   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.

3. Id. at 509.
4. Id.
5. Id.
firearm, when Bailey was decided.\footnote{Frank J. Murray, Justices Overturn Convictions Based on a New Gun “Use” Ruling, WASH. TIMES, Dec. 12, 1995, at A4.} Almost immediately, the courts found that Bailey should be applied retroactively because it was a new, nonconstitutional rule of substantive law that would produce different results.\footnote{See infra notes 129-30 and accompanying text.} Thus, the floodgates are now open to thousands of convicted criminals seeking relief based on the Bailey decision.

With such a narrow construction of the use prong, the courts are left to determine if the jury instructions given at trial are sufficient to sustain § 924(c)(1) convictions under the “carry” prong, considering the fact that a jury may have received an erroneous use instruction under Bailey.\footnote{See infra Part IV.A.} In addition, another intriguing implication has arisen. In Bailey, the Supreme Court explicitly declined to address the carry prong of § 924(c)(1)—the second and significant prong of § 924(c)(1).\footnote{See Bailey v. United States, 116 S. Ct. at 507-08.} On remand, inconsistencies are arising among the circuit decisions in applying § 924(c)(1) with respect to the carry prong.\footnote{See infra Part IV.B.} These diverse applications of § 924(c)(1),\footnote{See infra Part IV.B.} which had previously warranted the Supreme Court’s Bailey decision, may lead to either another Supreme Court decision or a change in the statute itself.

In previous Supreme Court decisions involving § 924(c)(1), the Court had expanded the conduct that was prohibited by § 924(c)(1).\footnote{See Smith v. United States, 508 U.S. 223, 237-38 (1993) (concluding that Congress intended an expansive meaning of § 924(c)(1) and expanded the “in relation to” clause); Deal v. United States, 508 U.S. 129, 137 (1993) (upholding six convictions under § 924(c)(1) through a broad reading of the statute).} Today, there is little doubt that the Bailey decision represents a major departure from the prior case law surrounding § 924(c)(1) convictions.\footnote{See Peter N. Witty, Note, Plain Language, Congressional Intent, and Common Sense, 71 NOTRE DAME L. REV. 799, 805 (1996).} Not only has Bailey reversed the trend of expanding the meaning behind § 924(c)(1), but it has also opened a new conflict among the circuits.

Due to the implications resulting from the Bailey decision, this Note addresses in detail the conflicts that have arisen. Part II of this Note summarizes the legal background and history behind 18 U.S.C. § 924(c), detailing how the Supreme Court addressed the ambiguity within the statute prior to the Bailey decision. Part III provides an abstract of the background and procedural history of the Bailey decision and critically analyzes the Court’s reasoning. Part IV analyzes the potential pitfalls precipitated by the major change in the law by the Bailey decision. In particular, the first section of Part IV discusses the jury instruction issue, which recently led to many overturned convictions under § 924(c)(1). The second section of Part IV details the arising controversy surrounding the carry prong of § 924(c)(1). Each of the various definitions of the “carry” prong determined by the
circuits will be evaluated and commented upon. Finally, Part V explores the
implications that Bailey holds for the future of § 924(c)(1) to show that the
Bailey decision may lead to the demise of the section.

II. LEGAL BACKGROUND

A. Legislative History Behind 18 U.S.C. § 924(c)(1)

In relevant part, 18 U.S.C. § 924(c)(1) states that whoever uses or carries
a firearm during and in relation to a crime of violence or a drug trafficking
crime shall receive an additional five-year sentence.15 Today’s version of 18
U.S.C. § 924(c)(1) is the product and outgrowth of a series of amendments
reflecting the public’s concern over the increasing number of drug-related
violent crimes.16 The original version of § 924(c)(1) was enacted by Congress as part
of the Gun Control Act of 1968.17 It was passed in hopes of deterring violent
crime by imposing mandatory minimum sentences18 for the use or unlawful
carrying of a firearm “during the commission of any felony.”19

In 1984, the statute was first amended by Congress which eliminated the
requirement that the carrying of a firearm be unlawful, and added that the
firearm need only be used or carried “during and in relation to” a crime of
violent.20 Although the 1984 Amendment was an attempt to help deal with the
“rapidly escalating crime rate,”21 there was still an increase in violent

16. Michael J. Riordan, Using a Firearm During and in Relation to a Drug Trafficking
United States: Should Possession Replace Carry and Use Under 18 U.S.C. § 924(c)(1)?, 5 J.L.
& POL’Y 679, 682 (1997) (stating that the language of 18 U.S.C. § 924(c) has been amended
eight times since 1968).
19. Id. Originally, § 924(c) read:
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.
§ 924(c), 82 Stat. at 1224.
21. 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, 824 (1994).
crimes associated with drug trafficking. Therefore, Congress revisited the issue in the Firearms Owners' Protection Act of 1986. In this Act, § 924(c)(1) was amended to make the statute applicable to drug trafficking crimes, and also made several unrelated technical changes. Since 1986, however, there has been little substantive change to § 924(c)(1) other than to increase the penalty provisions.

B. The United States Supreme Court Addresses the Ambiguity of 18 U.S.C. § 924(c)(1)

The Supreme Court first interpreted § 924(c) in Simpson v. United States. In Simpson, the Court held that Congress did not intend to subject the defendant to multiple penalties for the single criminal transaction in which he engaged simply because § 924(c) was another applicable statute. The Court found a basis for its holding in the legislative history behind § 924(c) and the statutory construction.

In 1980, the Supreme Court further limited the scope of § 924(c) in Busic v. United States. The Court again held that § 924(c) could not be used to enhance a sentence when an enhancement provision existed in the statute defining the felony committed. The Court relied on its holding in Simpson and readdressed the basis of the reasoning in the text and legislative history.

Discouraged by the limiting scope of § 924(c), Congress amended the statute following the Simpson and Busic cases in order to re-establish its effectiveness. This was done under the Comprehensive Crime Control Act of 1984, which drastically transformed the statute as it stood.

The Supreme Court did not address the ambiguities of § 924(c)(1) again until 1993. In Deal v. United States, the Court addressed the issue of whether a defendant’s convictions under § 924(c)(1) in one proceeding arose “[i]n the case of his second or subsequent conviction” within the meaning of § 924(c)(1). The Court found no ambiguity in the statute because it was

24. Clare, supra note 21, at 824-25.
25. Id. at 825.
27. Id. at 12.
28. Id. at 13-16.
30. Id. at 404-05.
31. Id. at 405.
33. Id.; see also supra note 20 and accompanying text.
35. Id. at 131.
clear that the statute intended that each and every criminal act may have an enhanced sentence because the statute does not require that the previous sentence be final before another offense could be enhanced.36

A few months later, the Court re-examined the proposed ambiguities of § 924(c)(1) in Smith v. United States,37 only this time with respect to the use prong. In Smith, the Court addressed the issue of whether or not the exchange of guns for narcotics constituted the use of a firearm under § 924(c)(1).38 Based upon a detailed analysis of the congressional intent, as well as the language, context, and structure of § 924(c)(1), the Court concluded that “using a firearm in a guns-for-drugs trade may constitute ‘us[ing] a firearm’ within the meaning of § 924(c)(1).”39

C. Split Among the Circuits

Following the Smith decision, the courts were left with a very low threshold for convictions under the use prong of § 924(c)(1).40 The Smith decision “opened the door” for prosecutors to reach “non-traditional theories of firearm use”41 and in fact, that is exactly what occurred. Prosecutors began prosecuting drug traffickers for both active uses of a firearm, as well as the passive uses of a firearm during an underlying drug offense.42 It was clear that the Smith Court failed to resolve the existing conflict, and therefore, ambiguity continued to proliferate among the circuits concerning the construction of the use prong of § 924(c)(1).43 Prior to the Bailey decision, two prevalent theories existed among the circuits that assisted the district courts in determining and defining the use prong under § 924(c)(1)—the “drug fortress”44 and “ready access” theories.45

36. Id. at 132.
38. Id. at 227.
39. Id. at 237.
40. Clare, supra note 21, at 825-26.
41. Id. at 833.
42. Witty, supra note 14, at 801.
44. Id. at 188. The drug fortress theory upheld convictions under § 924(c)(1) not only in situations in which the firearm was not found on the defendant, but also in which the firearm was found on the premises in close proximity to the drugs, paraphernalia, cash, or any other proceeds of the crime. Id.; see also Riordan, supra note 16, at 47.
45. Moore, supra note 43, at 183-84. The ready access theory upheld convictions under § 924(c)(1) if the government proved that either the drug transaction suggested that the defendant intended to have the firearm available for possible use, or the circumstances surrounding the presence of the firearm suggested that the firearm was strategically placed for quick and easily available use. Id.
1. The Drug Fortress Theory

In *United States v. McFadden*, the First Circuit held that the presence of a firearm for the maintenance or protection of a "fortress" was sufficient to uphold the conviction under § 924(c)(1). The court clearly rejected the defendant's contention that because the firearm was unloaded with no ammunition, "mere possession" does not constitute use. In a strong dissent, Judge Breyer distinguished between the use and "possession" of a firearm and stated that the "division in the case law indicates a perceived need to draw a legal line between simple possession of a gun and its use." In Judge Breyer's opinion, the line must be drawn to the clear intent of the language, so that the use of a firearm does not swallow up the possession of a firearm.

In *United States v. Molinar-Apodaca*, the Fifth Circuit established an extremely deferential test when it held that the mere possession of a firearm and drugs on the same premise, at the same time, without regard to the physical proximity of each other, was enough to sustain a conviction under § 924(c)(1). In *United States v. Blake*, the Fifth Circuit reiterated its stand that mere constructive possession can sustain a conviction under the use prong of § 924(c)(1).

2. The Ready Access Theory

The most significant decision under the ready access theory was *United States v. Feliz-Cordero*. The defendant was convicted under § 924(c)(1) for the possession of a firearm in a dresser drawer that contained a small quantity of drugs. The Second Circuit held that the government did not establish that the defendant used or carried the firearm during or in relation to a drug trafficking crime. Instead, the Second Circuit employed a two-part test for construing the use prong:

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46. United States v. McFadden, 13 F.3d 463 (1st Cir. 1994).
47. Id. at 465.
48. Id. at 465-66.
49. Id.
50. Id. at 470 (Breyer, C.J., dissenting).
51. Id. at 469.
52. United States v. Molinar-Apodaca, 889 F.2d 1417 (5th Cir. 1989).
53. Id. at 1424.
55. Id. at 342-43.
56. United States v. Feliz-Cordero, 859 F.2d 250 (2d Cir. 1988).
57. Id. at 253-54.
58. Id.
In 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.  

Therefore, the conviction under § 924(c)(1) could not stand because "the presence of a firearm in a dresser drawer does not meet either of the requirements."  

