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## **Immediate Accessibility or Mere Transport: The Dueling Interpretations of the "Carrying" Element of 18 U.S.C. § 924 (c)(1)**

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Mulvey: Drug Crimes and Firearms

**IMMEDIATE ACCESSIBILITY OR MERE  
TRANSPORT: THE DUELING  
INTERPRETATIONS OF THE "CARRYING"  
ELEMENT OF 18 U.S.C. § 924 (c)(1)**

## **I. INTRODUCTION**

In recent years, Congress has sought to impose enhanced penalties for those individuals convicted of narcotics trafficking who choose to further their crime by the use or carrying of a firearm.<sup>1</sup> The enactment of such legislation seems to have followed a national outcry for help from the federal government in dealing with the drug problem in the United States.<sup>2</sup> In a country where drug-related, drive-by shootings and gang violence are an everyday occurrence, the federal government has been called upon to create a tougher and more consistent criminal code to help wage its war on drugs.<sup>3</sup> Equipped with such legislation as § 924 (c)(1), courts are mandated to impose minimum sentences for those drug related offenses that are exacerbated by the presence of a firearm.<sup>4</sup>

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<sup>1</sup> See 18 U.S.C. § 924 (c)(1) (Supp. 1998).

<sup>2</sup> See William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 315 (1993).

<sup>3</sup> Vivian Artenstein Alberts, *Federal Sentencing Enhancement: Mandatory Penalties for Firearms Use Under the Comprehensive Crime Control Act of 1984*, 19 LOY. L.A. L. REV. 823, 826 (1986). See also *Smith v. United States*, 508 U.S. 223 (1993). Justice O'Connor points out that in 1989 "56 percent of all murders in New York City were drug related" and the percentage in Washington, D.C. was "as high as 80 percent." *Id.* at 240.

<sup>4</sup> 18 U.S.C. § 924 (c)(1) provides:

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

Since the amendments which have attached severe penalties to narcotics crimes where firearms play a particular role, courts have struggled with the construction and plain-meaning of the statute, so as not to impose strict mandatory sentences for crimes not fully intended by Congress.<sup>5</sup>

Specifically at issue has been the meaning of the terms “uses” or “carries” with respect to the defendant and the firearm in question. The United States Supreme Court in *Bailey v. United States*<sup>6</sup> provided guidance for courts in dealing with the issue of what constitutes “use” of a firearm under § 924 (c)(1). In *Bailey*, the defendant was charged with drug trafficking when a search of his car’s passenger compartment during a routine traffic stop revealed twenty-seven bags of cocaine and a round of ammunition.<sup>7</sup> After his arrest for possession of cocaine, police searched the locked trunk of his car and found large amounts of cash and a bag containing a loaded pistol.<sup>8</sup> The presence of the firearm formed the basis of Bailey’s conviction under § 924 (c)(1)

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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.

*Id.*

<sup>5</sup> See, e.g., *United States v. Foster*, 133 F.3d 704 (9th Cir. 1998). The amendments are not intended to reach people such as policemen who are authorized to carry a firearm then commit a crime without the aid of the firearm. *Id.* at 707 n. 8.

<sup>6</sup> 516 U.S. 137 (1995).

<sup>7</sup> *Id.* at 139.

<sup>8</sup> *Id.*

resulting in a consecutive sixty-month prison term added onto the underlying drug sentence.<sup>9</sup>

The *Bailey* Court necessarily narrowed the definition of “use,” placing the burden on the government to show “active employment” of the firearm. Accordingly, mere possession is not enough to constitute “use” under § 924 (c)(1).<sup>10</sup> Under *Bailey*, the active-employment understanding of “use” certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm.<sup>11</sup>

Despite Justice O'Connor's specificity for the “uses” terminology of § 924 (c)(1) in *Bailey*, some question remains as to the scope of the “carry” prong of the statute. The question is further complicated by the frequently occurring situation where drugs and firearms are found aboard a moving vehicle, and are used in furtherance of a drug trafficking offense. In such circumstances, the “carrying” requirement of § 924 (c)(1) would seemingly be satisfied in that a gun aboard a moving vehicle is actually “transported” or “conveyed” along with the drugs, forming the basis of the predicate offense.

It is the objective of this Comment to discuss this issue, specifically the degree of accessibility of a firearm aboard a moving vehicle necessary to sustain a “carrying” conviction under § 924 (c)(1). It will also address the differing views of the various circuits, which have created a true conflict in interpretation. This circuit split has resulted in a recent grant of certiorari by the United States Supreme Court which will decide the scope of the “carry” prong of the statute this term.<sup>12</sup> This Comment will then specifically analyze the two cases which have been consolidated for argument before the Supreme Court. Finally, upon summarizing the divergence of the circuits, this Comment will conclude by predicting how the Supreme Court

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 143.

<sup>11</sup> *Id.* at 148.

<sup>12</sup> See *Cleveland v. United States*, 106 F.3d 1056 (1st Cir. 1997), *cert. granted*, 66 U.S.L.W. 3416 (U.S. Dec. 16, 1997) (No. 96-8837); *Muscarello v. United States*, 106 F.3d 636 (5th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3416 (U.S. Dec. 16, 1997) (No. 96-1654).

might eventually rule with regard to the permissible scope of 18 U.S.C. § 924 (c)(1).

## II. BACKGROUND

18 U.S.C. § 924 (c)(1) imposes a mandatory five year term of imprisonment for using or carrying a firearm during and in relation to any drug trafficking offense.<sup>13</sup> “When Congress enacted the current version of § 924 (c)(1), it was no doubt aware that drugs and guns are a dangerous combination.”<sup>14</sup> Indeed, it has become increasingly self-evident that guns and drugs go hand-in-hand.<sup>15</sup> This close relationship between drug crimes and firearms perhaps led to the inception of modern-day § 924 (c)(1), “the policy response of the legislative and executive branches to . . . heightened public concern about the escalating drug and violence problems . . . .”<sup>16</sup>

Congress first made strides toward mandatory sentencing for drug-related crimes with the Narcotic Control Act of 1956<sup>17</sup> which imposed lengthy mandatory minimum sentences for “drug

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<sup>13</sup> See *supra* note 4 and accompanying text.

<sup>14</sup> *Smith v. United States*, 508 U.S. 223, 240 (1993).

<sup>15</sup> See *U.S. v. Giraldo*, 80 F.3d 667, 676 (2d Cir. 1996) (noting that “guns are among the common ‘tools’ of the narcotics trade.”).

<sup>16</sup> *Wilkins*, *supra* note 2, at 306.

<sup>17</sup> Pub. L. No. 84-728, 70 Stat. 567 (1956). The Narcotic Control Act of 1956 amended the Internal Revenue Code of 1954 and the Narcotic Drugs Import and Export Act “to provide for a more effective control of narcotic drugs . . . .” *Id.* The Act states in pertinent part:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction . . . or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug . . . shall be imprisoned not less than five or more than twenty years . . . .

