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# "USE" AND THE IRRESISTIBLE IMPULSE<sup>1</sup> TO LEGISLATE

Robert C. Dorf, Esq.\*

## INTRODUCTION

No, Mr. Bumble, the law is not "a ass, a idiot,"<sup>2</sup> but it does seem that meaning what is said and saying what a statute's plain language means

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\* Please note that the Supreme Court decision in *Bailey v. United States*, 1995 WL 712269, was handed down on December 6, 1995. Consequently, this article was not able to include the decision in the text; however, the author is pleased to note that he correctly predicted not only the outcome of the Supreme Court's decision, but also the unanimous nature of it.

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The views expressed in this article are those of the author and do not reflect those of his office.

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1. ROBERT TRAVER, *ANATOMY OF A MURDER* 418 (St. Martin's Press 1958). In this novel, the judge instructed the jury concerning expert testimony offered on behalf of the defendant concerning a type of insanity known as "irresistible impulse" as follows:

I charge you that such a form of insanity is recognized as a defense to crime in Michigan and that it is the law of this state that even if the defendant had been able to comprehend the nature and consequences of his act, and to know that it was wrong, that nevertheless if he was forced to its execution by an irresistible impulse which he was powerless to control in consequence of a temporary or permanent disease of the mind, then he was insane and you should acquit him.

*Id.*

2. See *United States v. Bailey*, 995 F.2d 1113, 1119 (D.C. Cir. 1993) (Ginsburg, J., dissenting) (referring to a character in the novel by CHARLES DICKENS, *OLIVER TWIST* 520 (Dodd, Mead & Co. 1941) (1838)). In his dissent, Judge Ginsburg found the majority's affirmation of the defendant's conviction for "use" of a hand gun under 18 U.S.C. § 924(c) to be irreconcilable with previous D.C. Circuit decisions in *United States v. Derr*, 990 F.2d 1330 (1993), and *United States v. Bruce*, 939 F.2d 1053 (1991). *Id.* (Ginsburg, J., dissenting). See *infra* note 5. In each case, the Court of Appeals reversed the lower court's conviction under 18 U.S.C. § 924(c) because the lower court failed to establish the second prong of the two-part test which the D.C. Circuit had sculpted to determine whether a defendant has "used" a gun "during and in relation to" the drug trafficking crime under § 924(c). See *Derr*, 990 F.2d at 1338; *Bruce*, 939 F.2d at 1056.

approaches the realm of virtual impossibility when courts interpret the word "use" with regard to firearms.

The purpose of this article is to discuss the loss of what I describe as the "possession-use distinction." In view of Justice (then, Chief Judge of the First Circuit Court of Appeals) Stephen Breyer's expressed disapproval of the judicial dissolution of the distinction between "possession" and "use,"<sup>3</sup> perhaps the federal and New York State courts will rethink their interpretations of the relevant statutes. Likewise, it is possible that both Congress and the New York legislature will amend the statutes in question to punish both "use" and "possession" at the same level.

As one who has long toiled in the vineyards of the criminal law in both the New York State courts and in the federal system, I have often been nonplused (from the technician's point of view) regarding firearms case law. My confusion exists in spite of sensitivity to the understandable human and judicial impulse to treat criminal possession *and* use of weapons equally severely because of the death and destruction that both the guns *and* the defendants have caused. Nevertheless, it is impossible to applaud judicial hammering of statutory "possession" into "use" which is contrary to legislative intent.

In his dissent in *United States v. Bailey*,<sup>4</sup> Judge Stephen F. Williams stated that the majority's interpretation of the word "use" as it relates to 18 U.S.C. § 924(c)<sup>5</sup> gives rise to an "ultimate result . . . that possession

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The test requires the government to establish beyond a reasonable doubt that (1) there is a nexus between the defendant and the gun (which can be satisfied by showing actual or constructive possession by defendant), and (2) the gun was "used" to facilitate the predicate offense. *Bailey*, 995 F.2d at 116; *Derr*, 990 F.2d at 1337. Judge Ginsburg questioned the propriety of the *Derr* and *Bruce* decisions as well as the constitutionality of the two-part test. See *Bailey*, 995 F.2d at 1119-21 (Ginsburg, J., dissenting). Essentially, Judge Ginsburg's argument is that "§ 924(c) reaches the use of a firearm 'in relation to any . . . drug trafficking crime,'" rather than merely a predicate crime charged so that the "related" drug trafficking crime need not have been charged so long as all of its elements are proved beyond a reasonable doubt." *Id.* at 1121 (Ginsburg, J., dissenting) (quoting 18 U.S.C. § 924(c)). These "bumblings" in the D.C. Circuit, according to Judge Ginsburg, gave rise to his statement that "[s]ometimes the law is 'a ass, a idiot,' Mr. Bumble." *Id.* at 1119 (Ginsburg, J., dissenting).

3. See *United States v. McFadden*, 13 F.3d 463, 466-70 (1st Cir. 1994) (Breyer, C.J., dissenting) (arguing that wide variance in case law has made it necessary to draw the line between simple possession and use of a gun so that possession of a gun in relation to a drug crime does not *automatically* connote use).

4. 36 F.3d 106 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 1689 (1995). This case constitutes a rehearing of two cases and will later be referred to as *Robinson #2* in this text. See *supra* notes 11 and 20-24.