The Third Circuit clearly adopted the ready access theory as well. In United States v. Theodoropoulos, the Third Circuit, after a review of the legislative history and other circuits' holdings, rejected the drug fortress theory. Instead, the court adopted the Feliz-Cordero test and held that the presence of a loaded shotgun and the mere availability of the firearm is not "equal to use 'in relation' to an offense." The decision hinged on the idea that the government must prove that the firearm is "readily accessible," not mere possession. Similarly, in post-Theodoropoulos decisions, the Third Circuit continued to require a showing that the gun was readily accessible.

3. The District of Columbia Circuit's Rationale

The District of Columbia Circuit originally began its § 924(c)(1) use prong analysis by following the drug fortress theory. In its first decision, United States v. Long, the District of Columbia Circuit established what became known as the Long test. That test established that a conviction under the use prong could not be upheld unless there were indications that the defendant had actual or constructive possession of the firearm. The Long test articulated that actual or constructive possession of a firearm is indicated by one or more of the following factors: "close physical proximity to the

59. Id. at 254.
60. Id.
62. Id. at 596-97.
63. Id. at 597.
64. Id.
65. See United States v. Hill, 967 F.2d 902, 906-07 (3d Cir. 1992) (upholding a conviction under § 924(c)(1) because the defendant had "easy access" to the firearm); United States v. Reyes, 930 F.2d 310, 313-14 (3d Cir. 1991) (holding that an unloaded pistol found in the trunk of a car was readily accessible; the government established that the defendant had a key to the trunk and a bullet for the gun on his person).
67. Id. at 1576-77.
firearm, possessory interest in the firearm, or dominion and control over the premises on which the firearm was located."\textsuperscript{68}

In 1993, the District of Columbia Circuit began to exhibit the exact split that existed among the other circuits with respect to the use prong of § 924(c)(1), only this time within the circuit. Decided on the same day, two different panels of judges decided two similar cases with two rather different outcomes. The decisions of \textit{United States v. Bailey}\textsuperscript{69} and \textit{United States v. Robinson}\textsuperscript{70} presented the same conflict that developed among the other circuits as each adopted different theories of the use of a firearm. This situation warranted a review by the United States Supreme Court, which produced a major change in the law.

\section*{III. \textit{BAILEY v. UNITED STATES}—A MAJOR CHANGE IN THE LAW}

\subsection*{A. The Facts: Background and Procedural History}

1. \textit{United States v. Bailey}:\textsuperscript{71} \textit{The District of Columbia Circuit Decision}

Defendant Ronald J. Bailey was stopped by two officers of the Metropolitan Police for failure to have a front license plate and an inspection sticker.\textsuperscript{72} After failing to produce a driver’s license, the officers ordered Bailey out of the car.\textsuperscript{73} The officers noticed that Bailey pushed something between the seat and the front console of the car prior to his exiting.\textsuperscript{74} Suspicious, the officers searched the car and found a round of ammunition and thirty grams of cocaine in the passenger compartment.\textsuperscript{75} In the trunk, the officers found a loaded 9mm pistol and cash.\textsuperscript{76} Bailey was subsequently indicted and convicted under federal drug charges, as well as one violation of § 924(c)(1).\textsuperscript{77}

On appeal, Bailey contended that his § 924(c)(1) conviction must be overturned because there was insufficient evidence to sustain a conviction under the use prong.\textsuperscript{78} A panel of the District of Columbia Circuit held that the conviction could be sustained because “a rational jury could easily have

\begin{itemize}
  \item \textsuperscript{68} \textit{Id. at 1578.}
  \item \textsuperscript{72} \textit{Id. at 1114.}
  \item \textsuperscript{73} \textit{Id.}
  \item \textsuperscript{74} \textit{Id.}
  \item \textsuperscript{75} \textit{Id.}
  \item \textsuperscript{76} \textit{Id.}
  \item \textsuperscript{77} \textit{Id. at 1114-15.}
  \item \textsuperscript{78} \textit{Id. at 1115.} Section 924(c)(1) provides, “whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm.” \textit{Id.}
concluded that Bailey ‘used’ the loaded high-caliber gun in the trunk of the car he was driving ‘during and in relation to’ a drug trafficking crime.  

The panel reached its holding by examining situations in which Bailey likely had been using his gun to protect his possession of cocaine as he sold his drugs.  

The panel exhibited a reliance on the drug fortress theory when it applied the multifactor test established by the District of Columbia Circuit in the *Long* decision.

2. United States v. Robinson: The District of Columbia Circuit Decision

Canisha Robinson sold crack cocaine to a police officer on two occasions as part of a sting operation. After obtaining a search warrant, the police executed it at the apartment in which the crack cocaine was sold and delivered to the officer. The police found, as part of the search, a .22-caliber derringer firearm, holster, drugs, money, and Robinson’s tax return in a locked trunk in the bedroom closet. Robinson was indicted and convicted on federal drug charges, as well as one violation of § 924(c)(1).

Robinson appealed her conviction by challenging the sufficiency of the evidence on her § 924(c)(1) conviction. The panel of the District of Columbia Circuit overturned Robinson’s conviction, holding that possession of a single unloaded firearm found inside a locked trunk in the bedroom closet falls short of the type of evidence needed to establish “actual use” under § 924(c)(1). Moreover, the panel found that the facts did not meet the multifactor test established by the District of Columbia Circuit in the *Long* decision. The panel did not accept the drug fortress theory in this instance because it failed to see how a gun, found in a locked trunk in the bedroom closet, could be of any help to Robinson in protecting her drug stash. In this case, the panel did not rely on the possible speculation that Robinson used

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79. *Id.* at 1119.
80. *Id.* at 1118. For example, the District of Columbia Circuit panel found that an inference could be drawn from the facts; specifically, that the cocaine packaged for sale, the money, and the firearm, which were all located in the trunk, were used to protect any prior distribution that occurred outside the vehicle. *Id.* Moreover, the firearm was used to protect Bailey’s earlier possession of the cocaine. *Id.* Therefore, because of the real possibility of being attacked, a jury could reasonably have concluded that “Bailey used the gun in the trunk to protect his inventory of drugs.” *Id.*
81. *Id.* at 1116 (citing United States v. Long, 905 F.2d 1572 (D.C. Cir. 1990)).
83. *Id.* at 885.
84. *Id.*
85. *Id.*
86. *Id.* at 886.
87. *Id.*
88. *Id.* at 887.
89. *Id.* at 888.
90. *Id.*
the firearm at the time of distribution; instead, it concluded that mere proximity has never been “sufficient to support a conviction under § 924(c)(1) in [the] circuit.”


Due to the conflict within the District of Columbia Circuit, the Circuit voted to consolidate the Bailey and Robinson cases for en banc reconsideration. The divided en banc court adopted a new test for the lower courts to apply to determine the definition of “use” for a conviction under § 924(c)(1). Writing for the majority, Judge Ginsburg held:

In the context of § 924(c)(1), “use” could be defined either narrowly, so as to encompass only the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense, or more broadly, so as to include the other ways in which a gun can be used to facilitate drug trafficking. The narrow definition has the virtue of simplicity; it is, after all, relatively easy to determine whether the defendant’s firing, brandishing, or displaying a gun was related to the defendant’s contemporaneous ... drug trafficking offense. The narrow definition also has the vice of simplicity ... to capture all of the various uses of a firearm that the Congress apparently intended to reach via § 924(c)(1).

The District of Columbia Circuit rejected the Long multifactor approach. The court concluded that the government must show only the proximity of the firearm to the drugs involved in the predicate offense, or the accessibility of the firearm to the defendant from the place where the drugs, drug paraphernalia, or drug proceeds were located. This test has become known as the “proximity and accessibility” test. The court ultimately affirmed each defendant’s conviction after applying the proximity and accessibility test.

In a strong dissent, joined by three judges, Judge Williams expressed his view that “the wording, history and context of § 924(c) call[ed] for a different bright-line rule.” The dissent understood the use prong to

91. Id. at 890.
93. See id.
94. Id. at 108.
95. Id. at 114.
96. Id. at 118.
97. Id.
98. Id.
99. Id.
100. Id. at 121 (Williams, J., dissenting).
connote active use and rejected the intended use theory because in the ordinary sense of the word, use means activity.\textsuperscript{101}

The United States Supreme Court granted review of the Bailey case due to the conflict among the circuits and within the circuits as to the use prong of § 924(c)(1).\textsuperscript{102}

B. The Unanimous Court

On December 6, 1995, the Supreme Court issued its ruling in Bailey v. United States.\textsuperscript{103} Justice O’Connor wrote for the unanimous Court, rejecting the District of Columbia Circuit’s proximity and accessibility test to determine “use” under 18 U.S.C. § 924(c)(1).\textsuperscript{104} In doing so, the Court reversed Bailey’s and Robinson’s convictions because there was not sufficient evidence to support the convictions, based on the new active-employment test.\textsuperscript{105}

The Supreme Court considered several paradoxical statements that illustrated the interpretational difficulties with which the circuits were struggling; then the Court rejected the proximity and accessibility test.\textsuperscript{106} The Court concluded that the word “‘use’ must connote more than mere possession of a firearm by a person who commits a drug offense.”\textsuperscript{107} Therefore, the Court concluded that the District of Columbia Circuit’s proximity and accessibility test was flawed for its failure to differentiate between mere possession and active use.\textsuperscript{108}

The Supreme Court found support for its conclusion in the language, context, and legislative history of § 924(c)(1).\textsuperscript{109} The Court opined that the context of use within § 924(c)(1) indicated that the government must show active employment of the firearm to satisfy the use prong.\textsuperscript{110} The Court began its analysis with the language of the statute—not only the bare meaning of use, but its “placement and purpose in the statutory scheme.”\textsuperscript{111} The Court commented on the fact that the statute explicitly differentiated between two types of conduct with a firearm—use and carry.\textsuperscript{112} The Court assumed that Congress used these two terms because “it intended each term to have a particular, nonsuperfluous meaning.”\textsuperscript{113} The Court then explained that a

\textsuperscript{101} Id.
\textsuperscript{104} Id. at 505-09.
\textsuperscript{105} Id. at 509.
\textsuperscript{106} Id. at 505-06.
\textsuperscript{107} Id. at 506.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 506-07.
\textsuperscript{113} Id. at 507.
firearm can be used without being carried and a firearm can be carried without being used.\textsuperscript{114}

The Supreme Court examined the context of § 924(c)(1) to illustrate the problems of the District of Columbia Circuit’s definition of use.\textsuperscript{115} Relying on Smith v. United States,\textsuperscript{116} the Court found that if Congress had intended a broader application of the statute, as the District of Columbia Circuit had found, Congress would have specified its intentions.\textsuperscript{117} Comparing 18 U.S.C. § 924(d)(1) with § 924(c)(1), the Court noted that Congress specified a broader interpretation of use in § 924(d)(1) than the liability attached to actual use in § 924(c)(1).\textsuperscript{118} The Court considered this difference between the two sections to be a demonstration that Congress did not intend a broad meaning of use in § 924(c)(1).\textsuperscript{119}

The Supreme Court then examined the amendments surrounding § 924(c)(1).\textsuperscript{120} The Court rejected the government’s contention that the amendments to § 924(c)(1) changed the terms of carry and use such that “the terms should now be understood to overlap.”\textsuperscript{121} Instead, the Court found that “there [was] no evidence to indicate that Congress intended to expand the meaning of ‘use’ so far as to swallow up any significance for ‘carry.’”\textsuperscript{122}

Justice O’Connor concluded the opinion by providing illustrations of activities that fall within the active employment standard set forth by the Court.\textsuperscript{123} Ultimately, “if the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not ‘used.’”\textsuperscript{124} In the end, the Court noted:

While it is undeniable that the active-employment reading of “use” restricts the scope of § 924(c)(1), the Government often has other means available to charge offenders who mix guns and drugs. . . . But the word “use” in § 924(c)(1) cannot support the extended applications that prosecutors have sometimes placed on it, in order to penalize drug-trafficking offenders for firearms possession.