*Id.* at 570. Furthermore, the Act states that “the imposition or execution of sentence shall not be suspended [and] probation shall not be granted.” *Id.* at 569.

importation and distribution offenses.”<sup>18</sup> However, the Act was met with much resistance because of its severity, and it was eventually repealed in 1970.<sup>19</sup> In the next decade, the nation became dissatisfied with the “revolving-door system”<sup>20</sup> of justice, where “offenders often were incarcerated, deemed rehabilitated, and released only to start the cycle anew.”<sup>21</sup> Congress’ response was two-fold: (1) the reform of sentencing guidelines,<sup>22</sup> and (2) the imposition of mandatory sentencing.<sup>23</sup>

Section 924 (c) was originally enacted in 1968 as part of the Omnibus Crime Control and Safe Streets Act of 1968,<sup>24</sup> proscribing the unlawful carrying of a firearm while engaged in a federal felony.<sup>25</sup> The 1968 statute however proved ineffective as a deterrent, allowing both parole and suspended sentences.<sup>26</sup> Furthermore, the Supreme Court at that time interpreted § 924 (c) “as a cumulative enhancement provision, rather than as a separate, additional offense.”<sup>27</sup> Thus, if the underlying offense itself called for statutorily imposed enhanced sentences, § 924 (c) could not be used to impose further enhancements.<sup>28</sup>

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<sup>18</sup> Michael J. Riordan, *Using a Firearm during and in Relation to a Drug Trafficking Crime: Defining the Elements of the Mandatory Sentencing Provision of 18 U.S.C. § 924(c)(1)*, 30 DUQ. L. REV. 39, 39 (1991).

<sup>19</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801-971).

<sup>20</sup> Wilkins, *supra* note 2, at 305.

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

<sup>22</sup> *Id.* at 306.

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

<sup>24</sup> See Allan L. Schwartz, *Construction and Application of Provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 924(c)) That Person Who Uses Firearm to Commit, or Carries Firearm Unlawfully During Commission of, Federal Felony, Shall Be Sentenced to Term of Imprisonment in Addition to Punishment for Such Felony*, 25 ALR FED 678, 679-80 (1975).

<sup>25</sup> *Id.* at 680.

<sup>26</sup> Thomas A. Clare, *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, 823 (1994).

<sup>27</sup> *Id.*

<sup>28</sup> See generally *Simpson v. United States*, 435 U.S. 6 (1978).

In 1984, both parties in Congress responded to a public concern over the "nation's rising crime rate"<sup>29</sup> with the enactment of the Comprehensive Crime Control Act of 1984 [hereinafter "CCCA"],<sup>30</sup> an extensive crime bill which sought to revise many areas of the federal criminal code including "bail reform, narcotics enforcement, forfeiture, and sentencing."<sup>31</sup> Indeed, the Reagan Administration staunchly supported the passage of the CCCA claiming interest in "improv[ing] the efficiency and coordination of Federal law enforcement, with special emphasis on violent and drug-related crime."<sup>32</sup>

Congress amended § 924 (c) and incorporated it into the CCCA,<sup>33</sup> requiring mandatory five year sentences without parole, thereby curtailing judicial discretion in sentencing.<sup>34</sup> Proponents of mandatory sentencing see many advantages to these reforms, citing more predictable prison terms, increased public safety, increased efficiency of federal law enforcement, and increased deterrence to violent and drug-related crime.<sup>35</sup> On the other hand, critics of mandatory minimum penalties such as those prescribed by § 924 (c)(1), claim a disadvantage in the impairment of a judge's ability to consider each defendant on a case-by-case basis.<sup>36</sup> There is also a serious concern as to increased prison overcrowding.<sup>37</sup> "[W]here mandatory sentences for serious crime had gone into effect, both time served and incarceration rates increased."<sup>38</sup>

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<sup>29</sup> Alberts, *supra* note 3, at 832.

<sup>30</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

<sup>31</sup> Riordan, *supra* note 18, at 42.

<sup>32</sup> Alberts, *supra* note 3, at 833 n. 80.

<sup>33</sup> The 1984 Amendment changed the "any felony" language to "any crime of violence" and inserted the words "and in relation to" following the word "during." As such, there must be some nexus between the violent predicate offense and the use or carrying of a firearm. Also, the term 'unlawfully' as pertaining to the carrying of a firearm was eliminated.

<sup>34</sup> Alberts, *supra* note 3, at 832.

<sup>35</sup> *Id.* at 833.

<sup>36</sup> *Id.* at 832.

<sup>37</sup> *Id.* at 831.

<sup>38</sup> *Id.*

As further ammunition in its continuing war on drugs, Congress again amended § 924 (c)(1) in 1986, applying mandatory minimum sentencing to drug crimes as part of The Firearm Owners' Protection Act.<sup>39</sup> As such, a person who "during and in relation to ... [a] drug trafficking crime ... uses or carries a firearm" is subject to the five-year mandatory minimum sentence enhancement of 18 U.S.C. § 924 (c)(1).<sup>40</sup>

The various amendments to § 924 (c) have been criticized as "piecemeal legislation,"<sup>41</sup> thus resulting in inconsistency in interpretation.<sup>42</sup> On the whole, however, the "purpose of [these] amendments . . . was to impose harsher sanctions 'where firearms facilitated, or had the potential of facilitating, the commission of a felony,' and, more specifically, the commission of a drug trafficking crime."<sup>43</sup>

### III. THE CIRCUITS IN CONFLICT

"Section 924 (c)(1) has been the source of much perplexity in the courts. The circuits are in conflict both in the standards they have articulated and in the results they have reached."<sup>44</sup> Since *Bailey v. United States*,<sup>45</sup> the circuit courts have been better able to distinguish the "use" of a firearm "during and in relation to a drug trafficking offense" as set forth by the statute. As articulated in *Bailey*, "use" connotes "active employment" of a firearm rather than mere possession.<sup>46</sup> Furthermore, "use"

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<sup>39</sup> Pub. L. No. 99-308, 100 Stat. 449 (codified at 18 U.S.C. § 921 (1986)).

<sup>40</sup> 18 U.S.C. § 924 (c)(1) (Supp. 1991). The 1986 amendment inserted the "drug trafficking crime" language after "any crime of violence," thus imposing enhanced penalties if some nexus between the use or carrying of a firearm and some drug trafficking offense occurs. *Id.*

<sup>41</sup> Clare, *supra* note 26, at 825.

<sup>42</sup> *Id.* at 825-26.

<sup>43</sup> Riordan, *supra* note 18, at 46 n. 55.

<sup>44</sup> *Bailey v. United States*, 516 U.S. 137, 142 (1995).

<sup>45</sup> 516 U.S. 137 (1995).

<sup>46</sup> *Id.* at 143.



should mean “to avail oneself of,”<sup>47</sup> which would include, but not be limited to, brandishing, displaying or firing, of a firearm.<sup>48</sup>

The *Bailey* Court recognized that the interpretation of “use” and “carry” could overlap under § 924 (c)(1).<sup>49</sup> However, the Court was loathe to find that Congress “intended that they be understood as redundant.”<sup>50</sup> Rather, the decision in *Bailey* reserved an independent meaning for the “carry” prong of the statute, stating that “a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction; . . . and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction.”<sup>51</sup>

The question of the use or carrying of a firearm in the commission of a narcotics trafficking crime is further complicated by the locale of many drug arrests, a moving vehicle. As case law illustrates, many drug offenders are apprehended while in transit, usually in the role of courier of both drugs *and* weapons.<sup>52</sup> Without brandishing, displaying, or mentioning the firearm in the vehicle, it could hardly be said that the defendant “used” the firearm under the *Bailey* criteria. Rather, most often, guns in this scenario are hidden in the glove compartment,<sup>53</sup> under the seat,<sup>54</sup>

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<sup>47</sup> *Id.* at 150.