5. 18 U.S.C. § 924(c) (1984). Section 924(c)(1) provides, in pertinent part: "Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a

amounts to 'use.'"<sup>6</sup> In *United States v. McFadden*,<sup>7</sup> then Chief Judge Breyer stated, in dissent to the majority's definition of "use" in relation to firearm possession, that "in my view, prior cases, and likely congressional intent, indicate that the word 'use,' in this particular statute, carries a more active meaning - a meaning that excludes simple . . . possession."<sup>8</sup>

Statutorily speaking, both 18 U.S.C. § 924(c)(1)<sup>9</sup> and New York Penal Law § 265.03<sup>10</sup> punish "use of a firearm," as distinguished from simple or mere possession, with enhanced penalties.

By means of linguistic manipulation and strained statutory interpretation, the New York and federal courts have blurred or dissolved the distinction between possession and use of a firearm. That loss or blurring of the "possession-use distinction" may seem subtle to the casual reader; however, the resulting sentencing enhancements verge on the draconian.<sup>11</sup> The view set forth herein is that both Congress and the New York State legislature never intended to blur the "possession-use distinction." The loss of that important distinction appears to be a case law distortion that is a creation of the judiciary.

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firearm, shall, in addition to the punishment provided for such . . . drug trafficking crime, be sentenced to imprisonment for five years." *Id.*

6. See *United States v. Bailey*, 36 F.3d at 120-24 (Williams, J., dissenting) (arguing that a more active definition of the word "use" should be substituted for the majority's broad definition and that the new "proximity" and "accessibility" test virtually guarantees a conviction under § 924(c) where guns and drugs are involved); *infra* notes 11-12 and accompanying text.

7. 13 F.3d 463 (1st Cir. 1994).

8. *Id.* at 467 (Breyer, C.J., dissenting).

9. See *supra* note 5.

10. N.Y. PENAL LAW § 265.03 (McKinney 1995). Section 265.03 states: "A person is guilty of criminal possession of a weapon in the second degree when he possesses a machine-gun or loaded firearm with intent to use the same unlawfully against another." *Id.* Criminal possession of a weapon in the second degree is a Class "C" felony; the penalty is a maximum of 15 years. *Id.* See N.Y. PENAL LAW § 70.02(1)(b) (McKinney 1995); N.Y. PENAL LAW § 70.00(2)(c) (McKinney 1995). Criminal possession of a weapon in the third degree, simple possession, is a Class "D" felony; the penalty is a maximum of seven years. N.Y. PENAL LAW § 265.02(4), (5) (McKinney 1995). See N.Y. PENAL LAW § 70.02(1)(c) (McKinney 1995); N.Y. PENAL LAW § 70.00(2)(d) (McKinney 1995).

11. *McFadden*, 13 F.3d at 467 (Breyer, C.J., dissenting). "Let me be more specific. The special 'mandatory minimum' sentencing statute says that anyone who 'uses or carries' a gun 'during and in relation to any . . . drug trafficking crime' must receive a mandatory five-year prison term added on to his drug crime sentence." *Id.* (Breyer, C.J., dissenting) (quoting 18 U.S.C. § 924(c)(1)). See *supra* notes 5 and 10.

## A. FEDERAL FIREARMS LAW

The concerns of the courts and the basis of “the irresistible impulse” to legislate and expand the definition of “use” are nowhere more clearly and candidly stated than by Judge Ginsburg in his majority opinion in *United States v. Bailey*,<sup>12</sup> wherein the court states that “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 . . . drug trafficking offense. The narrow definition also has the vice of simplicity, however; it is too narrow to capture all of the various uses of a firearm that the Congress apparently intended to reach via § 924(c)(1).<sup>13</sup>

Without stating a basis for his belief as to Congress’ apparent intention, Judge Ginsburg describes what amounts to an almost metaphysical definition of the term “use” as follows: “A gun can surely be used even when it is not being handled, however. For example a gun placed in a drawer beside one’s bed for fear of an intruder would, in common parlance, be a gun ‘used’ for domestic protection.”<sup>14</sup> In Judge Ginsburg’s court, “use” seems to be whatever the court says it is.

Difficulty defining “use” is not limited to the *Bailey* court. In *Smith v. United States*,<sup>15</sup> a six to three decision, the Supreme Court of the United States vigorously debated whether § 924(c) “use” included bartering or trading a firearm in exchange for cocaine (the majority view),<sup>16</sup> or that “use” was limited to the classic paradigmatic definition (the dissenting view).<sup>17</sup> A distinguishing feature of *Smith*, however, may be that peti-

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12. 36 F.3d at 114. *United States v. Bailey* was an *en banc* rehearing of the appeals of defendants Bailey, *supra* note 2, and Robinson, *infra* note 21. The D.C. Circuit affirmed both convictions, and threw out its two-pronged, open-ended test. *Bailey*, 36 F.3d at 118. See *supra* note 2 for discussion of the old test. The new test promulgated by the court established that a finding that the firearm was (1) accessible and (2) proximate to the defendant during the commission of a drug trafficking offense will affirm a conviction under 18 U.S.C. § 924(c). *Id.* at 108.

13. *Id.* at 114.

14. *Id.*

15. 113 S. Ct. 2050, 2052 (1993) (holding that trading a gun for narcotics constituted “use” within the meaning of § 924(c)).