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{117} Bailey v. United States, 116 S. Ct. at 507.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 507-08.
\textsuperscript{121} Id. at 508.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 508-09. The active employment standard includes brandishing, displaying, bartering, striking with, and firing or attempting to fire a firearm. Id. at 508. Moreover, reference to a firearm intended to change the circumstances of a crime, as well as, the presence of a gun on the table during a crime is clearly a “use” of a firearm. Id.
\textsuperscript{124} Id.
The language of § 924(c)(1) ... compels the conclusion that Congress intended "use" in the active sense of "to avail oneself of."  

IV. THE POTENTIAL PITFALLS OF BAILEY—SHOULD BAILEY HAVE BEEN APPLIED RETROACTIVELY?

Several potential problems arose out of the Supreme Court's decision in Bailey v. United States. Approximately ten thousand convicted criminals were in prison serving sentences under § 924(c)(1) when Bailey was decided, and the floodgates opened to all of them to seek relief. Many have criticized the Bailey decision for the mere fact that thousands of convictions could be reversed.

That concern became a reality when the courts began holding that Bailey applied retroactively. Courts immediately held that Bailey applied to § 924(c)(1) convictions on direct review. Then, the courts found that Bailey had a retroactive effect to cases on collateral review. Courts began overturning convictions under § 924(c)(1) almost immediately.

Not only has Bailey overturned thousands of convictions under the use prong, but two dilemmas also arose with respect to the jury instructions

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125. Id. at 509.
128. Id.; see also Whiting, supra note 16, at 688-90 (stating that the Bailey decision has sparked strong reaction among many legislators and law enforcement agents); Jeri Rowe, Gun Ruling Means Drug Resentencing, GREENSBORO NEWS & RECORD, Apr. 16, 1996, at B1 (illustrating the impact of the Bailey decision on inmates, legislators, and legal practitioners).
129. See United States v. Wacker, 72 F.3d 1453, 1463 (10th Cir. 1995), cert. denied, 117 S. Ct. 136 (1996). This case applied Bailey retroactively on the date it was decided, December 6, 1995. Id. at 1453; see also Sanabria v. United States, 916 F. Supp. 106, 114 (D. P.R. 1996) (applying Bailey under the Teague v. Lane, 489 U.S. 288, 300-01 (1989) retroactive rationale and finding that “Bailey announces a new, nonconstitutional rule of substantive law that produces a different result”).
130. United States v. Barnhardt, 93 F.3d 706, 708 (10th Cir. 1996).
131. See, e.g., United States v. Johnston, 127 F.3d 380, 404 (5th Cir. 1997) (reversing the § 924(c)(1) conviction because the government conceded that there was insufficient evidence of use, as construed in Bailey, to uphold the conviction), cert. denied sub nom. Alvarado v. United States, 118 S. Ct. 1174 (1998); United States v. Lindsey, 123 F.3d 978, 982 (7th Cir. 1997) (reversing the § 924(c)(1) conviction because the government conceded that the convictions could not stand in light of Bailey); United States v. Blount, 98 F.3d 1489, 1494 (5th Cir. 1996) (reversing the convictions under § 924(c)(1) because the defendant did not carry or use a firearm), cert. denied, 118 S. Ct. 895 (1998); United States v. Catlett, 97 F.3d 565, 574 (D.C. Cir. 1996) (vacating the § 924(c)(1) conviction because the government conceded in light of Bailey that the firearm was not used); United States v. Welch, 97 F.3d 142, 150 (6th Cir. 1996) (reversing the conviction because the mere presence of firearms in the room did not support the conviction under the use prong), cert. denied sub nom. Parker v. United States, 117 S. Ct. 999 (1997); United States v. David, 96 F.3d 1477, 1478-82 (D.C. Cir. 1996) (reversing the conviction because there was insufficient evidence to find use of a
used and the carry prong's application, resulting in even more overturned convictions. These dilemmas involve erroneous or inadequate jury instructions and conflicting definitions of carry which is resulting in many overturned convictions.

A. Inadequate Jury Instructions Lead to Overturned Convictions

With such a narrow construction of the use prong after Bailey, the courts were left to determine if the jury instructions given at trial were sufficient to sustain § 924(c)(1) convictions under the carry prong. Recently convicted defendants, as well as prisoners convicted up to ten years ago, are now allowed to file motions and appeals attempting to overturn their convictions because many juries likely received erroneous jury instructions on the use of a firearm.

The circuits are split on the issue of whether an erroneous or inadequate jury instruction on § 924(c)(1) should lead to an overturned conviction. In some of the circuits, courts have found that the erroneous instruction regarding the use and carry prongs was a harmless error and upheld the convictions. Still in other courts, in situations that the defendant did not...
object to the jury instruction, judges have found that the erroneous instruction did not rise to a level of a plain error. While in other courts, the erroneous jury instructions did not warrant reversal because it was possible to tell which ground the jury selected in convicting the defendant. Finally, in situations


135. See, e.g., United States v. Bonilla-Comacho, 121 F.3d 287 (7th Cir. 1997); United States v. Montes-Fierro, No. 96-2002, 1997 WL 174110, at *2 (10th Cir. Apr. 10, 1997), cert. denied, 118 S. Ct. 205 (1997); United States v. Miner, 108 F.3d 967 (8th Cir.), cert. denied, 118 S. Ct. 259 (1997); United States v. Taylor, 102 F.3d 767 (6th Cir. 1996), cert. denied, 118 S. Ct. 327 (1997); United States v. Feinberg, 89 F.3d 333 (7th Cir. 1996), cert. denied, 117 S. Ct. 997 (1997) (stating that any fact-finder would certainly conclude that the defendant carried a bomb that was sitting on his lap while driving in a car with the codefendant); United States v. Ramirez-Ferrer, 82 F.3d 1149, 1154 (1st Cir.), cert. denied, 117 S. Ct. 405 (1996) (stating that the defendant's failure to object to the jury instruction allowed the court to review for plain error); United States v. Baker, 78 F.3d 1241, 1248 (7th Cir. 1996), cert. denied, 117 S. Ct. 1720 (1997) (holding that a reasonable jury could have concluded that the defendant carried a firearm). The circuits have applied the Olanos test set out in United States v. Olanos, 507 U.S. 725 (1993), as the proper test. See, e.g., United States v. Miner, 108 F.3d at 969 (holding that it was not a plain error under the Olanos test regardless of whether the government conceded that it was a plain error); United States v. Taylor, 102 F.3d at 769-71 (holding that the erroneous jury instruction did not affect the defendant's substantial rights); United States v. Feinberg, 89 F.3d at 355; United States v. Ramirez-Ferrer, 82 F.3d at 1151, 1154; United States v. Baker, 78 F.3d at 1247-48. But see United States v. Chase, No. 95-5290, 1997 WL 657132, at *4 (4th Cir. Oct. 23, 1997) (holding that if the jury was improperly instructed as to the essential element of the offense, in this case the use instruction, and it is difficult to tell what the jury actually made their finding on, then the convictions must be set aside).

136. United States v. Hudgins, 120 F.3d 483, 484 (4th Cir. 1997). In Hudgins, the Fourth Circuit invoked the Yates rule, which addresses whether an erroneous jury instruction results in submission of a "legally inadequate" ground to convict the defendant. Id. at 486-87 (citing Yates v. United States, 354 U.S. 298 (1957)). Based on this test, the Fourth Circuit stated that it was not impossible to tell upon which ground the jury convicted the defendant. Id. Moreover, the Fourth Circuit noted that the other circuit's Olanos approach to addressing an erroneous jury instruction failed to "take into account the more direct route that is prescribed by the established Yates/Griffin rule." Id. at 488 n.3; see also United States v. Quinn, 123 F.3d 1415, 1428 (11th Cir. 1997) (upholding the conviction because the court was convinced that the jury found the defendant guilty of carrying, not using, the firearm); United States v. Mauldin, 109 F.3d 1159, 1161-62 (6th Cir. 1997) (holding that the jury would have found that he carried a firearm; therefore the conviction must stand); Wyley v. United States, No. 95-
of postconviction relief, some courts are finding that an erroneous instruction on § 924(c)(1) did not actually prejudice the defendant, and thus, upheld the conviction.\textsuperscript{137} Therefore, it is obvious that the circuits are split on which test to apply, but the courts usually reach the same result.\textsuperscript{138}

It appeared, nevertheless, that the majority of the circuits were leaning toward vacating the convictions under § 924(c)(1) for a new trial to allow a properly instructed jury to make a proper determination.\textsuperscript{139} For instance, the Tenth Circuit in \textit{United States v. Spring},\textsuperscript{140} found that the jury instruction focused on the use prong of § 924(c)(1) and failed to focus the jury's

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\textsuperscript{138} The Fourth Circuit stated, "The same result might be reached . . . by some courts in generally comparable Bailey-spawned situations, by employing the more tortured . . . plain error analytic route . . . ." \textit{United States v. Hodgins}, 120 F.3d 483, 488 n.3 (4th Cir. 1997).


attention on the proper elements of the carry prong.141 Therefore, the Tenth Circuit concluded that the jury instruction for § 924(c)(1) was incomplete, and as such, a plain error.142 In United States v. Miller,143 the Tenth Circuit again found that although the evidence supported a conviction under the carry prong, the case should be remanded for a new trial because the instruction on § 924(c)(1) was incorrect.144

Almost a year later, however, the Tenth Circuit overruled its Miller holding in United States v. Holland.145 In Holland, the Tenth Circuit held that “an erroneous ‘use’ instruction does not require reversal of the conviction when the jury was also instructed without objection to the ‘carry’” prong of § 924(c)(1).146 The Tenth Circuit held that the issue now is to determine if the jury verdict could be predicated on all the elements of the carry prong, regardless of the erroneous use instruction.147 If the verdict could be predicated on the carry prong, as it was found in Holland, the Tenth Circuit will uphold the defendant’s conviction because a defendant does not suffer actual prejudice by an erroneous use instruction; taking all the jury