<sup>48</sup> *Id.* at 148.

<sup>49</sup> *Id.* at 145.

<sup>50</sup> *Id.* at 146.

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

<sup>52</sup> See *United States v. Pineda-Ortuno*, 952 F.2d 98 (5th Cir. 1992) (affirming gun carrying convictions where defendants admitted operating a vehicle knowing that guns and drugs were hidden under the back seat). The Fifth Circuit noted that “the word ‘carry’ derives from the french *carier*, which means ‘to transport in a vehicle’. . . .” *Id.* at 104; see also *United States v. Freisinger*, 937 F.2d 383 (8th Cir. 1991) (holding that transporting a firearm in the passenger compartment of a vehicle containing drugs suffices for a section 924 (c) conviction); see also *United States v. Ramos*, 861 F.2d 228 (9th Cir. 1988) (finding the fact that a defendant transported cocaine and a concealed weapon en route to a drug sale sufficient to prove a causal connection between firearm and drug trafficking crime).

<sup>53</sup> See *United States v. Farris*, 77 F.3d 391, 393-94 (11th Cir. 1996) (stating that a gun found in the glove compartment of a vehicle which was being used as a drug distribution center, was “carried” for purposes of section 924(c)).

or even within secret compartments inside the vehicle.<sup>54</sup> In these situations, courts differ as to whether such placement of a firearm, while arguably close in proximity to both the defendant and the drugs, still suffices for a carrying charge under § 924 (c)(1).<sup>56</sup>

In *United States v. Pimentel*,<sup>57</sup> the Second Circuit dealt with the situation of a defendant, Pimentel, who was found in the front passenger seat of a car during a drug transaction wherein a loaded gun, drugs, and cash were to be found in a secret compartment on the back of his seat.<sup>58</sup> Access to the secret compartment was accomplished by Pimentel's co-conspirators in the crime.<sup>59</sup> The driver, Berroa, who by "pressing the rear defogger button on the car's dashboard plus a button by the door on the driver's side of the car"<sup>60</sup> opened the compartment to an accomplice, Morrell, who was positioned in the back seat ready to exchange drugs and money from within the compartment.<sup>61</sup> Pimentel was subsequently convicted of narcotics trafficking, as well as using and carrying a firearm during and in relation to the underlying drug crime.<sup>62</sup> He appealed the firearm count contending

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<sup>54</sup> See *United States v. Eaton*, 890 F.2d 511, 512 (1st Cir. 1989) (holding that a gun found under the front seat of the truck defendant was driving could be deemed "carried" under section 924 (c), given that the gun was loaded, that it was within easy reach, and that statements made by defendant showed intent to use the gun to protect the contraband).

<sup>55</sup> See *United States v. Pimentel*, 83 F.3d 55, 57 (2d Cir. 1996) (holding that a gun hidden from view in a secret compartment within a car from which drugs are distributed suffices for a carrying conviction).

<sup>56</sup> See *United States v. Travis*, 993 F.2d 1316 (8th Cir.), *cert. denied*, 510 U.S. 383 (1993) (affirming carrying conviction under section 924 (c)(1) where firearms were found in locked glove compartment of car that defendant was driving). *But see* *United States v. Cruz-Rojas*, 101 F.3d 283, 286 (2d Cir. 1996) (arguing that despite the transport of concealed drugs and weaponry, the gun conviction should be vacated because the gun was hidden "up under the dash of [the] vehicle," and thus was not readily accessible to defendants).

<sup>57</sup> 83 F.3d 55 (2d Cir. 1996).

<sup>58</sup> *Id.* at 57.

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

<sup>60</sup> *Id.*

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

<sup>62</sup> *Id.* at 57-58.

insufficient evidence to show that he used or carried the gun.<sup>63</sup> Furthermore, he claimed that the gun was indeed inaccessible to him.<sup>64</sup>

The court agreed, as per *Bailey*, that the gun was not actively employed and thus not “used.”<sup>65</sup> However, Pimentel was still liable for the “carrying” prong of § 924 (c)(1) under a *Pinkerton*<sup>66</sup> theory of liability which states that a co-conspirator may be held responsible for the substantive acts of a co-conspirator if those acts are performed in furtherance of the conspiracy, and may reasonably be foreseen as a consequence of the conspiracy.<sup>67</sup> Here, Pimentel was found to be part of the drug conspiracy.<sup>68</sup> “Morell and Berroa had collaborative access to the gun,”<sup>69</sup> and there was ample evidence to show that Pimentel knew of the presence of the gun and could reasonably foresee the carrying of the firearm as part of the conspiracy.<sup>70</sup>

The *Pimentel* court relied on *United States v. Giraldo*<sup>71</sup> in determining that Morrell and Berroa committed the substantive offense for which Pimentel was ultimately held liable.<sup>72</sup> Morrell and Berroa each had a part in gaining access to the gun, thus it was immediately accessible to them in collaboration.<sup>73</sup> In *Giraldo*, a change dish between the two front seats of a Pontiac

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<sup>63</sup> *Id.* at 58.

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

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

<sup>66</sup> See *Pinkerton v. United States*, 328 U.S. 640, 646-48 (1946); see also *United States v. Pazos*, 993 F.2d 136, 141 (7th Cir. 1993) (stating that “[a] conspirator in a drug conspiracy can be held liable for a coconspirator’s § 924 (c) violation because it is reasonably foreseeable that a firearm may be carried during a drug transaction.”).

<sup>67</sup> Alois Valerian Gross, J.D., *Federal Criminal Liability of Narcotics Conspirator for Different Substantive Crime of Other Conspirator*, 77 ALR FED 661, 662 (1986).

<sup>68</sup> *Pimentel*, 83 F.3d 55 at 58.

<sup>69</sup> *Id.*

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

<sup>71</sup> 80 F.3d 667 (2d Cir. 1996).

<sup>72</sup> *Pimentel*, 83 F.3d at 58.

<sup>73</sup> *Id.*

easily lifted out to expose a hiding compartment for a firearm.<sup>74</sup> The Second Circuit concluded that the driver, Fermin, carried the firearm in relation to a narcotics offense when: (1) the gun was easily within his reach, (2) he knew the gun was there, and (3) it could be inferred that the car belonged to him, as he was the driver, and he did have documents of ownership of the car on his person.<sup>75</sup> Furthermore, a carrying charge may reasonably be sustained in the case of a concealed weapon when, “in some circumstances, a defendant puts a gun into place to protect drugs or to embolden himself.”<sup>76</sup> In sum, “Second Circuit law requires ‘at least a showing that the gun was within reach during the commission of the drug offense in order to sustain a conviction for carrying a firearm.’”<sup>77</sup>

In defining the “carry” prong of § 924 (c)(1), many courts have looked to the ordinary meaning of the term itself for guidance. The First Circuit adopted a definition of “carry” that incorporates the “element of transportation.”<sup>78</sup> In *United States v. Ramirez-Ferrer*,<sup>79</sup> the court utilized Webster’s Third New International Dictionary to find varied definitions of “carry” as follows: “to move while supporting (as . . . in one’s hands or arms),” “to move an appreciable distance without dragging,” and “to bring along to another place.”<sup>80</sup>

The facts of *Ramirez-Ferrer* involved an illegal drug distribution operation and a loaded gun aboard a moving boat.<sup>81</sup> The gun was found partially hidden but in close proximity to the defendant at the time the boat was interdicted.<sup>82</sup> The court conceded that Ramirez-Ferrer did not “move the firearm while supporting it in

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<sup>74</sup> *Giraldo*, 80 F.3d at 672.