16. *Id.*

17. *Id.* at 2060-61 (Scalia, J., dissenting). In his dissent, Justice Scalia wryly noted that

tioner not only verbally offered the weapon for sale, he also pulled it out of a bag and displayed or brandished it to the undercover police officer.<sup>18</sup> This, arguably, may constitute a paradigmatic use of the firearm.

The depth of the statutory construction quagmire is exemplified by a long judicial reach into a dusty corner. In an effort to expand the meaning of "use" to include virtually all forms of possession, the Supreme Court, in *Smith*, and the D.C. Circuit, in *Bailey*, cite an 1884 customs case in which the Supreme Court found garments to be "in use" even though they had not been worn.<sup>19</sup> It is worth noting that the *Smith* court did not address firearm possession in terms of § 924(c) when the firearm is simply secreted somewhere in a residence and the sole relevance of the weapon to the drug transaction is the practical assumption that the drugs and the gun are connected.

The problem appears to be that when "use" goes from the narrow definition (which I contend Congress intended) to an open-ended definition, that open approach produces widely divergent and seemingly contradictory results.<sup>20</sup>

The case of *United States v. Robinson*<sup>21</sup> [hereinafter *Robinson #1*] epitomizes this difficulty. In *Robinson #1*, the police made a buy of crack-cocaine in the defendant's apartment and after arrest, an unloaded .22 caliber Derringer was found in defendant's locked trunk - a trunk located in a bedroom closet.<sup>22</sup> The *Robinson #1* court held there was no "use" based upon the notion that the gun was not sufficiently available

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[i]t would, indeed, be "both reasonable and normal to say that petitioner 'used' his MAC-10 in his drug trafficking offense by trading it for cocaine." [citation omitted] It would also be reasonable and normal to say that he "used" it to scratch his head. . . . It is unquestionably *not* reasonable and normal, I think, to say simply "do not use firearms" when one means to prohibit selling or scratching with them.

*Id.* (Scalia, J., dissenting).

18. *Id.* at 2052.

19. *Id.* at 2054 (citing *Astor v. Merritt*, 111 U.S. 202 (holding that new articles of clothing are chargeable with duty in contemplation of their future use despite the fact that the clothes were not for sale)); *United States v. Bailey*, 36 F.3d 106, 108 (D.C. Cir. 1994). The Supreme Court and the D.C. Circuit used *Astor* to demonstrate how the broader, more inclusive definition of "use" has long been established in Supreme Court jurisprudence. 113 S. Ct. at 2054; *Bailey*, 36 F.3d at 108.

20. See *United States v. Bailey*, 36 F.3d at 111 (referring to the court's opinions in *United States v. Derr*, 990 F.2d 1330 (D.C. Cir. 1993), *United States v. Morris*, 977 F.2d 617 (D.C. Cir. 1992), and *United States v. Bruce*, 939 F.2d 1053 (D.C. Cir. 1991)); *supra* note 2 for discussion.

21. 997 F.2d 884 (D.C. Cir. 1993) (finding no evidence of actual use).

22. *Id.* at 884.

to be a risk for firing or brandishing.<sup>23</sup> Thereafter, the court, sitting en banc in *United States v. Bailey* [hereinafter *Robinson #2*], held that Robinson did “use” the gun.<sup>24</sup> A majority of the court stated that

[i]n the context of § 924(c)(1), therefore, we hold that one uses a gun, i.e., avails oneself of a gun, and therefore violates the statute, whenever one puts or keeps the gun in a particular place from which one (or one’s agent) can gain access to it if and when needed to facilitate a drug crime.<sup>25</sup>

In his dissent in *United States v. McFadden*, Justice Breyer attempted, with some futility, to rationalize the federal case law regarding “use” and § 924(c) by citing *Robinson # 1*.<sup>26</sup> He stated that in *Robinson #1*, “the D.C. Circuit refused to permit a ‘used for protection’ inference where a defendant kept an unloaded pistol and drugs in a locked footlocker in a closet (the footlocker, in contrast with [*United States v.*] *Wilkinson*,<sup>27</sup> apparently was not ‘carried’ from place to place.)”<sup>28</sup> Subsequent to Justice Breyer’s dissent in *United States v. McFadden*, *Robinson #1* was reversed in *Robinson # 2*.<sup>29</sup>

Thereafter, on April 17, 1995, the Supreme Court granted Bailey and Robinson’s petitions for writs of certiorari.<sup>30</sup> The cases have been consolidated before the Supreme Court of the United States for the 1995-96 term.<sup>31</sup>

Returning to *United States v. McFadden*, Justice Breyer’s difficulty with the majority’s construction of “use” as defined in § 924(c) was that the defendant never used the unloaded shotgun hidden under his mattress.<sup>32</sup> “Use” of the unloaded shotgun was remote because the \$40/two

23. *Id.* at 888 (noting that it was highly unlikely there was an “intention” to use a gun which was found “unloaded, locked away, and without ammunition anywhere on the premises”).

24. 36 F.3d at 114 (recognizing the more inclusive understanding of “use” where a gun can be used “even when it is not being handled”).

25. *Id.* at 115.

26. 13 F.3d 463, 470 (1st Cir. 1994) (Breyer, C.J., dissenting).