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141. Id. at 1466; see also United States v. Smith, 82 F.3d 1564, 1567 (10th Cir. 1996) (holding that a § 924(c)(1) conviction could not stand when the court had “no assurance that the jury did not convict on the legally insufficient evidence and erroneous instruction regarding use of the firearm”), cert. denied, 118 S. Ct. 256 (1997).
142. United States v. Spring, 80 F.3d at 1466.
144. Id. at 1257-58; see also United States v. DeSantiago-Flores, 107 F.3d 1472, 1477 (10th Cir. 1997) (vacating the conviction under § 924(c)(1) because the instruction was “clearly defective in light of Bailey” as it did not define “use” or “carry” separately); United States v. Green, No. 96-5059, 1997 WL 307147, at *2 (10th Cir. June 9, 1997) (vacating the defendant’s conviction under § 924(c)(1) because the court could not determine with “absolute certainty that the jury based its verdict” on the carry prong), cert. denied sub nom. Hankins v. United States, 118 S. Ct., 318 (1997); United States v. Simpson, 94 F.3d 1373, 1379 (10th Cir.) (stating that the jury instruction was deficient because it did not define “carry” separately and the terms “use” and “carry” were redundant), cert. denied, 117 S. Ct. 411 (1996); United States v. Holland, No. 96-1102, 1996 WL 494325 (10th Cir. Aug. 27, 1996) (holding that the jury instruction for “carry” fails because there was no mention that the jury needed to find simultaneous transportation of the firearm), cert. denied, 118 S. Ct. 253 (1997). But see United States v. Arias-Santos, No. 96-1490, 1997 WL 452254, at *4 (10th Cir. Aug. 8, 1997) (holding that the improper jury instruction on the use prong did not prejudice the defendant because the jury necessarily determined that he carried the firearm).
146. Id. at 1359 n.4.
147. Id. The court stated that the court, en banc, unanimously agreed that prior cases inconsistent with this holding were overruled. Id. (citing United States v. DeSantiago-Flores, 107 F.3d 1472 (10th Cir. 1997); United States v Miller, 84 F.3d 1244 (10th Cir.), cert. denied, 117 S. Ct. 443 (1996)).
instructions together, the jury verdict established all the elements of the carry prong.148

The Sixth Circuit, however, has taken the stance that cases using erroneous jury instructions under pre-Bailey decisions should be vacated. In United States v. Moore,149 the Sixth Circuit vacated the § 924(c)(1) conviction because the jury instructions drew no distinction between use or carry.150 This allowed the jury to convict the defendant even if it had believed that the gun was not within the defendant’s reach; regardless of whether it had been physically transported.151 Furthermore, in United States v. Anderson,152 the Sixth Circuit found that the jury instruction affected the fairness of the judicial proceedings and constituted a plain error.153

The Eighth Circuit has consistently held that an erroneous jury instruction on the use prong warrants a reversal of the conviction under § 924(c)(1) because it is an instructional error.154 This reversal is appropriate regardless of whether the evidence is sufficient to satisfy the carry prong.155 In United States v. Caldwell,156 the Eighth Circuit held that “in deciding whether an error is clear under current law, the proper focus is the law applicable on appeal rather than at trial.”157 In Caldwell, the district court did not instruct the jury separately on the carry term and thus, it affected his substantial rights.158 The Eighth Circuit stated that a “failure to correct the error could result in a miscarriage of justice and would seriously affect the fairness,

150. Id. at 113-14.
151. Id.
153. Id. at 1315. But see United States v. Taylor, 102 F.3d 767, 771 (6th Cir. 1996) (holding that the jury instruction that permitted a conviction under § 924(c)(1) for carrying a firearm was not a plain error because it did not affect the defendant’s substantial rights), cert. denied, 118 S. Ct. 327 (1997). The dissent in Taylor strongly criticized the panel’s decision. Id. at 771-76 (Hillman, J., dissenting). Judge Hillman believed that the instant case fell squarely within the Moore decision and that there was no way to conclude that the jury implicitly reached the necessary finding; therefore, the erroneous jury instruction constituted a plain error. Id. at 775-76.
154. See United States v. Behler, 100 F.3d 632, 640 (8th Cir. 1996) (reversing a § 924(c) conviction for instructional error), cert. denied, 118 S. Ct. 152 (1997); United States v. Caldwell, 97 F.3d 1063, 1068 (8th Cir. 1996) (holding that a § 924(c)(1) instructional error constituted a plain error warranting reversal of the conviction). But see United States v. Miner, 108 F.3d 967, 969-70 (8th Cir.) (holding that an erroneous instruction did not amount to a plain error), cert. denied, 118 S. Ct. 259 (1997).
155. United States v. Behler, 100 F.3d at 639-40; United States v. Caldwell, 97 F.3d at 1069-70.
156. United States v. Caldwell, 97 F.3d 1063 (8th Cir. 1996).
157. Id. at 1069 (quoting United States v. Webster, 84 F.3d 1056, 1067 (8th Cir. 1996)).
158. Id. at 1068-69.
integrity or public reputation of judicial proceedings." The Eighth Circuit then considered whether the case should be remanded for a new trial, depending on whether there was sufficient evidence to support a conviction under the carry prong. It ultimately reversed and remanded for a new trial. Several months later, the Eighth Circuit applied the Caldwell holding and held there was a plain error because the court did not know whether the jury agreed to convict the defendant by finding that the defendant used the firearm or by finding that he carried a firearm.

The Fourth Circuit has split on how to deal with erroneous jury instructions in light of the Bailey decision. Various panels of the Fourth Circuit have released divergent decisions with respect to erroneous jury instructions. In United States v. Hawthorne, the Fourth Circuit, on its own initiative, addressed whether the deficient jury instructions on the § 924(c)(1) use element should reverse the convictions. After finding that there was sufficient evidence to support the jury’s verdict under post-Bailey reasoning, the Fourth Circuit reversed the conviction finding, “If the jury is misinstructed—or not instructed at all—as to an essential element of the crime, we must set aside the defendant’s conviction . . . .” The exception would be if, “beyond a reasonable doubt, the jury actually made the finding that inheres in the element.” The Fourth Circuit determined that it could not possibly know the jury’s rationale for finding use of the firearm, and ultimately vacated the convictions to allow the government to decide whether to retry the defendants.

In United States v. Smith, the Fourth Circuit also reversed the defendant’s conviction for misinstructing the jury on the use prong, regardless of the fact that defendant’s counsel conceded that there was sufficient evidence to support the jury’s verdict. Once again, the court quoted Hawthorne and found that because the jury was instructed as to both the use and the carry prongs, the court could not determine whether the jury convicted the defen-

159. Id. at 1069.
160. Id.
161. Id. at 1070.
165. Id. at 121.
166. Id. at 120-21. The Fourth Circuit found that although the evidence established that the firearms were only “present” during the drug transactions, a reasonable jury could have inferred that the firearms were left out in the open and used in that “sense of the term.” Id.
167. Id. at 121.
168. Id.
170. Id. at 124-25.
The Implications of Bailey v. United States

The defendant under § 924(c)(1) for use or carry of the firearm. Therefore, the Fourth Circuit reversed the conviction outright; giving the government the option to retry the defendant. The Fourth Circuit then published the decision of United States v. Hudgins. In this case, the panel of judges initially determined that the evidence was sufficient to support a conviction under the carry prong of § 924(c)(1). Then, the Fourth Circuit addressed whether the court’s conceded error on the use instruction required the case to be remanded for a new trial. The panel applied the rule of Griffin v. United States, finding that if any one of the grounds submitted to the jury to convict the defendant was supported by sufficient evidence, then the verdict must stand without further inquiry. Ignoring the Smith decision, this panel looked at the record and found that it was clear that the jury found the elements of the carry prong, regardless if it also found use under the erroneous use instruction. Thus, the panel was left with no doubt as to the jury’s guilty verdict under the carry prong and upheld the verdict.

Shortly after the Hudgins decision, another panel of the Fourth Circuit addressed an erroneous use instruction in United States v. Chase. In Chase, the panel did not acknowledge the reasoning of the Hudgins panel, but instead used the reasoning in Hawthorne and Smith in reversing the conviction because the jury was instructed under both the use and carry prong. At this point, it is difficult to tell in which direction the Fourth Circuit will head, but it is obviously applying two different tests with respect to erroneous jury instructions in light of Bailey.

The Seventh Circuit has also been charging down the path to vacate convictions under § 924(c)(1) and remand for new trials based on improper

171. Id.
172. Id. at 125.
174. Id. at 486. In this case, the government’s evidence established that the defendant carried the firearm during the drug transaction. Id.
175. Id. at 486-87.
176. Id.
177. Id. at 487.
178. Id. at 488.
180. Id. at *4.
instructions. In *United States v. Thomas*, the Seventh Circuit viewed the erroneous jury instruction as harmful because the court was not convinced that, had a jury been properly instructed under § 924(c)(1), it would not have convicted the defendants. The Seventh Circuit went more in depth when examining the jury instructions on the § 924(c)(1) charges in *United States v. Robinson* and set an essential framework that it intended to follow.

The essential framework is as follows: 1) if all the firearms evidence presented qualifies as either active-employment "use" or "carry," we will affirm the conviction despite the bad instruction; 2) if none of the evidence presented qualifies as either active-employment "use" or "carry," we will reverse the conviction outright; and 3) if some of the evidence presented could qualify as either active-employment "use" or as "carry," but other firearms evidence presented exemplifies only possession or some other type of now-defunct, inactive "use," we will reverse the conviction and remand for a new trial, since we cannot be sure whether the jury convicted on the proper basis or the improper basis.

This essential framework by the Seventh Circuit demonstrates the Seventh Circuit's concern of the disparate views surfacing throughout the circuits and within the circuits. These disparate views pose a number of potential consequences throughout the federal system. Some defendants that were convicted under an erroneous instruction, and that had their convictions upheld, may not have been convicted under the carry prong had the jury been properly instructed. On the other hand, instead of the courts of appeal viewing the evidence and deciding the issue, the district courts have become inundated by vacated and remanded cases. In turn, the government must decide if a clear-cut charge and conviction under the carry prong is worthy of

181. See, e.g., *United States v. Robinson*, 96 F.3d 246, 250 (7th Cir. 1996); *United States v. Hightower*, 96 F.3d 211, 215 (7th Cir. 1996); *United States v. Smith*, 80 F.3d 215, 221 (7th Cir. 1996); *United States v. Thomas*, 86 F.3d 647, 651 (7th Cir.), cert. denied sub nom. Story v. United States, 117 S. Ct. 392 (1996). But see *United States v. Bonilla-Comacho*, 121 F.3d 287, 291 (7th Cir. 1997) (jury instruction did not amount to a plain error); *United States v. Feinberg*, 89 F.3d 333, 340 (7th Cir. 1996) (upholding conviction under § 924(c)(1) because the erroneous use instruction did not rise to plain error level), cert. denied, 117 S. Ct. 997 (1997); *United States v. Baker*, 78 F.3d 1241, 1248 (7th Cir. 1996) (upholding the § 924(c)(1) conviction because the erroneous jury instruction did not rise to level of plain error), cert. denied, 117 S. Ct. 1720 (1997).