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

<sup>76</sup> *Id.* at 675 (quoting *United States v. Bailey*, 516 U.S. 137, 145 (1995)).

<sup>77</sup> *United States v. Santos*, 84 F.3d 43, 47 (2d Cir. 1996) (quoting *United States v. Feliz-Cordes*, 859 F.2d 250, 253 (2d Cir. 1988)).

<sup>78</sup> *United States v. Ramirez-Ferrer*, 82 F.3d 1149, 1152 (1st Cir. 1996).

<sup>79</sup> 82 F.3d 1149 (1st Cir. 1996).

<sup>80</sup> *Id.* at 1152 (citing WEBSTER’S THIRD NEW DICTIONARY 343 (1986)).

<sup>81</sup> *Id.* at 1150.

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

[his] hands or arms . . . .”<sup>83</sup> “However, transporting a firearm on a boat would certainly implicate moving it ‘an appreciable distance without dragging it’”<sup>84</sup> or “bringing it along to another place.”<sup>85</sup> The court upheld the conviction for carrying under § 924 (c)(1) based on the accessibility of the gun and the physical transportation of the weapon in relation to the drug offense.<sup>86</sup>

Similarly, “a number of courts of appeals have held that possessing a firearm in an automobile during and in relation to a drug trafficking crime constitutes ‘carrying’ under § 924 (c)(1).”<sup>87</sup> In *United States v. Eyer*,<sup>88</sup> the Third Circuit ruled that the presence of a fully loaded gun found with drugs in the console between the two front seats of a car satisfied the carrying prong of § 924 (c)(1) simply in that the gun was easily accessible and in transit aboard the vehicle.<sup>89</sup>

In *United States v. Brockington*,<sup>90</sup> the Fourth Circuit recognized that one is guilty of carrying a firearm under § 924 (c)(1) when its presence is used in relation to the drug trafficking crime.<sup>91</sup> In this case, Brockington was arrested as he was riding in a taxi, and found to have drugs in his possession clearly intended for distribution.<sup>92</sup> Furthermore, a fully loaded weapon was found “under the floormat directly beneath Brockington’s seat in the cab.”<sup>93</sup> The *Brockington* court affirmed the conviction for “carrying” a firearm despite the fact that the defendant was not physically carrying the firearm at the time.<sup>94</sup> The court based its

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<sup>83</sup> *Id.* at 1153.

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

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1154.

<sup>87</sup> See *United States v. Eyer*, 113 F.3d 470, 475 (3rd Cir. 1997).

<sup>88</sup> 113 F.3d 470 (3rd Cir. 1997).

<sup>89</sup> *Id.* at 476.

<sup>90</sup> 849 F.2d 872 (4th Cir. 1988).

<sup>91</sup> *Id.* at 876.

<sup>92</sup> *Id.* at 874.

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

<sup>94</sup> *Id.* at 876. “Th[e] evidence, coupled with the common sense recognition that drug dealing is a dangerous and often violent enterprise, more than supports an inference that Brockington carried the weapon to facilitate his ‘business.’” *Id.*

decision on the defendant's admission that he possessed the firearm for protection, and that he carried the weapon to facilitate his business.<sup>95</sup>

The Fifth Circuit in *United States v. Pineda-Orturo*<sup>96</sup> differentiates between "carrying" on one's person and via some medium of transport.<sup>97</sup> "When a vehicle is used, 'carrying' takes on a different meaning from carrying on the person because the means of carrying is the vehicle itself."<sup>98</sup> In *Pineda-Orturo*, large quantities of drugs and firearms were found inside a detained vehicle occupied by the defendants.<sup>99</sup> The evidence amply showed that the defendants operated the vehicle with knowledge of the presence of the firearms, and the firearms were in the car during and in relation to a drug-related crime.<sup>100</sup> The Fifth Circuit then noted that while constructive possession ordinarily might not equate to carrying, "constructive possession will support a conviction for carrying a firearm in a motor vehicle, if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime."<sup>101</sup> Thus, unlike the Second Circuit, the Fifth Circuit does not require that the gun carried aboard a moving vehicle be immediately accessible and within reach.

The Sixth Circuit, however, requires a higher degree of accessibility with regard to a weapon aboard a moving vehicle. In *United States v. Riascos-Suarez*,<sup>102</sup> the court found "that in

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<sup>95</sup> *Id.* See also *United States v. Mitchell*, 103 F.3d 649 (4th Cir. 1997). "[B]ecause the firearm placed in the trunk of the automobile for the journey to the [drug] transfer point is obviously being 'carried' under the plain meaning of that term, the firearm does not cease to be 'carried' simply because it is not readily accessible to the offender." *Id.* at 653-54.

<sup>96</sup> 952 F.2d 98 (5th Cir. 1992).

<sup>97</sup> *Id.* at 103-04.

<sup>98</sup> *Id.* at 104.

<sup>99</sup> *Id.* at 100.

<sup>100</sup> *Id.* "Here, [defendants'] control over the vehicle, which they both admitted driving, when combined with [defendants'] nervousness, conflicting statements, and implausible stories, is sufficient to support a finding that they had knowing possession." *Id.* at 102.

<sup>101</sup> *Id.* at 104.

<sup>102</sup> 73 F.3d 616 (6th Cir. 1996).

order for a defendant to be convicted of carrying a gun in violation of § 924 (c)(1), the firearm must be immediately available for use -- on the defendant or within his or her reach. Such availability takes the weapon beyond simple possession or storage.”<sup>103</sup> In this case, a police detective stopped the defendant for speeding, and upon asking the defendant to exit the vehicle, he visibly noticed a handgun placed in the driver’s side of the console.<sup>104</sup> Although no drugs were actually found in the vehicle, evidence within the car successfully led investigators to defendant’s hotel room where large amounts of cocaine were being readied for distribution.<sup>105</sup> The presence of the handgun in this case, immediately accessible to defendant and in transit aboard defendant’s vehicle, could easily be regarded as protection for defendant’s nefarious dealings. As the court noted, the weapon’s “presence or involvement was not the result of coincidence.”<sup>106</sup>

As further confirmation, the Sixth Circuit in *United States v. Malcuit*,<sup>107</sup> vacated a carrying conviction where defendant had large amounts of drugs and money in his car at the time of his arrest, but the firearm which was the basis of his conviction, was found in a duffel bag on the back seat of his car.<sup>108</sup> Here, Malcuit argued that the presence of the weapon “was coincidental and entirely unrelated to the drug offenses.”<sup>109</sup> The court struck down the government’s argument that constructive possession of the weapon aboard a moving vehicle in the context of a drug-related crime satisfies the “carry” prong of § 924 (c)(1).<sup>110</sup> “The mere availability of a firearm near a drug stash is not sufficient when the government fails to show a nexus between the firearm and the drug trafficking crime.”<sup>111</sup>

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<sup>103</sup> *Id.* at 623.

<sup>104</sup> *Id.* at 620.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 623.

<sup>107</sup> 104 F.3d 880 (6th Cir. 1996).

<sup>108</sup> *Id.* at 881-82.

<sup>109</sup> *Id.* at 883.

<sup>110</sup> *Id.* at 886.

<sup>111</sup> *Id.* at 885.