27. 926 F.2d 22 (1st Cir.) (guns in duffel bag with cocaine), *cert. denied*, 111 S. Ct. 2813 (1991).

28. *McFadden*, 13 F.3d at 470 (Breyer, C.J., dissenting) (citing *United States v. Robinson*, 997 F.2d 884, 887-88 (D.C. Cir. 1993)).

29. *Bailey*, 36 F.3d at 118 (holding that a conviction under § 924(c)(1) will be affirmed when there is evidence of the gun’s proximity and accessibility). *See supra* note 12.

30. *Bailey v. United States*, 115 S. Ct. 1689 (1995).

31. *Id.*

32. *McFadden*, 13 F.3d at 469 (Breyer, C.J., dissenting) (stating that the drug offender’s possession of the gun did not rise to the level of a “use”).

gram cocaine drug transaction took place downstairs in the foyer of defendant's apartment building.<sup>33</sup> The majority in *McFadden* noted that the First Circuit had previously held that "mere presence of arms for the protection of drugs for sale is present use."<sup>34</sup> Furthermore, the court noted that it had previously found "use" based on "simple presence for protection, the maintenance of a 'fortress.'"<sup>35</sup>

In reversing the trial court's directed verdict of acquittal as to possession with intent to use, the *McFadden* majority announced that it was not necessarily fond of the inflexible nature of § 924(c).<sup>36</sup> The court, however, while agreeing with the dissent in its desire for more flexible Sentencing Guidelines, saw "no give, and no surrender, in this monolith of a statute, on the books for many years and not disturbed when the Guidelines were enacted."<sup>37</sup> Furthermore, the majority suggested that the United States Attorney's judgment in applying § 924(c) to such a small-time defendant was questionable.<sup>38</sup> The majority, nevertheless, explained that, while the defendant's crimes did not necessarily rise to the level of those found in a case such as *Wilkinson* or *Hadfield*, the "difference [was] in degree, not in kind," and that "[t]he statute does not measure the crime."<sup>39</sup> Quoting *Wilkinson*, the *McFadden* court stated that "ultimately, whether or not the gun[] helped appellant commit the drug crime is a matter for a jury, applying common-sense theories of human nature and causation."<sup>40</sup> Pursuant to § 924(c), defendant received a five year incarceration enhancement.<sup>41</sup>

Surely, converting *McFadden*'s possession into "use" was a linguistic and metaphysical feat as well as a statutory expansion that seems to have

33. *Id.* at 465.

34. *Id.* at 465 (citing *United States v. Wilkinson*, 929 F.2d 22 (1st Cir.) (carrying guns and drugs in bag to another's house), *cert. denied*, 501 U.S. 1211 (1991)).

35. *Id.* at 465 (citing *United States v. Hadfield*, 918 F.2d 987 (1st Cir. 1990) (guns on the drug premises), *cert. denied*, 111 S. Ct. 2062 (1991)).

36. *Id.* at 466.

37. *Id.*

38. *Id.* To the misadventure of the defendant, however, the court stated that "[i]t can not be for the court to control the U.S. Attorney's use of this truly fortress of a statute; a defendant's only hope is the U.S. Attorney's judgment, and the jury. Here he failed." *Id.*

39. *Id.* The court added:

Moreover, how does one measure for this? And in what way do our differing facts, on a case by case basis, indicate that we are taking a new approach? Only one gun? Possible lack of title? No ammunition? Under our cases none of these failures is fatal. *The reason for this is that the difference between mere possession and use is in the mind of the user.*

*Id.* (citations omitted) (emphasis added).

40. *Id.* (quoting *United States v. Wilkinson*, 929 F.2d at 26).

41. *Id.* at 464. See 18 U.S.C. § 924(c)(1), *supra* note 5.



misplaced Congressional intent; McFadden's weapon secreted in his room was inaccessible for the drug sale. As Justice Breyer stated: "As I read the case law, when courts have held that 'use' encompasses 'possession,' they have always found (1) possession, (2) in connection with a drug crime, and (3) *something more*."<sup>42</sup> What, however, is "*something more*?"<sup>43</sup>

In *United States v. Payero*,<sup>44</sup> "something more" was the common sense notion that the firearm gave the defendant courage by allowing him to protect himself.<sup>45</sup> In *United States v. Bruce*,<sup>46</sup> "something more" was the mere presence of the firearm.<sup>47</sup> In contrast to the *Payero* court, Judge Williams, in his dissent in *Robinson # 2*,<sup>48</sup> argued that mere presence for protection or courage is the virtual opposite of "use."<sup>49</sup>

In the Second Circuit, "something more" is, in actuality, the number and accessibility of the firearms defendant possessed.<sup>50</sup> Citing *United States v. Meggett*<sup>51</sup> in his dissenting opinion in *Robinson #2*, Judge Williams stated that "[w]hile the majority attempts to fine-tune the concept of facilitation (and thereby, use) through its twin guideposts of proximity and accessibility, the ultimate result is that possession amounts to 'use' because possession enhances the defendant's confidence."<sup>52</sup> Judge Williams added that "[h]ad Congress intended that, all it need have mentioned is possession."<sup>53</sup>

Finally, it should be noted that Judge Williams, in clear and comprehensible language, explained that the "carry" provision of § 924(c)(1)

42. *Id.* at 468 (Breyer, C.J., dissenting).