183. Id. at 651.


185. Id. at 250.

186. Id. (citations omitted).
not only the court’s time, but also their own time to retry the case. This flood of convicted criminal claims will likely lead to the dismissal of valid “carry” prong cases because the federal courts and United States Attorneys’ Offices will become overloaded from all the remanded cases for new trials. Thus, the question remains—should Bailey have been applied retroactively in this context?

B. Conflict Forming Among the Circuits—Issue of “Carry” Prong Left Unresolved by Bailey

The Supreme Court in Bailey explicitly declined to address the second and significant prong of § 924(c)(1)—the carry prong. In fact, the Bailey Court stated, “The ‘carry’ prong of § 924(c)(1) . . . brings some offenders who would not satisfy the ‘use’ prong within the reach of the statute.” On remand, inconsistencies are arising among the decisions of the various circuits in applying § 924(c)(1) with respect to the carry prong. These diverse applications of § 924(c)(1), which are occurring and had previously warranted the first decision by the Supreme Court in the Bailey decision with respect to 18 U.S.C. § 924(c)(1), will induce more confusion and inconsistent convictions among and within the circuits.

Following the Bailey decision, each of the circuits readressed the circumstances under which one may be convicted under the carry prong.

\[187. \text{See generally United States v. Everett, No. 96-3669, 1997 WL 420335 (7th Cir. July 23, 1997) (dealing with a coconspirator case surrounding § 924 convictions after the government decided not to retry two of the three coconspirators after the Seventh Circuit reversed their convictions); United States v. White, No. 95-10533, 1997 WL 154046 (9th Cir. May 26, 1997) (vacating the conviction in its entirety after the government informed the Ninth Circuit that it would not prosecute the defendant under § 924(c)(1)), cert. denied sub nom. Thompson v. United States, 118 S. Ct. 189 (1997).}


189. Id. at 509.

This is due to the fact that the evidence likely was insufficient to sustain the conviction under the use prong, requiring the circuits to determine whether or not the evidence was sufficient to sustain the conviction under the carry prong. Currently, two rules have emerged and have been applied by the circuits in upholding or reversing § 924(c)(1) convictions: the minority rule adopted by "ready accessibility" circuits, and the majority rule adopted by other circuits.

1. Minority Rule—Circuits Requiring "Ready Accessibility"

The Sixth Circuit was the first to determine if the defendant could be convicted under the carry prong following its determination that the defendant’s conviction clearly could not be sustained under the use prong in United States v. Riascos-Suarez.\textsuperscript{191} The Sixth Circuit held, in light of Bailey, that a conviction for carrying a gun in violation of § 924(c)(1) requires that "the firearm must be immediately available for use—on the defendant or within his or her reach."\textsuperscript{192} The defendant in Riascos-Suarez had a clearly visible gun in his vehicle, placed in the driver’s side console.\textsuperscript{193} Based on these facts, the Sixth Circuit held that the defendant carried the firearm for purposes of § 924(c)(1).\textsuperscript{194}

In United States v. Moore,\textsuperscript{195} the Sixth Circuit further clarified the carry prong.\textsuperscript{196} The Sixth Circuit stated that immediate availability is a key and necessary factor; but not a sufficient determinant.\textsuperscript{197} In Moore, the police found four loaded firearms strewn across the bedroom in which the sleeping defendant was apprehended.\textsuperscript{198} Under the Riascos-Suarez standard, the defendant would have been carrying a firearm for purposes of § 924(c)(1).\textsuperscript{199} Therefore, the Sixth Circuit determined that the dictionary definition of carry required some sort of physical transportation in order to satisfy the carry prong under § 924(c)(1).\textsuperscript{200} The Sixth Circuit noted that if the term "carry" was to include such a broad connotation, then Congress would have selected a

\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 623-24.
\textsuperscript{195} United States v. Moore, 76 F.3d 111 (6th Cir. 1996).
\textsuperscript{196} Id. at 112-13; see also United States v. Welch, 97 F.3d 142, 150 (6th Cir. 1996) (reversing a § 924(c)(1) conviction because the mere possession of a firearm in a room at the time of arrest did not support a conviction under the carry prong), cert. denied sub nom. Parker v. United States, 117 S. Ct. 999 (1997).
\textsuperscript{197} United States v. Moore, 76 F.3d at 113.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
more accurate term. Thus, the Sixth Circuit vacated the defendant’s conviction and remanded the case.

The Sixth Circuit has held its ground with regard to what is required to uphold a conviction under the carry prong of § 924(c)(1). In several more recent decisions, the Sixth Circuit has reiterated the requirement of the ready accessibility of the firearm.

The Ninth Circuit established its position on the carry prong in light of Bailey in United States v. Hernandez. In Hernandez, the defendant was convicted of using or carrying a firearm based on evidence that the defendant had a firearm locked in a toolbox with the drugs. The Ninth Circuit examined the Webster’s Dictionary definitions, which suggested that the “term ‘carry’ involves activity beyond mere possession.” Based on those definitions, the Ninth Circuit concluded that a defendant “must have transported the firearm on or about his or her person. . . . This means the firearm must have been immediately available for use by the defendant.” Therefore, the Ninth Circuit vacated the defendant’s convictions because they were not supported by the evidence.

201. Id.
202. Id. at 114.
203. See, e.g., United States v. Washington, 127 F.3d 510, 515 (6th Cir. 1997) (finding that the firearm was easily accessible in the automobile console of the vehicle); United States v. Allen, 106 F.3d 695, 702 (6th Cir.) (upholding the defendant’s conviction under the carry prong because the defendant physically transported the firearm in his briefcase, and the firearm was immediately available to him), cert. denied, 117 S. Ct. 2467 (1997); United States v. Malcut, 104 F.3d 880, 885-86 (6th Cir.), vacated, 116 F.3d 163 (1997) (reversing the defendant’s conviction because the firearm was unloaded, in a zippered gym bag in the back seat of the vehicle, and it was unclear by the evidence that the firearm would have been “within effortless reach”); United States v. Taylor, 102 F.3d 767, 771 (6th Cir. 1996) (holding that a jury could have concluded that the firearm was immediately available for use because it was located under his seat in the vehicle), cert. denied, 118 S. Ct. 327 (1997); United States v. Myers, 102 F.3d 227, 237 (6th Cir. 1996) (finding that the firearms were easily accessible to the defendant because they were found under the front seat of the vehicle), cert. denied, 117 S. Ct. 1720 (1997).
204. United States v. Hernandez, 80 F.3d 1253 (9th Cir. 1996).
205. Id. at 1257; see also United States v. Garcia, 77 F.3d 274, 277 (9th Cir. 1996) (overturning a § 924(c)(1) conviction because the defendant was charged only with “using” a firearm, which failed the active employment test set out in Bailey); United States v. Murrietta-Nunez, No. 94-10489, 1996 WL 65240, at *5 (9th Cir. Feb. 14, 1996) (reversing the defendants’ convictions because storing a gun for possible, later use did not constitute use or carry under the Bailey decision).
207. Id.
208. Id.
In *United States v. Staples*,\(^{209}\) however, the Ninth Circuit readressed the carry prong in a case in which the defendant's firearm was found in the glove compartment of the defendant's vehicle.\(^{210}\) The Ninth Circuit held that the defendant was carrying the firearm under the *Hernandez* standard because a firearm was carried in an automobile.\(^{211}\) Drawing guidance from the *Bailey* decision, the Ninth Circuit held that a defendant could carry a firearm in an automobile, not necessarily on or about his or her person.\(^{212}\) Thus, a firearm found in a glove compartment is about the defendant's person, within reach, and immediately available for use.\(^{213}\)

Defendants in the Second Circuit also challenged their convictions under § 924(c)(1) following the *Bailey* decision. In *United States v. Giraldo*,\(^{214}\) the Second Circuit found that the government only established that one of the defendants had carried the firearm during and in relation to a drug trafficking crime.\(^{215}\) Relying on the pre-*Bailey* decision of *United States v. Feliz-Cordero*,\(^{216}\) 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."\(^{217}\) Applying the pre-*Bailey* law to the facts of the case, the Second Circuit found that the evidence did not support a conviction under the carry prong for one defendant because that defendant was sitting in the back seat of the vehicle and the gun was found in a cavity below the change dish in the front of the vehicle.\(^{218}\) Therefore, that defendant could not easily reach the firearm.\(^{219}\) The evidence, however, was sufficient to support the conviction for the other defendant seated in the front seat of the vehicle.\(^{220}\)

Late in 1996, the Second Circuit was confronted with *United States v. Cruz-Rojas*,\(^{221}\) another case related to the carry prong of § 924(c)(1). The police in *Cruz-Rojas* discovered a firearm under the dashboard of the vehicle

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210. *Id.* at 464; see also *United States v. Willett*, 90 F.3d 404 (9th Cir. 1996) (sustaining the defendant's conviction for carrying a firearm during a drug trafficking crime because the defendant admitted in his plea agreement that the firearm was located in the vehicle on the front seat).

211. *United States v. Staples*, 85 F.3d at 464 (citing *United States v. Farris*, 77 F.3d 391 (11th Cir.), *cert. denied*, 117 S. Ct. 241 (1996); *United States v. Barber*, 594 F.2d 1242 (9th Cir. 1979)).

212. *Id.*

213. *Id.*


215. *Id.* at 677-78.


218. *Id.*

219. *Id.*

220. *Id.* at 677.

several months after the initial stop. The Second Circuit applied the law established in *Giraldo* and found little evidence that the gun was readily accessible to either of the defendants. Thus, the Second Circuit reversed and remanded the convictions because it could not reasonably infer from the evidence that the firearm was readily accessible to the defendant.