In *United States v. Moore*,<sup>112</sup> the Sixth Circuit expanded upon its decision in *Riascos-Suarez*, adding that a definition of “carry” under § 924 (c)(1) should also take into account an element of “transportation.”<sup>113</sup> While “immediate availability” was a key factor of the decision in *Riascos-Suarez*, the Sixth Circuit in *Moore* qualified it as a “necessary, but not sufficient, determinant.”<sup>114</sup> “A definition of ‘carry’ that takes only availability into account ignores the term’s most obvious connotation, i.e., physical transportation.”<sup>115</sup> Therefore, under *Moore*, the Sixth Circuit requires the government to prove that the weapon was immediately accessible and that the defendant was in the process of physically transporting the firearm in conjunction with a drug trafficking crime.<sup>116</sup>

Seventh Circuit jurisprudence in this area focuses on the nexus between firearm and drugs, “and not [on] the distance between owner and gun at the moment of arrest.”<sup>117</sup> In *United States v. Molina*,<sup>118</sup> a carrying conviction was affirmed where a stash of cocaine and a loaded semiautomatic pistol were found in a secret compartment in defendant’s car.<sup>119</sup> The question of whether a gun needs to be immediately accessible was deemed to be irrelevant.<sup>120</sup> Indeed, the court specifically noted that “a gun does not have to be within a defendant’s immediate reach” for a conviction under § 924 (c)(1).<sup>121</sup> In *Molina*, the fact that the defendant placed the gun in the secret compartment with the drugs, and then

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<sup>112</sup> 76 F.3d 111 (6th Cir. 1996).

<sup>113</sup> *Id.* at 113.

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

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

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

<sup>117</sup> *United States v. Molina*, 102 F.3d 928, 932 (7th Cir. 1996). “The question before us is not where the gun was located at the time of the arrest, but rather did the defendant carry the gun during and in relation to a drug trafficking crime.” *Id.* at 931.

<sup>118</sup> 102 F.3d 928 (7th Cir. 1996).

<sup>119</sup> *Id.* at 929. The secret compartment was found in defendant’s 1989 Chevy Blazer “underneath the face of the speaker located in the rear seat on the driver’s side wall of the vehicle.” *Id.*

<sup>120</sup> *Id.* at 932.

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



transported these items as he drove in the car, was enough to satisfy the requirements of the statute.<sup>122</sup>

In *United States v. Freisinger*,<sup>123</sup> the Eighth Circuit looked to the ordinary meaning of the word “carries” for interpretation of § 924 (c)(1). The court noted that common usage of the term would certainly include carrying of a firearm within a moving vehicle.<sup>124</sup> In *Freisinger*, defendant was stopped and arrested for drunken driving.<sup>125</sup> Upon inspection of the car, law enforcement found large amounts of drugs, cash, drug paraphernalia, and multiple firearms.<sup>126</sup> Among the weaponry found in the car were a gun case with rifle and ammunition, and three loaded revolvers placed in a knotted pillowcase, within a large plastic bag, in the back seat.<sup>127</sup> The court believed this to be ample evidence to support a ‘carrying’ of the weapons<sup>128</sup> in connection with the drug operation. “The evidence conclusively established that there were four firearms in the passenger compartment of Freisinger’s car. That alone constitutes ‘carrying’ as that term is used in common parlance.”<sup>129</sup>

A more recent Eighth Circuit case reaffirms *Freisinger* as good law, reiterating the rule for carrying under § 924 (c)(1) as follows: “to transport a firearm within the passenger compartment of a vehicle loaded with drugs is to ‘carry’ a firearm.”<sup>130</sup> In *United States v. Nelson*,<sup>131</sup> two unloaded shotguns and a loaded revolver were found in defendant’s car along with a large quantity of marijuana.<sup>132</sup> Testimony adduced at trial and

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<sup>122</sup> *Id.* “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 . . . car.” *Id.*

<sup>123</sup> 937 F.2d 383 (8th Cir. 1991).

<sup>124</sup> *Id.* at 387.

<sup>125</sup> *Id.* at 385.

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

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

<sup>128</sup> *Id.* at 387.

<sup>129</sup> *Id.*

<sup>130</sup> *United States v. Nelson*, 109 F.3d 1323, 1326 (8th Cir. 1997).

<sup>131</sup> 109 F.3d 1323 (9th Cir. 1997).

<sup>132</sup> *Id.* at 1325.

admissions by the defendant himself revealed that Nelson had possession of both the drugs and the guns within the car and that the loaded revolver, although concealed under the back seat carpet, was within reach from the driver's seat.<sup>133</sup> Accordingly, the court affirmed an accessibility requirement, stating that "ready availability of the firearm is required for a 'carry' conviction in this Circuit."<sup>134</sup>

Decisions in the Ninth Circuit over the past twenty years show a swing in statutory interpretation. In *United States v. Barber*,<sup>135</sup> the Ninth Circuit first adopted a broad definition of "carry."<sup>136</sup> The court formulated a "transportation test" to decide the specific issue of whether a gun is carried in a vehicle during a drug crime.<sup>137</sup> In *Barber*, the defendant argued that the common understanding of the word "carries" is that of "bearing the weapon upon one's person or having the gun within his immediate control."<sup>138</sup> In response, the court espoused its view that Congress never intended such a narrow reading of the word 'carries,' and that the ordinary meaning that connotes 'transportation' may be used for interpretation.<sup>139</sup>

In *Barber*, defendant was arrested in his girlfriend's Jaguar an hour after he fled the scene of a controlled drug buy.<sup>140</sup> A search of the vehicle turned up a firearm in the locked glove

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

<sup>134</sup> *Id.* at 1326; *accord* *United States v. Peyton*, 108 F.3d 876 (8th Cir. 1997) (affirming a carrying conviction where a loaded pistol was found under the front seat of the car defendant was driving, and where further search revealed large amounts of drugs and cash in the passenger compartment as well); *United States v. Rhondenizer*, 106 F.3d 222 (8th Cir. 1997). "We have repeatedly held that to transport a firearm in the passenger compartment of a vehicle loaded with drugs is to carry a firearm within the meaning of 18 U.S.C. § 924 (c)(1)." *Id.* at 226-27.

<sup>135</sup> 594 F.2d 1242 (9th Cir. 1979).

<sup>136</sup> *See id.*

<sup>137</sup> *See* *United States v. Foster*, 133 F.3d 704, 710 (9th Cir. 1998) (Trott, J., dissenting).

<sup>138</sup> *Barber*, 594 F.2d at 1244.

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

<sup>140</sup> *Id.* at 1243.

compartment.<sup>141</sup> Despite the fact that Barber never carried the weapon “on his person,” and that it was in a locked compartment in the car, the court utilized the ordinary meaning of “carry” to connote transportation of the weapon *within the moving vehicle*.<sup>142</sup> Furthermore, the court found ample evidence to impute to Barber a knowledge of the gun in the glove compartment.<sup>143</sup> Although he was not the owner of the car, he was operating it for purposes of narcotics trafficking; his use of the car would imply use of the glove compartment, and his papers found in the glove compartment along with the gun indicated his access thereof.<sup>144</sup>

However, in *United States v. Hernandez*,<sup>145</sup> the Ninth Circuit decided a case which involved a drug trafficker and a firearm, but not a motor vehicle. *Hernandez* applied an “immediately available for use” test, which has since been used in the vehicular context.<sup>146</sup> While not addressing the *Barber* decision directly, the *Hernandez* case and its test for carrying has seemingly supplanted *Barber*’s “transportation test” in the circuit.<sup>147</sup> In *Hernandez*, defendant was arrested in his auto body shop where a locked tool box was found to contain drugs and a loaded firearm.<sup>148</sup> He was eventually convicted of using or carrying a firearm during and in relation to a drug trafficking crime and appealed.<sup>149</sup> The court looked to the ordinary meaning of carrying, but found that it required some activity beyond simple possession.<sup>150</sup> Based on this finding, the court “conclude[d] that in order for a defendant to be convicted of ‘carrying’ a gun in violation of section 924 (c)(1), the defendant must have transported the firearm on or about his

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1244 (emphasis added).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> 80 F.3d 1253 (9th Cir. 1996).