43. *Id.* (Breyer, C.J., dissenting).

44. 888 F.2d 928 (1st Cir. 1989).

45. *Id.* at 929 (holding that a conviction will be sustained if the weapon facilitated the transaction by "lending courage to the possessor").

46. 939 F.2d 1053, 1056 (presence of a Derringer and ammunition in a bag next to the cache of drugs is not sufficient proof of "use" within the meaning of the statute).

47. *Id.* at 1054.

48. 36 F.3d 106, 119-26 (D.C. Cir. 1994) (Williams, J., dissenting).

49. *Id.* at 122-23 (Williams, J., dissenting) (arguing that the majority's broad definition of "use" has largely removed significance of the "carry" provision of § 924(c)).

50. See *United States v. Meggett*, 875 F.2d 24, 28-29 (2d Cir. 1989) (holding that possession of five firearms and large quantity of ammunition secreted about defendant's apartment constituted "use" because weapons were an "integral part of the felony"). This case, when compared with the majority in *McFadden*, is indicative of the confusion which divergent application and interpretation of § 924(c) has engendered in the federal system. See *id.*; *supra* notes 38-39 and accompanying text.

51. 875 F.2d 24 (2d Cir. 1989).

52. *Bailey*, 36 F.3d at 124 (Williams, J., dissenting) (citing *United States v. McFadden*, 13 F.3d at 466).

53. *Id.* at 125 (Williams, J., dissenting) (emphasis added).

would apply to Bailey who was arrested with his gun in the trunk of his car and his drugs in both the front and trunk of the car.<sup>54</sup> The "use" provision of the statute, of course, would not apply to him.

## B. NEW YORK FIREARMS LAW

In order to understand the New York courts' "legislative" approach to blurring the "possession-use distinction," an understanding of New York's statutory history is indispensable. By the year 1915, New York Penal Law Section 1897 stated:

A person who attempts to use against another, or who carries, or possess, any instrument or weapon of the kind commonly known as a black-jack, slungshot [sic], billy, sandclub, sandbag, metal knuckles, bludgeon, or who, *with intent to use the same unlawfully against another*, carries or possesses a dagger, dirk, dangerous knife, razor, stiletto, or any other dangerous or deadly instrument or weapon is guilty of a misdemeanor, and if he has been previously convicted of any crime he is guilty of a felony.<sup>55</sup>

Section 1898 stated as follows:

The possession, by any person other than a public officer, of any of the weapons specified in section eighteen hundred and ninety-seven or eighteen hundred and ninety-seven-a of this chapter, concealed or furtively carried on the person, is presumptive [sic] evidence of carrying, or concealing, or possessing, *with intent to use the same in violation of this article*.<sup>56</sup>

By 1965, the last year the old Penal Law was in effect, the statute in question had been little changed. Section 1897(9) stated as follows:

Any person who has in his possession any dagger, dangerous knife, dirk, razor, stiletto, imitation pistol or any other dangerous or deadly instrument or weapon *with intent to use the same unlawfully against another* is guilty of a misdemeanor, and he is guilty of a felony if he has previously been convicted of any crime.<sup>57</sup>

Furthermore, section 1899(4) stated in pertinent part:

The possession by any person of any dagger, dirk, stiletto, dangerous knife or of any other weapon, instrument, appliance or substance de-

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54. *Id.* (Williams, J., dissenting) (finding that a gun may be "carried" if it is on the person of "a confederate and within easy reach of the defendant") (citation omitted).

55. N.Y. PENAL LAW § 1897 (McKinney 1917) (bold in original) (emphasis added).

56. N.Y. PENAL LAW § 1898 (McKinney 1917) (bold in original) (emphasis added).

57. N.Y. PENAL LAW § 1897(9) (McKinney 1965) (originally enacted in N.Y. PENAL LAW of 1909) (emphasis added).

signed, made or adapted for use primarily as a weapon, is presumptive evidence of *intent to use the same unlawfully against another*.<sup>58</sup>

Moving from 1965 to the present penal law, Penal Law Section 265.01(2), criminal possession of a weapon in the fourth degree reads as follows:

A person is guilty of criminal possession of a weapon in the fourth degree when: . . . (2) He possesses any dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon with *intent to use the same unlawfully against another*. . . . Criminal possession of a weapon in the fourth degree is a class A misdemeanor.<sup>59</sup>

During the same period, 1965 to present, Penal Law Section 265.15(4), referred to as the statutory presumption of use, stated in pertinent part: "The possession by any person of any dagger, dirk, stiletto, dangerous knife or any other weapon, instrument, appliance or substance designed, made or adapted for use primarily as a weapon, is presumptive evidence of *intent to use the same unlawfully against another*." <sup>60</sup>

On September 1, 1974, Penal Law Section 265.03, criminal possession of a weapon in the second degree, became effective.<sup>61</sup> That statute states: "A person is guilty of criminal possession of a weapon in the second degree when he possesses a machine-gun or loaded firearm with *intent to use the same unlawfully against another*." <sup>62</sup>