The Second Circuit then addressed the precise contours of the carry prong in a nonautomobile context in *United States v. Canady*. In *Canady*, police officers were dispatched to investigate a burglary call. The defendant invited the officers into the house, and as the officers were waiting for the defendant's alibi to arrive, they observed two firearms underneath a cushion on the loveseat where the defendant was sitting. The defendant was arrested and the police officers subsequently found cocaine under the cushions of the loveseat. The defendant challenged his convictions under § 924(c)(1) claiming insufficient evidence after the *Bailey* decision. The Second Circuit did not agree, however, finding that the evidence was sufficient to uphold the conviction for carrying a firearm under § 924(c)(1). The Second Circuit went through a comprehensive analysis of the carry prong of § 924(c)(1). Specifically, the Second Circuit reiterated its previous post-*Bailey* decisions in finding that “proximity to and accessibility of a firearm are necessary elements of ‘carrying’ a firearm in violation of section 924(c)(1).” The Second Circuit further stated, however, that this is not enough to satisfy the carry prong of § 924(c)(1). Instead, the Second Circuit found that the qualifications of the carry prong will be met only if the defendant “(1) had physical possession of the firearm, as distinct from constructive possession, or (2) moved the firearm from one place to another.” In this case, the Second Circuit found that even though there was not direct evidence that the defendant held or moved the firearm, other evidence established that the defendant actually bore it on his person. The evidence included the fact that a fingerprint was found on the gun, which he admitted he owned, and that it was near the cocaine. Therefore, the defen-

222. Id. at 284.
223. Id. at 285.
224. Id.
226. Id. at 354.
227. Id. at 354-55.
228. Id. at 355.
229. Id.
230. Id. at 356.
231. Id.
232. Id. at 357 (citing United States v. Cruz-Rojas, 101 F.3d 283 (2d Cir. 1996); United States v. Feliz-Cordero, 859 F.2d 250 (2d Cir. 1988)).
233. Id. at 358.
234. Id. (citations omitted).
235. Id.
236. Id.
dant “transported the gun when he stored it together with the cocaine in the
loveseat.”

The Eighth Circuit became concerned with the newly recognized
importance of the carry prong of § 924(c)(1) as well. In United States v.
White,238 the Eighth Circuit addressed the question of what constituted car-
rying for the purposes of a conviction under § 924(c)(1).239 After looking at
the dictionary definitions of “carry,” the Eighth Circuit found that “the
government must prove that [the defendant] bore the firearm on or about
his person during and in relation to a drug trafficking offense” to sustain a
conviction for carrying.240 In this case, the Eighth Circuit held the defendant’s
conviction must stand because he clearly carried the firearm on or about his
person before he hurled it into the open field.241

Several months later, the Eighth Circuit was confronted with another
conviction that required the court to readdress the carry prong of § 924(c)(1).
In United States v. Willis,242 the Eighth Circuit found that the Bailey decision
left intact the pre-Bailey cases that analyzed the carry prong.243 Therefore,
the Eighth Circuit held that the ordinary meaning of carry includes
“transporting firearms in the passenger compartment of a car loaded with
drugs”—the facts in the Willis case.244 Thus, the defendants’ convictions
under § 924(c)(1) were upheld because the guns remained readily accessible
to the defendants; the firearms were in the passenger compartment of the
vehicle.245

At this point, it was difficult to determine whether the Eighth Circuit
would follow the readily accessible rule. The Eighth Circuit informally estab-
lished its position, however, in United States v. Nelson.246 In Nelson, the
defendant was arrested after a sheriff’s deputy noticed a vehicle that was
emitting a strong marijuana odor, sitting in a closed park.247 A search of the
vehicle revealed marijuana and two unloaded shotguns in the rear interior of

237. Id.
238. United States v. White, 81 F.3d 80 (8th Cir. 1996).
239. Id. at 83.
240. Id.
241. Id. at 83-84.
242. United States v. Willis, 89 F.3d 1371 (8th Cir.), cert. denied, 117 S. Ct. 273
(1996).
243. Id. at 1378; see also United States v. Barry, 98 F.3d 373 (8th Cir. 1996)
(upholding a § 924(c)(1) conviction involving a shotgun that was found in the glove
compartment of the vehicle transporting the illegal drugs), cert. denied, 117 S. Ct. 1014
(1997); United States v. Rhodenizer, 106 F.3d 222 (8th Cir. 1997) (upholding a § 924(c)(1)
conviction because the firearm was found in the passenger compartment of the vehicle); United
States v. Peyton, 108 F.3d 876 (8th Cir. 1997) (upholding the defendant’s conviction for
carrying a firearm in violation of § 924(c)(1) after a gun was found under the passenger’s seat).
244. Id.
245. Id. at 1379.
247. Id. at 1325.
the hatchback, as well as a revolver in a well behind the driver’s seat.\textsuperscript{248} The defendant pleaded guilty, verified the location of the guns, and the sheriff also testified that the defendant could have reached the weapon and fired it within five to ten seconds.\textsuperscript{249}

The Eighth Circuit began its analysis by noting that the carry jurisprudence following the Bailey decision had not shifted.\textsuperscript{250} Instead, a firearm within the passenger compartment of a vehicle loaded with drugs meets the definition of carrying a firearm.\textsuperscript{251} Acknowledging that its decision in White seemed more strict than the pre-Bailey decisions, the Eighth Circuit stated that the pre-Bailey decision that a person can carry a firearm in a vehicle is still intact.\textsuperscript{252} The court then stated, “We will assume, without deciding, that ready availability of the firearm is required for a ‘carry’ conviction in this Circuit.”\textsuperscript{253} The evidence that the defendant could have the firearm ready to fire within five to ten seconds constituted a sufficient basis for a conviction under the carry prong; therefore, the court upheld the conviction.\textsuperscript{254} Thus, at this point, it would be safe to say that the Eighth Circuit would follow the ready accessibility requirement for a conviction under the carry prong of § 924(c)(1).

2. Majority Rule

The Eleventh Circuit, in United States v. Jones,\textsuperscript{255} reversed a defendant’s conviction under both the use and carry prongs because the evidence was not sufficient to maintain the conviction.\textsuperscript{256} In rejecting its pre-Bailey decisions, the Eleventh Circuit held that the presence of a firearm in a location near a sufficient amount of drugs did not satisfy the carry prong in light of Bailey.\textsuperscript{257}

For the first time, in March of 1996, the Eleventh Circuit addressed the sufficiency of evidence issue for supporting a conviction under the carry

\begin{itemize}
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Id.
\item \textsuperscript{250} Id. at 1326.
\item \textsuperscript{251} Id. (citing several post-Bailey decisions that reaffirmed the pre-Bailey carry jurisprudence).
\item \textsuperscript{252} Id. (citing United States v. Freisinger, 937 F.2d 383 (8th Cir. 1991)).
\item \textsuperscript{253} Id.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} United States v. Jones, 74 F.3d 275 (11th Cir. 1996), remanded by 116 S. Ct. 663 (1995).
\item \textsuperscript{256} Id. at 276.
\item \textsuperscript{257} Id. Prior to Bailey, the Eleventh Circuit held that the “presence of weapons in a location that the defendant used to distribute a significant quantity of illegal drugs is sufficient to submit to the jury the issue of whether the defendant used the firearm in connection with a drug-trafficking crime.” United States v. Clavis, 956 F.2d 1079, 1095 (11th Cir. 1992) (citing United States v. Poole, 878 F.2d 1389, 1393 (11th Cir. 1989)).
\end{itemize}
prong of § 924(c)(1) in the automobile context in United States v. Farris.\textsuperscript{258} In Farris, the defendant’s firearm was found in the glove compartment of the vehicle that had transported him to the drug deal.\textsuperscript{259} The Eleventh Circuit held that a reasonable jury could convict a defendant under the carry prong based on evidence that the defendant used the vehicle as a “drug distribution center” and that the firearm was carried in that vehicle.\textsuperscript{260}

The Seventh Circuit slightly altered its prior interpretation of “carry” in United States v. Baker.\textsuperscript{261} The Seventh Circuit found that the defendant carried the firearm within the meaning of the statute after the defendant was arrested during a routine traffic stop in which a gun and crack cocaine was found under the seat of a car.\textsuperscript{262} The Seventh Circuit found that “carry” would constitute “to move while supporting: TRANSPORT.”\textsuperscript{263} The Seventh Circuit agreed with the Sixth Circuit’s decision in Riascos-Suarez, to a certain extent, in holding that a defendant who has a firearm within his reach may be convicted under § 924(c)(1).\textsuperscript{264} The Seventh Circuit noted, however, that it did not wish to offer an opinion on whether carrying a firearm would be equal to having a loaded gun locked in the trunk of the car with the drugs.\textsuperscript{265} Clearly, this stance indicated that in certain instances involving certain factors, the court may stray away from its previous holdings.

That is clearly what occurred in United States v. Molina.\textsuperscript{266} In Molina, DEA agents discovered a secret compartment underneath the face of a speaker located in the rear seat on the driver’s side wall.\textsuperscript{267} In the compartment, the DEA agents found drugs and a fully loaded firearm.\textsuperscript{268} The Seventh Circuit rejected the defendant’s contentions that the Circuit had

\textsuperscript{258} United States v. Farris, 77 F.3d 391 (11th Cir.), cert. denied, 117 S. Ct. 241 (1996).

\textsuperscript{259} Id. at 395; see also United States v. Quinn, 123 F.3d 1415, 1428 (11th Cir. 1997) (upholding the conviction because there was overwhelming evidence that the defendant carried the firearm); United States v. Range, 94 F.3d 614, 617 (11th Cir. 1996) (holding that the evidence was sufficient to support a conviction under the carry prong because the firearm was found under the floor mat of the front seat of the defendant’s vehicle).

\textsuperscript{260} United States v. Farris, 77 F.3d at 395-96. The Eleventh Circuit provided very little analysis in the opinion; it merely relied on the government’s argument and the decisions of other circuits. See id. at 395 (citing United States v. Freisinger, 937 F.2d 383, 387 (8th Cir. 1991); United States v. Ross, 920 F.2d 1530, 1536 (10th Cir. 1990); United States v. Cardenas, 864 F.2d 1528, 1535-36 (10th Cir. 1989)).

\textsuperscript{261} United States v. Baker, 78 F.3d 1241 (7th Cir. 1996), cert. denied, 117 S. Ct. 1720 (1997).

\textsuperscript{262} Id. at 1245.

\textsuperscript{263} Id. at 1247 (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 175 (10th ed. 1993)) (internal quotations omitted).

\textsuperscript{264} Id.

\textsuperscript{265} Id.

\textsuperscript{266} United States v. Molina, 102 F.3d 928 (7th Cir. 1996).

\textsuperscript{267} Id. at 929.

\textsuperscript{268} Id.
adopted the Sixth Circuit’s definition of carry in its prior decision in *United States v. Baker.*

Rather, the Seventh Circuit finally addressed whether an additional factor of “ready accessibility” was necessary for a conviction of carry. The Seventh Circuit stated:

> Although in *Baker* we declined to decide whether the presence of a firearm and drugs located in the trunk of a car would be sufficient for a conviction under § 924(c)(1), today we state that it would, noting that a gun does not have to be within a defendant’s immediate reach. If a firearm and drugs are in the same place, and the gun has been moved at all, such as with a car, then both the carrying and relation prongs have been established even if both the gun and the drugs are locked together in the trunk of the car.

It is significant to note, however, that the Seventh Circuit stated that if the gun and drugs are not found in the same location, “the relation between [the gun and the drugs] would be more strained, even if the gun was easily accessible.” Thus, because the gun and drugs were found in the same area, the conviction under § 924(c)(1) was upheld.