<sup>146</sup> See *United States v. Foster*, 133 F.3d 704, 710 (9th Cir. 1998) (Trott, J., dissenting).

<sup>147</sup> *Id.*

<sup>148</sup> *Hernandez*, 80 F.3d at 1257.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 1258.

or her person.”<sup>151</sup> In other words, the gun must be “immediately available for use by the defendant.”<sup>152</sup>

There has been some question as to the appropriateness of *Hernandez* in non-vehicular cases.<sup>153</sup> But, in the very recent case of *United States v. Foster*,<sup>154</sup> the Ninth Circuit has put any doubt to rest by reaffirming the holding of *Hernandez* in a case which did indeed involve a motor vehicle.<sup>155</sup> In *Foster*, defendant was suspected of manufacturing and distributing methamphetamine.<sup>156</sup> When police pulled Foster over in his pickup truck, they found “a zipped up bag under a snap-down tarp” in his truck bed.<sup>157</sup> Inside the bag was a loaded, semiautomatic weapon and drug paraphernalia.<sup>158</sup> Based on this evidence, Foster was convicted of drug trafficking and of carrying a firearm pursuant to § 924 (c)(1).<sup>159</sup> Since his conviction, the Supreme Court decided *Bailey* which once again raised the issue of whether Foster carried the firearm. The Ninth Circuit “took the case en banc to resolve a conflict in [Ninth Circuit] caselaw over the interpretation of carrying a firearm when a gun is found in a vehicle.”<sup>160</sup>

In an opinion which focuses on “dueling interpretations” of many terms in the English language, Judge Kozinski pointed out that the word “carry” could mean “to transport or even to arrange for something to be transported.”<sup>161</sup> On the other hand, it could mean “to hold an object while moving from one place to another.”<sup>162</sup> He chose the narrower definition of “carry” to

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<sup>151</sup> *Id.*

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

<sup>153</sup> See *United States v. Foster*, 133 F.3d 704 (9th Cir. 1998). “*Hernandez* gives us a perfectly good test for carrying when vehicles are not involved, but the test fails to give Congressional will its meaning when vehicles are involved.” *Id.* at 710 (Trott, J., dissenting).

<sup>154</sup> 133 F.3d 704 (9th Cir. 1998).

<sup>155</sup> *Id.* at 708.

<sup>156</sup> *Id.* at 705.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

answer the question of whether Foster carried a firearm when he drove with it zipped up in his truck bed. Judge Kozinski also consulted Black's Law Dictionary for further support of the narrower reading. It separately defines "carrying arms" as "[t]o wear, bear, or carry them upon the person or in the clothing or in a pocket, for the 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."<sup>163</sup> Anticipating criticism of such a narrow definition, Judge Kozinski elaborated that "[t]he key aspect of the narrow definition is not that the weapon actually be borne on the person. Rather, it is that the weapon remain within easy reach while the individual is in motion."<sup>164</sup>

A dissenting opinion by Judge Trott in *Foster* illustrates the need and anticipation for a determination by the Supreme Court to ultimately decide this issue.<sup>165</sup> In a dissent joined by two other judges, Judge Trott criticized the majority's result as one that "gives drug traffickers the least exposure to the law's reach when they are the most vulnerable to detection by law enforcement."<sup>166</sup> The dissent would return to the "transportation test" of *Barber*, extending the definition of "carry" to include the transportation of a weapon by motor vehicle, regardless if the item carried is within easy reach.<sup>167</sup>

The Tenth Circuit in *United States v. Cardenas*,<sup>168</sup> distinguished "carrying" of firearms under § 924 (c)(1) from mere transportation of firearms.<sup>169</sup> After an exhaustive investigation of legislative intent, including an analysis of the 1968 meaning of

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<sup>163</sup> *Id.* at 706 (citing BLACK'S LAW DICTIONARY 214 (6th ed. 1990)).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 714 (Trott, J., dissenting). "While we have been debating this case en banc, the Supreme Court has granted certiorari in *Cleveland* and *Muscarello*. I am certain that our opinions will contribute to a final resolution of this issue." *Id.* (Trott, J., dissenting).

<sup>166</sup> *Id.* at 710. (Trott, J., dissenting).

<sup>167</sup> *Id.* at 710 (Trott, J., dissenting). "This holding [in *United States v. Barber*] embracing the 'transportation test' made as much sense then as it does now." *Id.* (Trott, J., dissenting).

<sup>168</sup> 864 F.2d 1528 (10th Cir. 1989).

<sup>169</sup> *Id.* at 1536.

“carrying,” the court held that “mere transportation of a firearm is not within the purview of section 924 (c)(1).”<sup>170</sup> Rather, the statutory construction of “carrying” requires some degree of possession as well as transporting, and a weapon aboard a moving vehicle should be “within effortless reach” to fall within the statute.<sup>171</sup> The *Cardenas* court specifically held:

[T]hat when a motor vehicle is used, “carrying a weapon” takes on a less restrictive meaning than carrying on the person. The means of carrying is the vehicle, itself, rather than the defendants hands or pocket, and the requirement of possession, the exercise of dominion and control, consonant with the common legal definition of “carrying” a weapon in a vehicle at the time of the enactment of § 924 (c) is precisely what distinguishes “carrying” from mere “transportation.”<sup>172</sup>

In this case, a .25 caliber handgun was concealed behind a potato chip bag in an open compartment on the driver’s side dashboard of Cardenas’ car.<sup>173</sup> The gun was “within inches” of the steering wheel and thus in very close proximity to the driver, Cardenas.<sup>174</sup> Furthermore, the defendant admitted knowing that the gun was in the truck.<sup>175</sup> Such knowing placement and concealment is indicative that Cardenas held dominion and control over the weapon and thus “carried” it in relation to his drug offense.<sup>176</sup>

*United States v. Ross*<sup>177</sup> further supplemented the rather narrow reading of *Cardenas* by easing the proximity requirement.<sup>178</sup> In *Ross*, the defendant sold drugs out of the trunk of his car and

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<sup>170</sup> *Id.* at 1534.

<sup>171</sup> *Id.* at 1533.

<sup>172</sup> *Id.* at 1535-36.

<sup>173</sup> *Id.* at 1530.

<sup>174</sup> *Id.* at 1533.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> 920 F.2d 1530 (10th Cir. 1990).