Significantly, the presumptive language of section 265.15(4) does *not* mention or refer to the word "firearm."<sup>63</sup> If the effective dates of the statutes are considered, it is clear that in writing the phrase "with intent to use unlawfully against another" prior to 1965, the New York legislature did not intend the presumption under section 265.15(4) to apply to section 265.03, criminal possession of a weapon in the second degree.<sup>64</sup> Rather, the legislature, through the use of identical language in section 265.15(4) ("intent to use the same unlawfully against another"), meant to apply that presumption solely to section 265.01(2), criminal possession of a weapon in the fourth degree, which is a Class "A" misde-

58. N.Y. PENAL LAW § 1899(4) (McKinney 1965) (originally enacted in N.Y. PENAL LAW of 1909) (emphasis added).

59. N.Y. PENAL LAW § 265.01(2) (McKinney 1995) (emphasis added).

60. N.Y. PENAL LAW § 265.15(4) (McKinney 1995) (emphasis added).

61. N.Y. PENAL LAW § 265.03 (McKinney 1995) (emphasis added).

62. *Id.*

63. See N.Y. PENAL LAW § 265.15(4), *supra* note 60 and accompanying text.

64. N.Y. PENAL LAW § 265.03 (originally enacted as Act of September 1, 1974, L.1974, c. 1041, § 12).

meanor.<sup>65</sup> This is so because the section 265.15(4) presumption, and the long history of that presumption, make clear that it is meant to be used in conjunction with the particular misdemeanor weapons listed in section 265.01(2), as well as "generic" weapons made by adaptation of ordinary objects, such as a pencil or a pen, for use as a weapon.<sup>66</sup> The presumption's phrase "with intent to use the same unlawfully against the person or property of another"<sup>67</sup> clearly applies to the following weapons or objects listed in section 265.01(2): "dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon."<sup>68</sup> Section 265.01(2) makes these weapons illegal when they are used against another unlawfully and intentionally.<sup>69</sup> In contrast, section 265.01(1) mentions "firearm" among others, and makes the weapons listed in that subdivision per se illegal, the intent to use unlawfully against another not being required.<sup>70</sup> As such, the presumption statute does not apply to firearms.

Furthermore, the section 265.15(4) presumption has been applied only to misdemeanors since the turn of the century.<sup>71</sup> It is clear that the legislature did not intend that presumption to apply to criminal possession of a weapon in the second degree, a Class "C" felony with a fifteen year maximum. Nor did the legislature intend that simple or mere possession of a firearm, proscribed in section 265.02(4),<sup>72</sup> a Class "D" felony with

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65. See N.Y. PENAL LAW § 265.01(2), *supra* notes 59-60 and accompanying text.

66. See N.Y. PENAL LAW § 265.15(4), *supra* notes 59-60 and accompanying text.

67. See N.Y. PENAL LAW § 265.15(4), *supra* note 60 and accompanying text.

68. See N.Y. PENAL LAW § 265.01(2), *supra* note 59 and accompanying text.

69. See *id.*, *supra* note 59 and accompanying text.

70. N.Y. PENAL LAW § 265.01(1) (McKinney 1995). Section 265.01(1) provides: A person is guilty of criminal possession of a weapon in the fourth degree when: (1) He possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sand bag, sandclub, wristbrace type slingshot or slungshot, shiriken or "Kung Fu Star" . . . .

*Id.*

71. See *infra* notes 73-74 and accompanying text.

72. N.Y. PENAL LAW § 265.02 (McKinney 1995). Section 265.02 provides: A person is guilty of criminal possession of a weapon in the third degree when: (1) He commits the crime of criminal possession of a weapon in the fourth degree as defined in subdivision one, two, three or five of section 265.01, and has been previously convicted of any crime; or (2) He possesses any explosive or incendiary bomb, bombshell, firearm silencer, machine-gun or any other firearm or weapon simulating a machine-gun and which is adaptable for such use; or (3) He knowingly has in his possession a machine-gun, firearm, rifle or shotgun which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such machine-gun, firearm, rifle or shotgun; or (4) He possesses any loaded firearm. Such possession shall not, ex-

a seven year maximum, to be enhanced to criminal possession of a weapon in the second degree by the application of the statutory presumption.

As of 1977, the "intent to use" presumption, section 265.15(4), had not been applied in a gun prosecution charging mere possession under criminal possession of a weapon in the third degree so as to raise the charge to criminal possession of a weapon in the second degree.<sup>73</sup> It appears that the first case to apply the section 265.15(4) presumption to simple or mere possession of a firearm was *People v. Evans*.<sup>74</sup> This case involved a narcotics investigation in Suffolk County which included members of the New York City Police Department and the use of a confidential informant.<sup>75</sup> Importantly, the confidential informant knew about a contract that had been offered to kill one Rory Schonhaut.<sup>76</sup> When a Cadillac was seen in the vicinity of Schonhaut's house, officers from the local police arrived to investigate and were directed to an automobile driving past the house at that moment which fit the description.<sup>77</sup> The responding officers gave chase and, in attempting to pass the vehicle, noticed defendant driver's nervous behavior.<sup>78</sup> The vehicle was stopped and searched.<sup>79</sup> The search revealed a loaded .44 caliber revolver found under the driver's seat, a loaded .38 caliber revolver, a pair of handcuffs and eleven .44 caliber magnum bullets.<sup>80</sup> In addition, .44

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*cept as provided in subdivision one, constitute a violation of this section if such possession takes place in such person's home or place of business. (5)(i) He possesses twenty or more firearms; or (ii) he possesses a firearm and has been previously convicted of a felony or a class A misdemeanor defined in this chapter within the five years immediately preceding the commission of the offense and such possession did not take place in the person's home or place of business. Criminal possession of a weapon in the third degree is a class D felony.*

*Id.* (emphasis added).