The First Circuit addressed the carry prong of § 924(c)(1) for the first time in detail in *United States v. Ramirez-Ferrer.* A month earlier, the First Circuit had affirmed a § 924(c)(1) conviction under the carry prong in *United States v. Manning.* A panel of the First Circuit in *Manning,* however, decided not to “determine the precise contours of the ‘carry’ prong... as [the defendant’s] actions [met] any reasonable construction of the word.”

In *Ramirez-Ferrer,* the government presented evidence that the defendants were arrested about one mile off the Puerto Rican coast after the United States Customs Service found drugs and a firearm aboard the boat. The firearm was found under a shirt, near a storage compartment, close to where the defendant was seated when the boat was seized. The First Circuit noted that under the *Manning* holding, the limitations on the carry prong would be

269. *Id.* at 930.
270. *Id.* at 932.
271. *Id.* (citation omitted).
272. *Id.*
273. *Id.*
276. *Id.* at 216. In *Manning,* the government presented evidence that the defendant carried a briefcase from his vehicle into a residence. *Id.* The police found a briefcase that contained the firearm a few minutes later. *Id.*
277. *United States v. Ramirez-Ferrer,* 82 F.3d at 1150.
278. *Id.*
to situations in which the firearm was transported.\textsuperscript{279} Therefore, the First Circuit examined the two extremes in which one could define “carry.”\textsuperscript{280} At one extreme, carry could be defined so narrowly as to require actual physical contact between the defendant and the firearm.\textsuperscript{281} At the other extreme, carry could be defined so loosely that it is construed to mean the firearm must merely be transported without touching it or having it accessible.\textsuperscript{282} The First Circuit then examined the varying definitions of carry by the other circuits and adopted the broad application of the carry prong.\textsuperscript{283} The First Circuit determined that the convictions for the defendant’s conduct were sufficient for a conviction under the carry prong of § 924(c)(1).\textsuperscript{284} The First Circuit implicitly noted that in order to maintain a conviction, there must be persuasive authority emphasizing the accessibility and transportation of the firearm.\textsuperscript{285}

The First Circuit was once again confronted with a § 924(c)(1) conviction and decided to examine the issues more carefully in United States v. Cleveland.\textsuperscript{286} The defendants in Cleveland pleaded guilty to violations of § 924(c)(1) after DEA agents found three firearms in one vehicle and cocaine in the other vehicle.\textsuperscript{287} The defendants argued that there was insufficient factual basis for their guilty pleas in light of the Bailey decision.\textsuperscript{288} The First Circuit agreed that there was insufficient evidence under the use prong, but because the Supreme Court did not address the requirements relative to carry, an interpretation of carry was imperative.\textsuperscript{289}

The First Circuit stated that a firearm on a suspect’s person or in a vehicle is carrying within the context of § 924(c)(1), as the First Circuit had previously held in Ramirez-Ferrer.\textsuperscript{290} The First Circuit also noted that “[t]his result accords with our pre-Bailey ‘carry’ cases and with the holding of the other circuits to have considered this issue post-Bailey.”\textsuperscript{291} As to the second and more relevant issue, the First Circuit agreed with the Fourth, Seventh, and Tenth Circuits in concluding that a firearm may be carried in a vehicle “without necessarily being immediately accessible to the defendant while it is

\textsuperscript{279} Id. at 1152.
\textsuperscript{280} Id. at 1153.
\textsuperscript{281} Id.
\textsuperscript{282} Id.
\textsuperscript{283} Id. at 1153-54. The First Circuit specifically addressed the decisions of United States v. Farris, 77 F.3d 391 (11th Cir.), cert. denied, 117 S. Ct. 241 (1996), and United States v. Riascos-Suarez, 73 F.3d 616 (6th Cir.), cert. denied, 117 S. Ct. 136 (1996).
\textsuperscript{284} United States v. Ramirez-Ferrer, 82 F.3d at 1154.
\textsuperscript{285} Id.
\textsuperscript{287} Id. at 1059.
\textsuperscript{288} Id. at 1064-65.
\textsuperscript{289} Id. at 1065.
\textsuperscript{290} Id.
\textsuperscript{291} Id. at 1065-66 (citing numerous pre-Bailey cases, as well as other circuits’ decisions).
Drawing upon the “ordinary or natural meaning” of the word and dictionary definitions, the First Circuit stated:

We strongly doubt—given the omnipresence of automobiles in today’s world and in drug dealing, and given the basic meaning of “carry” as including transport by vehicle—that Congress, in prescribing liability for anyone who “uses or carries” a firearm during or in relation to a drug trafficking offense, meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction.\(^{293}\)

Moreover, the First Circuit found the reasoning of the contrary position to be unpersuasive.\(^{294}\) In fact, the First Circuit disagreed that the degree that one may reach the firearm would differentiate between carrying of a firearm and possession of a firearm.\(^{295}\) Additionally, the First Circuit did not believe that a distinguishing characteristic of carry is the “instant availability of the item carried.”\(^{296}\) Rather, the mere fact that the firearm was being moved from one place to another either on the person or in a vehicle was sufficient to support a conviction under § 924(c)(1).\(^{297}\) Therefore, the First Circuit upheld the convictions for violations of § 924(c)(1).\(^{298}\)

The Tenth Circuit addressed the § 924(c)(1) dilemma for the first time in United States v. Miller.\(^{299}\) The defendants in Miller were arrested after a routine traffic stop in which drugs and firearms were found.\(^{300}\) The firearms were found in the rear of the vehicle in a bag which was in close proximity to the drugs.\(^{301}\) The Tenth Circuit began its analysis with pre-Bailey decisions in

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292. Id. at 1067 (citing United States v. Mitchell, 104 F.3d 649, 653 (4th Cir. 1997); United States v. Molina, 102 F.3d 928, 932 (7th Cir. 1996); United States v. Miller, 84 F.3d 1244, 1260 (10th Cir.), cert. denied, 117 S. Ct. 443 (1996)).

293. Id. The First Circuit rejected the Black’s Law Dictionary definition of “carry arms or weapons,” finding it to be inapposite to the circumstances surrounding § 924(c)(1). Id. ("To wear, bear, or carry them upon the person or in the clothing or in a pocket, for purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person.") (quoting BLACK’S LAW DICTIONARY 214 (6th ed. 1990)).

294. Id. at 1068.

295. Id.

296. Id.

297. Id.

298. Id. at 1069.


300. Id. at 1249; see also United States v. Barnhardt, 93 F.3d 706, 710 (10th Cir. 1996) (holding that there was an adequate factual basis for the conviction under the carry prong of § 924(c)(1) because the defendant admitted to carrying the firearm tucked in the back of his pants during the drug transaction); United States v. Richardson, 86 F.3d 1537, 1549 (10th Cir.) (concluding that the defendant carried the firearm under the Miller definition because one firearm was found on his person and another next to him in the vehicle), cert. denied, 117 S. Ct. 588 (1996).

301. Id. at 1260.
order to determine if those decisions, which defined “carry” as the transportation of a firearm in a vehicle or on a person while the defendant has actual or constructive possession of the firearm while doing so, survived Bailey. Following a brief look at other circuits’ decisions, the Tenth Circuit noted that the Bailey decision did not conflict with any of its pre-Bailey decisions, and therefore, those decisions must stand. The Tenth Circuit upheld the convictions of the defendants, finding that acceptance of a narrow definition would result in an obviously foolish conclusion that the object must be within the reach of the carrier. If it was found that the individual is no longer carrying the firearm in this instance, he is doing something else, and that would be a foolish conclusion.

It took the Fourth Circuit more than a year after the Bailey decision before it decided the “carry” issue under 18 U.S.C. § 924(c)(1) in more definite terms. In United States v. Mitchell, the Fourth Circuit confronted the issue in a case involving a defendant that was arrested while facilitating a sale of cocaine to an undercover agent out of his automobile. The officers found a loaded firearm between the front bucket seats of the vehicle after the arrest. Acknowledging that there was not sufficient evidence to support a conclusion that the defendant used the firearm, the Fourth Circuit began an inquiry into the carry prong. The Fourth Circuit chose to “construe it in accord with its ordinary or natural meaning.” Therefore, the Fourth Circuit concluded that carry “requires knowing

302. Id. at 1258-59.
303. Id. at 1259-60. The Tenth Circuit specifically looked at the decisions of the First, Second, Sixth, Seventh, Ninth, and Eleventh Circuits. Id.
304. Id. The Miller court, however, reversed and remanded the case for a new trial because it found that the jury instructions were erroneous with respect to the charges under § 924(c)(1). Id. at 1257-58, 1261.
305. Id. at 1260.
306. Prior to the decision in United States v. Mitchell, the Fourth Circuit only briefly addressed the carry prong. See United States v. Hayden, 85 F.3d 153 (4th Cir. 1996). In Hayden, the Fourth Circuit held that evidence indicating that a firearm was immediately or readily available to the defendant would satisfy the possession necessary to constitute carrying. Id. at 162.
308. Id. at 651.
309. Id.
310. Id. at 652.
311. Id. at 653. The Fourth Circuit stated, “we are called upon to consider whether the evidence presented was sufficient to provide an adequate basis for [the defendant’s] plea under the ‘carry’ prong of § 924(c)(1)” because the Bailey Court made it “clear that an individual may violate § 924(c)(1) by ‘carrying’ a firearm” instead of using a firearm. Id.
312. Id. (quoting Smith v. United States, 508 U.S. 223, 227-28 (1993)). The Fourth Circuit looked at a number of different dictionary definitions to draw upon the plain meaning of the term. Id.
possession and bearing, movement, conveyance, or transportation of the firearm in some manner.\footnote{313}

Most significantly, however, the Fourth Circuit noted the split that had begun to arise with respect to the carry prong in light of the Bailey decision.\footnote{314} The Fourth Circuit decided not to follow several of the other circuits that have held that carry has an "additional factor" within the plain meaning of the term—"readily accessible."\footnote{315} Instead, the Fourth Circuit agreed with the Tenth Circuit in finding that the firearm does not have to be readily accessible.\footnote{316} Thus, the Fourth Circuit found that the record in Mitchell clearly established carry within the normal and natural meaning of § 924(c)(1).\footnote{317}

The Fifth Circuit has not provided a bright-line test that shows whether it would include an element of ready accessibility. The Fifth Circuit has, however, briefly addressed the degree of evidence needed to uphold a conviction under the carry prong of § 924(c)(1).\footnote{318} In United States v. Fike,\footnote{319} the Fifth Circuit agreed with the Sixth Circuit’s holding in Riascos-Suarez that placing a firearm under the driver’s seat of a car and transporting it establishes carrying for the purposes of § 924(c)(1).\footnote{320} The Fifth Circuit drew its conclusion on a brief analysis of the dictionary definition.\footnote{321}