<sup>178</sup> *Id.* at 1536.

upon his arrest, police found drug paraphernalia and a loaded firearm enclosed in his car trunk.<sup>179</sup> The Tenth Circuit held “the jury could have reasonably found that Ross carried the gun with him in his car during and in relation to his drug distribution activities.”<sup>180</sup> Thus, lack of proof that a firearm is *within effortless reach* will not defeat a “carrying” conviction under § 924 (c)(1).<sup>181</sup>

The Eleventh Circuit took the vehicular carrying issue one step further by attaching § 924 (c)(1) carrying penalties in situations where a vehicle could be classified as a “drug distribution center,”<sup>182</sup> and firearms were known to be present therein.<sup>183</sup> In *United States v. Farris*,<sup>184</sup> evidence showed that (1) a gun found in the glove compartment belonged to defendant; (2) the car in which the gun was found was used as a base for drug distribution; and (3) defendant was the drug “salesman” himself.<sup>185</sup> As such, the car, the drugs, and the firearm together form a drug nexus and the defendant could be charged with “carrying” a firearm pursuant to the statute.<sup>186</sup>

The D.C. Circuit, somewhat like the Second Circuit, held that a firearm must be accessible so as to afford the defendant security to further his crimes.<sup>187</sup> In *United States v. Evans*,<sup>188</sup> the defendants traveled via automobile from New York City to

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

<sup>180</sup> *Id.* at 1536-37.

<sup>181</sup> *Id.* (emphasis added). While the gun was in the trunk of the car and arguably inaccessible, the fact that the car itself was the means for defendant's drug distribution activities, and that the gun was transported in ready fashion along with evidence of narcotics trafficking, suffices for a carrying conviction in this Circuit. *Id.* See also *United States v. Miller*, 84 F.3d 1244 (10th Cir. 1996). “[T]he government is required to prove only that the defendant transported a firearm in a vehicle and that he had actual or constructive possession of the firearm while doing so.” *Id.* at 1259.

<sup>182</sup> *United States v. Farris*, 77 F.3d 391, 395 (11th Cir. 1996).

<sup>183</sup> *Id.*

<sup>184</sup> 77 F.3d 391 (11th Cir. 1996).

<sup>185</sup> *Id.* at 395.

<sup>186</sup> *Id.*

<sup>187</sup> See, e.g., *United States v. Evans*, 888 F.2d 891 (D.C. Cir. 1989).

<sup>188</sup> 888 F.2d 891 (1989).

Washington, D.C. with the intent to sell narcotics.<sup>189</sup> To carry out this intent they transported with them a large quantity of “crack” cocaine and guns in a black knapsack.<sup>190</sup> The court found that it was reasonable for the jury to find that the defendant carried a firearm “in the sense that it was within reach and available to protect him during his ongoing crime of possession with intent to distribute cocaine.”<sup>191</sup>

#### IV. THE SUPREME COURT’S POSITION

The United States Supreme Court has had the opportunity to interpret 18 U.S.C. § 924 (c)(1) in the often-cited case of *Bailey v. United States*.<sup>192</sup> The *Bailey* Court altered our understanding of the “use” prong of the enhancing statute, thus influencing subsequent case law. Under *Bailey*, in order to support a conviction for “use” of a firearm during and in relation to a drug trafficking offense, the government must show active employment of the firearm, rather than mere possession.<sup>193</sup> In other words, “use” implies “to avail oneself of,” and the inert storage of a gun for active use later on is insufficient.<sup>194</sup>

The Court’s narrowing interpretation of the “use” prong of § 924 (c)(1) has expanded the utility of the “carry” prong as an alternative basis for statutory liability.<sup>195</sup> Pre-*Bailey*, many courts equated “use” with “possession” which, in essence, shut out any role for the term “carries” under the statute.<sup>195</sup> After *Bailey* limited the definition of use, “the ‘carry’ prong of section 924(c)(1) . . . brings some offenders who would not satisfy the ‘use prong’ within reach of the statute.”<sup>197</sup>

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<sup>189</sup> *Id.* at 895.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 894-95.

<sup>192</sup> 516 U.S. 137 (1995).

<sup>193</sup> *Id.* at 143, 148.

<sup>194</sup> *Id.* at 149-50.

<sup>195</sup> *Id.* at 146.

<sup>196</sup> *Id.* “This reading is of such breadth that no role remains for carry.” *Id.*

<sup>197</sup> *Id.* at 150.



Although *Bailey* opened the door for convictions based solely on a “carrying” charge,<sup>198</sup> the Court fell short of defining what constitutes “carrying” under § 924 (c)(1), as it did for the “use” prong.<sup>199</sup> In the absence of United States Supreme Court guidance, the circuits have been grappling with this question, searching for clues from legislative history and original meanings at the time of enactment.<sup>200</sup>

Under *Bailey*, conviction pursuant to § 924 (c)(1) is prohibited for mere storage and possession of weapons near drugs and drug proceeds.<sup>201</sup> Therefore, one can infer that to “carry” a firearm within the meaning of the statute, one “must do more than possess or store a weapon.”<sup>202</sup> Something “more” would imply immediate availability and proximity to the firearm.<sup>203</sup> When a drug offender puts a gun into position where it will be at the ready, and will secure the drug transaction, this conscious action supplies something “more” than mere possession and storage.<sup>204</sup>

In evaluating our present question of what suffices for “carrying” aboard a moving vehicle, it may be inferred that a weapon found in a car that is the underlying means of transport for narcotics trafficking is not there by coincidence. The everyday connotation of “conveyance” is a complementary element, which would satisfy a “carrying” charge. Thus, it seems likely that the Supreme Court would look to the ordinary meaning of the word “carry” to interpret a case in which a firearm is present during and in relation to a drug crime. Justice Scalia, in his dissenting opinion in *Smith v. United States*,<sup>205</sup> attempted to draw a reasonable dichotomy between ‘uses’ and

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<sup>198</sup> See *United States v. Moore*, 76 F.3d 111 (6th Cir. 1996); See also *United States v. Farris*, 77 F.3d 391 (11th Cir. 1996).

<sup>199</sup> *Bailey*, 516 U.S. at 148. “The active employment understanding of ‘use’ certainly includes brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm.” *Id.*

<sup>200</sup> See *United States v. Cardenas*, 864 F.2d 1528 (10th Cir. 1989).

<sup>201</sup> *Bailey*, 516 U.S. at 149.

<sup>202</sup> *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir. 1996).

<sup>203</sup> *Id.* at 623.

<sup>204</sup> See *United States v. Giraldo*, 80 F.3d 667, 675 (2d Cir. 1996).

<sup>205</sup> 509 U.S. 223 (1993).

'carries' as follows: one uses a firearm (as a weapon) and one carries a firearm ("carrying it in such a manner as to be ready for use as a weapon").<sup>206</sup>

## V. THE SUPREME COURT'S GRANT OF CERTIORARI

This issue of statutory interpretation has split the circuits and will be addressed by the Supreme Court in a pair of cases consolidated for oral argument this month.<sup>207</sup> Certiorari was granted in *Cleveland v. United States*,<sup>203</sup> a First Circuit case out of Massachusetts, as well as in *Muscarello v. United States*,<sup>209</sup> a Fifth Circuit case out of Louisiana.