73. *See People v. Hassan*, 57 A.D.2d 594, 393 N.Y.S.2d 606 (2d Dep't 1977) (convicting defendant of criminal possession of a weapon in the second degree without an instruction as to section 265.15(4)).

74. 106 A.D.2d 527, 483 N.Y.S.2d 339 (2d Dep't 1984).

75. *Id.*, 483 N.Y.S.2d at 341.

76. *Id.* Ironically, the informant was actually offered the contract. *Id.*

77. *Id.* at 528, 483 N.Y.S.2d at 342.

78. *Id.* at 529, 483 N.Y.S.2d at 342. "At that point, Officer Pepple looked over at the driver of the vehicle, the defendant herein, and noticed that he was acting suspiciously." *Id.*

79. *Id.* at 529, 483 N.Y.S.2d at 342-43.

80. *Id.* at 529-30, 483 N.Y.S.2d at 343. The initial observation of the interior revealed the loaded .44 caliber revolver found under the driver's seat. *Id.* Once the vehicle had been impounded and brought to a precinct, the contents of the car were examined and the rest of the items noted above were uncovered. *Id.*

caliber rounds were found in the defendant's pants pockets during a search at the precinct.<sup>81</sup>

Prior to trial, defendant's motion to suppress was denied.<sup>82</sup> The trial court charged the jury that it could presume intent to use the guns unlawfully, pursuant to section 265.15(4), and convict the defendant of criminal possession of a weapon in the second degree.<sup>83</sup> The jury convicted the defendant.<sup>84</sup> On appeal, the Appellate Division, Second Department stated that the trial court's use of the section 265.15(4) presumption was proper:

The question of whether the defendant intended to use the weapons unlawfully against another (Penal Law, § 265.03) was for the jury to decide in view of the circumstances of the case. Moreover, the statutory presumption of intent (Penal Law, § 265.15, subd. 4) allowed the jury, if it so desired, to infer such intent.<sup>85</sup>

Notably, no case law was cited by the court nor was the legislative history of the law discussed. Had the defendant been carrying drugs and been prosecuted by the federal authorities, he clearly would have been guilty of "carrying" weapons, but not "use" according to Judge Williams of the D.C. Circuit.<sup>86</sup> In sharp contrast to Judge Williams' position, nearly every other federal court would have upheld Evans' conviction for firearms use, even though he never fired, brandished or even touched the guns in his Cadillac.<sup>87</sup>

As *Evans* illustrates, the New York courts, by liberally applying the statutory intent to use presumption (section 265.15(4)) originally meant for non-per se misdemeanor weapons possession, have blurred the "possession-use distinction."<sup>88</sup> In *Evans*, simple or mere possession of firearms, a Class "D" felony with a maximum sentence of seven years incarceration, was converted or enhanced into criminal possession of a

81. *Id.* at 530, 483 N.Y.S.2d at 343.

82. *Id.*

83. *Id.* at 532, 483 N.Y.S.2d at 344-45.

84. *Id.* at 532, 483 N.Y.S.2d at 345.

85. *Id.*

86. *See United States v. Bailey*, 36 F.3d 106, 121-23 (D.C. Cir. 1994) (Williams, J., dissenting) (arguing that "carrying" a gun with drugs requires more to rise to the level of "use").

87. *Id.* at 120 (Williams, J., dissenting). Nevertheless, Judge Williams reminds the majority that "[n]early all of our sister circuits say that mere possession of a firearm does not constitute 'use' under 18 U.S.C. § 924(c)." A brief discussion of the positions of the circuit courts can be found in *United States v. McFadden*, 13 F.3d 463, 469-70 (1st Cir. 1994) (Breyer, C.J., dissenting).

88. *See People v. Evans*, 106 A.D.2d 527, 483 N.Y.S.2d 339 (2d Dep't 1984).

weapon in the second degree, a Class "C" felony with a maximum sentence of fifteen years imprisonment.<sup>89</sup>

Contrary to the *Evans* decision, the defendant should have only been found to have been in simple or mere possession of the firearms which were in his vehicle, but which were not fired, brandished, or drawn. Nevertheless, a federally inspired metamorphosis of the defendant's possession into use by charging the jury with New York's statutory presumption of intent to use,<sup>90</sup> mirrored the federal courts' treatment of similar cases involving the application of 18 U.S.C. § 924(c)(1).<sup>91</sup> Thus, New York joined the federal courts in the dissolution of the "possession-use distinction." It may be no coincidence that § 924(c)(1) was passed by Congress in its present form in 1984, the same year *Evans* was decided.<sup>92</sup>

The trial court's use of the presumption in *Evans*, as approved by the Second Department, was a clear judicial expansion of a presumption heretofore applied only to misdemeanors. While the application of the presumption was a judicial tour de force applied to a "bad" defendant, it was also an unjustified encroachment on the intent of the New York State legislature.