\footnotetext{313}{Id. (citing United States v. Miller, 84 F.3d 1244 (10th Cir.), cert. denied, 117 S. Ct. 443 (1996)).}
\footnotetext{314}{Id.}
\footnotetext{315}{Id. (citing United States v. Cruz-Rojas, 101 F.3d 283 (2d Cir. 1996); United States v. Ramirez-Ferrer, 82 F.3d 1149 (1st Cir.), cert. denied, 117 S. Ct. 405 (1996); United States v. Hernandez, 80 F.3d 1253 (9th Cir. 1996); United States v. Riascos-Suarez, 73 F.3d 616 (6th Cir.), cert. denied, 117 S. Ct. 136 (1996)).}
\footnotetext{316}{Id. at 653-54. The Fourth Circuit provided a hypothetical situation that demonstrates a person carrying a firearm even when the firearm is not readily accessible. Id. at 653. Suppose an individual put cocaine and a firearm in a duffel bag at his residence; he leaves the residence and puts the bag into the trunk of his automobile. Id. At some point, the individual arrives at a specified location, removes the bag from the trunk, places the firearm in his or her jacket, and delivers the cocaine. Id. The Fourth Circuit stated that in this scenario, the individual “carried” the firearm in every stage of his journey within the meaning of § 924(c)(1). Id. Because the firearm is placed in the trunk, “the firearm does not cease to be ‘carried’ simply because it is not readily accessible to the offender.” Id. at 653-54.}
\footnotetext{317}{Id. at 654.}
\footnotetext{318}{See, e.g., United States v. Thompson, 122 F.3d 304 (5th Cir. 1997); United States v. McPhail, 112 F.3d 197 (5th Cir. 1997); United States v. Hall, 110 F.3d 1155 (5th Cir. 1997); United States v. Rivas, 85 F.3d 193 (5th Cir.), cert. denied, 117 S. Ct. 593 (1996); United States v. Fike, 82 F.3d 1315 (5th Cir.), cert. denied sub nom. Douglas v. United States, 117 S. Ct. 241 (1996).}
\footnotetext{319}{United States v. Fike, 82 F.3d 1314 (5th Cir.), cert. denied sub nom. Douglas v. United States, 117 S. Ct. 241 (1996).}
\footnotetext{320}{Id. at 1328.}
\footnotetext{321}{Id.}
Shortly thereafter, another panel of the Fifth Circuit also briefly decided a case surrounding the carry prong in United States v. Rivas. Citing the Eleventh Circuit's decision of Farris, as well as pre-Bailey decisions, the Fifth Circuit held that the carrying requirement is established if the person possesses a firearm in a vehicle. Thus, the defendant's conviction was upheld because it was undisputed that the firearm was in the defendant's possession during a drug trafficking offense and transported in a vehicle. Most recently, the Fifth Circuit vacated a defendant's conviction because it found there was not sufficient evidence to fulfill the carry prong. In United States v. Thompson, the firearm was found "stored in bureau drawers in a separate room, a factual situation vastly insufficient to support a conviction under the 'carry' prong of § 924(c)(1)."

3. Problems with Conflicting Interpretations of the "Carry" Prong

With such diversified views on the carry prong, a question arises; should the Bailey decision have been applied retroactively to the extent that it has, considering that the decision failed to address the second and, perhaps most significant prong, the carry prong?

Varying degrees of the definition of "carry" have arisen among the circuits following the Bailey decision. For example, the Second Circuit found that a conviction could not be sustained because the defendant was in the back seat of the vehicle and a firearm found in the front of the vehicle was not readily accessible to him. The Eighth Circuit, on the other hand, would likely have found that this evidence was sufficient to sustain a conviction on the carry prong of § 924(c)(1) because the defendant was in the "passenger compartment" of the vehicle where the gun was also located. Moreover, the First or Seventh Circuits would most likely hold that a conviction under the carrying prong could be sustained because the firearm was clearly carried in a vehicle, without requiring that the firearm be in the passenger compartment.

Furthermore, the circuits likely would have to reject the drug fortress theory with respect to the carry prong. A firearm located near the drug stash is clearly not carrying under § 924(c)(1). The Second Circuit, on the other

323. Id. at 195-96.
324. Id. at 196.
325. United States v. Thompson, 122 F.3d 304, 307 (5th Cir. 1997).
326. United States v. Thompson, 122 F.3d 304 (5th Cir. 1997).
327. Id. at 307.
hand, apparently has accepted the drug fortress theory, attempting to get any possible connotation of carry to be included as a violation of § 924(c)(1).\textsuperscript{331}

The circuits have shown the definite splits that previously arose with respect to the use prong prior to the Bailey decision. The First, Fourth, Seventh, Tenth, and Eleventh Circuits are in agreement as to the definition of carry—equivalent to transporting the firearm on or about the person or in a vehicle. The Second, Sixth, Eighth, and Ninth Circuits are also in agreement that the firearm must be on or about the person but within immediate reach in order to sustain a conviction under the carry prong. The split in circuits is the most apparent when looking at the carry prong in the automobile context. As explained, some of the circuits have held that the carry prong has been satisfied if the firearm is merely found in the vehicle.\textsuperscript{332} The other circuits require the firearm to be within immediate reach of the defendant while in the vehicle.\textsuperscript{333} This split will have to be resolved considering the diversity of convictions that will arise depending on the circuit in which the crime occurs.\textsuperscript{334}

V. CONCLUSION—WILL BAILEY RESULT IN THE DEMISE OF 18 U.S.C § 924(c)(1) AS IT CURRENTLY STANDS?

There is no doubt that the Bailey decision was a much needed and long anticipated decision in the area of criminal law. For years, criminal sentences were enhanced five years for the use of a firearm during or in relation to a drug trafficking crime when the firearm was never actively employed. Moreover, the Bailey decision provided a uniform test with respect to convictions under the use prong. The Bailey decision, however, clarified only a small part of the gray area of 18 U.S.C. § 924(c)(1).

The Bailey decision caused a serious uproar among American citizens and the United States Congress because of the mere fact that a number of convicted criminals are now walking the streets.\textsuperscript{335} In fact, in March 1996, Senator Jesse Helms introduced a Senate bill which would provide for increased mandatory minimum sentences for criminals possessing

\textsuperscript{331} See United States v. Canady, 126 F.3d 352 (2d Cir. 1997), cert. denied, 118 S. Ct. 1092 (1998).

\textsuperscript{332} See supra Part IV.B.2.

\textsuperscript{333} See supra Part IV.B.2.

\textsuperscript{334} As of the publication of this Note, the circuits were still issuing opinion after opinion from the fall-out of the Bailey decision. Unfortunately, not all the cases are included in this Note because of the abundance of post-Bailey decisions.

\textsuperscript{335} See Rowe, supra note 128, at B1; Murray, supra note 7, at A4; Whiting, supra note 16, 688-89; see also 142 Cong. Rec. S1970-77 (daily ed. March 13, 1996) (statement of Senator Jesse Helms); Violent and Drug Trafficking Crimes: The Effect of the Bailey Decision on Prosecution under Section 924(c) Before the Senate Comm. on the Judiciary, 104th Cong. 1-5, 22-26 (1996) (statements of Senator Mike Dewine, Senator Jesse Helms, Anthony M. Wilson, Agent in Charge, DEA, Thomas G. Hungar, attorney) [hereinafter Violent and Drug Trafficking Crimes].
firearms—increasing the minimum from five to ten years. In his speech surrounding the introduction of the bill, Senator Helms referred to the Bailey decision as undermining the efforts of Congress to crack down on "gun-toting thugs who commit violent felonies and drug trafficking offenses." Stating the decision was based on the "flimsiest reasoning," Senator Helms said the decision posed serious problems for law enforcement, weakens federal criminal law, and has led to the release of hundreds of violent criminals. The Senate has also introduced another bill with an extremely narrow approach in modifying § 924(c)(1). Other commentators suggest that because of the long history of confusion as to the use and carry prong of § 924(c)(1), Congress should amend the statute to replace the ‘carrying’ or ‘using’ of a gun under § 924(c) with ‘possession’ of a gun," or in the alternative, abolish § 924(c)(1) and allow the possession of a firearm to be an enhancement under the sentencing guidelines.

The uncertain area arising with respect to the carry prong of § 924(c)(1) may result in another review by the Supreme Court on § 924(c)(1)—only this time the Court will have to address the carry prong. On the other hand, the displeasure voiced by the United States Congress over the recent Bailey decision and the action taken by the United States Senate may lead to the ultimate upheaval of 18 U.S.C. § 924(c)(1) prior to any case being heard by the Supreme Court with respect to the carry prong. Many comments have been expressed by the courts, which need to be heeded by

336. 142 CONG. REC. S1970, S1977. In pertinent part, Senate Bill 1612 stated:

Section 924 (c)(1) . . . is amended to read as follows: (c)(1)(A) Except to the extent a greater minimum sentence is otherwise provided by any other provision of this subsection or any other law, a person who, during and in relation to any crime of violence or drug trafficking crime . . . for which a person may be prosecuted in a court of the United States, possesses a firearm shall, in addition to the punishment provided for such crime . . . (i) be punished by imprisonment for not less than 10 years; (ii) if the firearm is discharged, be punished by imprisonment for not less than 20 years; and (iii) if the death of a person results, be punished by the death penalty or by imprisonment for not less than life . . . ."

337. Id. at S1976.

338. Id. at S1977.

339. Violent and Drug Trafficking Crimes, supra note 335, at 26 (statement of Thomas G. Hungar, attorney). Senate Bill 1945 would add "a clause imposing liability on any person who 'has a firearm in close proximity to illegal drugs or drug proceeds, in close proximity at the time of his or her arrest, or in close proximity at the point of sale of illegal drugs.'" Id.


341. Id. at 682.

342. See Bailey v. United States, 116 S. Ct. 501, 507 (1995) (stating that if Congress had intended a broader application of the statute, it would have specified it); United States v. Baker, 78 F.3d 1241, 1247 (7th Cir. 1996) (holding that the court could not imagine that Congress intended such a narrow meaning of "carry," such as having the gun on his person),
Congress in making a stiffer statute that will warrant convictions in almost any instance that a firearm is present during or in relation to a crime of violence or a drug trafficking crime.

In the end, the Bailey decision provided a definite guideline to the uncertainty of convictions under 18 U.S.C. § 924(c)(1) with respect to the use prong. As discussed in this Note, however, serious side-effects in applying the Bailey decision retroactively have resulted. Although a revamping of § 924(c)(1) will not ameliorate the problems that have arisen from Bailey, such an overhaul of § 924(c)(1) is needed to help clarify the carry prong and provide prosecutors with a way in which to reach the original purpose of § 924(c)(1)—to punish those that possess firearms illegally.

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cert. denied, 117 S. Ct. 1720 (1997); United States v. Moore, 76 F.3d 111, 113 (6th Cir. 1996) ("[I]f Congress had meant section 924(c)(1) to implicate any individual who happens to be within arm's reach of a firearm, surely it would have selected a more accurate term than 'carry.'").