In the First Circuit decision of *United States v. Cleveland*,<sup>210</sup> the court followed the broad "transportation" reading of "carrying" as exemplified in *Ramirez-Ferrer*.<sup>211</sup> In *Cleveland*, defendants Cleveland and Gray prepared to meet with drug suppliers by putting three loaded handguns inside a duffel bag and then placing the bag in the trunk of their car.<sup>212</sup> It was admitted that the initial intent in taking along these weapons was to "use the guns to rob their suppliers of their cocaine."<sup>213</sup> Meanwhile, the drug supplier was being surveilled by DEA agents acting on information from confidential sources.<sup>214</sup> As defendants met with the supplier, the DEA agents moved in, searched the vehicles and made their arrests.<sup>215</sup> The presence of the handguns in the trunk of the car and the admission by defendant of the purpose for which the guns

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<sup>206</sup> *Id.* at 245-46 (Scalia, J., dissenting).

<sup>207</sup> See 66 U.S.L.W. 1454 (1998).

<sup>203</sup> 106 F.3d 1056 (1st Cir. 1997), *cert. granted*, 66 U.S.L.W. 1454 (U.S. Dec. 16, 1997) (No. 96-8837).

<sup>209</sup> 106 F.3d 636 (5th Cir. 1997), *cert. granted*, 66 U.S.L.W. 1454 (U.S. Dec. 16, 1997) (No. 96-1654).

<sup>210</sup> 106 F.3d 1056 (1st Cir. 1997).

<sup>211</sup> *United States v. Ramirez-Ferrer*, 82 F.3d 1149 (1st Cir. 1996).

<sup>212</sup> *Cleveland*, 106 F.3d at 1059.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

were present, became the basis for upholding defendant's guilty pleas under § 924 (c)(1).<sup>216</sup>

The First Circuit reduced the "carry" issue in this case to two questions: "First, must a firearm be on a suspect's person to be 'carried' or can one also 'carry' a firearm in a vehicle? Second, if one can 'carry' a firearm in a vehicle, must the weapon be immediately accessible to the defendant to be 'carried'?"<sup>217</sup> The answer to the first question had already been established in this circuit in *Ramirez-Ferrer*, where the court found that a firearm could be "carried" in a boat.<sup>218</sup> The First Circuit then looked at the issue of immediate accessibility in light of case law both pre- and post-*Bailey*.<sup>219</sup> It concluded, much like the Fourth, Seventh and Tenth Circuits that the word "carry" under the statute indicates "transport of a firearm by car," rather than immediate accessibility to the defendant while being transported.<sup>220</sup> In *Cleveland*, the fact of the guns being moved from one place to another, and not their accessibility, was determinative in affirming the convictions.<sup>221</sup>

In the second of the companion cases granted certiorari by the Supreme Court, defendant Muscarello pleaded guilty to distributing marijuana and using and carrying a firearm in relation to this crime.<sup>222</sup> His guilty plea was based on the fact that a fully loaded firearm was found in his car's locked glove compartment at the time of his arrest.<sup>223</sup> While awaiting sentencing, *Bailey* was decided and Muscarello sought dismissal of the gun charge claiming lack of evidence to support a showing of active employment of the gun.<sup>224</sup> Furthermore, Muscarello claimed that while he knowingly possessed the weapon in the

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<sup>216</sup> *Id.* at 1068-69.

<sup>217</sup> *Id.* at 1065.

<sup>218</sup> *Id.* The court deemed conveyance in a boat to be "indistinguishable for present purposes from a land vehicle like a car." *Id.*

<sup>219</sup> *Id.* at 1065-66.

<sup>220</sup> *Id.* at 1066.

<sup>221</sup> *Id.* at 1068-69.

<sup>222</sup> *United States v. Muscarello*, 106 F.3d 636, 637 (5th Cir. 1997).

<sup>223</sup> *Id.* at 638.

<sup>224</sup> *Id.* at 637.

vehicle, he did so by virtue of his job as a bailiff and not in relation to the drug offense.<sup>225</sup>

The Fifth Circuit addressed the issue of knowing possession of a firearm in a vehicle during a drug crime where the gun is locked in the glove compartment and thus not readily accessible.<sup>226</sup> The court pointed out that the decision in *Bailey* did not define the carrying prong of § 924 (c) and thus does not alter prior precedent with regard to carrying in a moving vehicle.<sup>227</sup> “Consequently, the carrying requirement of § 924 (c)(1) is met if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime.”<sup>228</sup> Here, it is the defendant’s knowing possession that triggers the “carrying” element, despite the fact that the glove compartment was locked, and despite defendant’s claim that the firearm was present because of his job.<sup>229</sup> The Fifth Circuit reinstated conviction based on this broad interpretation but cautioned that not every case of knowing possession will suffice for “carrying” under § 924 (c)(1).<sup>230</sup>

## VI. SUMMARY

18 U.S.C. § 924 (c)(1) imposes mandatory sentencing for those who use or carry a firearm during and in relation to narcotics trafficking.<sup>231</sup> After the Supreme Court narrowed the “use” prong of the statute, the circuits responded by defining the “carry” prong more broadly.<sup>232</sup> When the facts of a case point to “carrying” of a firearm aboard a moving vehicle, the plain

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 638.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 639.

<sup>230</sup> *Id.* “Albeit a rarity, it is at least conceivable for such a vehicle-contained gun to be carried ‘during’ but not necessarily ‘in relation to’ the offense.” *Id.*

<sup>231</sup> See *supra* note 4 and accompanying text.

<sup>232</sup> See generally *United States v. Nelson*, 109 F.3d 1323 (8th Cir. 1997).

meaning of the term attaches and prosecution under the “carry” prong of the statute seems only logical.<sup>233</sup>

The First Circuit regards evidence that a gun is knowingly transported in relation to a drug crime as sufficient to support a carrying conviction.<sup>234</sup> The Second Circuit stresses immediate accessibility to be convicted under the ‘carry’ prong of the statute.<sup>235</sup> Evidence that a drug offender transported a firearm in a moving vehicle while that firearm was within reach and immediately available suffices for a carrying conviction in the Sixth Circuit.<sup>236</sup> Immediate availability seems to be an important element in the Ninth Circuit as well.<sup>237</sup> On the other hand, the Seventh Circuit focuses on a proximity requirement, as between drugs and firearms, not owner and firearm.<sup>238</sup> The Tenth Circuit emphasizes the means of carrying as the vehicle itself.<sup>239</sup> Similarly, for the Eleventh Circuit, “carrying” a firearm means carrying aboard a moving vehicle, especially one that is key to a drug distribution operation.<sup>240</sup> Like the majority of the circuits, the United States Supreme Court will most probably support the broader interpretation of the “carrying” prong of § 924 (c)(1). Since the intent of the statute is to reduce narcotics trafficking as furthered by the presence of firearms,<sup>241</sup> the Court will most likely adopt a more expansive reading of “carry” to bring more offenders within the reach of its deterrence.

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<sup>233</sup> United States v. Ramirez-Ferrer, 82 F.3d 1149, 1152 (1st Cir. 1996).

<sup>234</sup> *Id.*

<sup>235</sup> United States v. Giraldo, 80 F.3d 667, 677 (2d Cir. 1996).

<sup>236</sup> United States v. Riascos-Suarez, 73 F.3d 616, 623 (6th Cir. 1996).

<sup>237</sup> See generally United States v. Foster, 133 F.3d 704 (9th Cir. 1998).

<sup>238</sup> See United States v. Molina, 102 F.3d 928 (7th Cir. 1996).

<sup>239</sup> United States v. Cardenas, 864 F.2d 1528, 1535-36 (10th Cir. 1989).

<sup>240</sup> United States v. Farris, 77 F.3d 391, 395 (11th Cir. 1996).

<sup>241</sup> Clare, *supra* note 26, at 815-16.

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