On the other hand, while the New York courts may have joined federal courts in kind, they have not joined them in degree. There are few reported New York cases which have converted or enhanced by the presumption of intent to use mere simple possession of a firearm to the "C" felony, criminal possession of a weapon in the second degree.<sup>93</sup>

In praise of New York judicial and prosecutorial restraint, it must be said that the courts and district attorneys have generally prosecuted those cases charging criminal possession of a weapon in the second degree where the defendant has fired the gun, shot someone, or at least brandished the firearm by word or deed.<sup>94</sup> Those are the paradigmatic uses

89. *Id.* See *supra* note 10.

90. See N.Y. PENAL LAW § 265.15(4), *supra* note 60.

91. See *supra* notes 5 and 32 and accompanying text.

92. See *supra* notes 5 and 74 for date verification.

93. See *People v. Coluccio*, 170 A.D.2d 523, 524, 566 N.Y.S.2d 87, 87-88 (2d Dep't) (finding that intent can be inferred from situation where defendant confessed to possessing a loaded gun to protect cocaine and money), *appeal denied*, 77 N.Y.2d 993, 575 N.E.2d 405, 571 N.Y.S.2d 919 (1991); *In re John N.*, 168 A.D.2d 386, 387, 563 N.Y.S.2d 397, 399 (1st Dep't 1990) (stating that the lower court correctly applied the statutory presumption of intent to use where a person possesses a weapon); *People v. Dumas*, 156 Misc. 2d 1025, 595 N.Y.S.2d 644 (Sup. Ct. Kings County 1992) (finding no rational basis or independent proof to invoke § 265.15(4)).

94. See *People v. Pons*, 68 N.Y.2d 264, 267, 501 N.E.2d 11, 13, 508 N.Y.S.2d 403, 405 (1986) (holding that "because possession of a weapon does not involve the use of

mentioned by Judge Ginsburg<sup>95</sup> and advocated by Judge Williams.<sup>96</sup> However, New York prosecutors are willing to indict for criminal possession of a weapon in the second degree, in mere possession circumstances, presumably as a plea bargaining tool.<sup>97</sup>

*People v. Dumas*<sup>98</sup> is a good example of a trial court's struggle - in a difficult case - to avoid the strictures of the *Evans* decision.<sup>99</sup> Consequently, no discussion of the presumption of intent,<sup>100</sup> as applied to criminal possession of a weapon in the second degree, would be complete without its discussion. Just as Justice Breyer was searching in

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physical force, there are no circumstances when justification [] can be a defense to the crime of criminal possession of a weapon") (citation omitted); *People v. Almodovar*, 62 N.Y.2d 126, 128-30, 464 N.E.2d 463, 464-65, 476 N.Y.S.2d 95, 97 (1984) (finding criminal possession of a weapon in the second degree where defendant fired several pistol shots claiming that he acted in self defense); *People v. Bumbury*, 194 A.D.2d 735, 735, 599 N.Y.S.2d 826, 827 (2d Dep't 1993) (finding that while defendant claimed he fired gun in self defense, the charge of criminal possession in the second degree is affirmed because the charge is based on possession with intent to use rather than use of a firearm); *People v. Wooten*, 149 A.D.2d 751, 751, 540 N.Y.S.2d 533, 534 (2d Dep't 1989) (holding that the "charge of criminal possession of a weapon in the second degree is based upon the defendant's possession of the loaded firearm, not its lawful use in self-defense"); *People v. Carrion*, 136 A.D.2d 649, 650, 523 N.Y.S.2d 606, 607 (2d Dep't) (finding charge of criminal possession in second degree based on possession, not its use), *appeal denied*, 71 N.Y.2d 967, 524 N.E.2d 432, 529 N.Y.S.2d 78 (1988); *People v. Lewis*, 116 A.D.2d 16, 20, 499 N.Y.S.2d 709, 711-12 (1st Dep't 1986) (reversing conviction for criminal possession in the second degree where defendant displayed the handle of the gun with a reasonable basis for self-defense and raised factual issues as to his intent to use the gun unlawfully). The reasoning in *People v. Pons* prohibiting application of the defense of justification to criminal possession of a weapon in the second degree (intent to use unlawfully against another) is strained and unreasonable. Justification is a defense to "intent" crimes. Because criminal possession of a weapon in the second degree is clearly an "intent" crime, it should be subject to that defense.

95. *United States v. Bailey*, 36 F.3d 106, 114 (D.C. Cir. 1994). In *Bailey*, the D.C. Circuit determined that restricting the definition of "use" to the paradigmatic level - "firing, brandishing, or displaying the gun during the commission of the predicate offense" - was, while virtuous in its simplicity, too narrow to include the manifold kinds of "use" which Congress seemingly intended to address via § 924(c). *Id.*

96. *Id.* at 121-22 (Williams, J., dissenting) (asserting that the language and background of § 924(c) suggests that an active definition of "use" was intended rather than the majority's adoption of a less restrictive, more encompassing interpretation).

97. *Cf. People v. Dumas*, 156 Misc. 2d 1025, 1025-26, 595 N.Y.S.2d 644, 645 (Sup. Ct. Kings County 1992) (agreeing that "'bootstrapping' of one presumption onto another presumption, in a vacuum," without any rational evidence pertaining to intent demands dismissal of all charges).

98. 156 Misc. 2d 1025, 595 N.Y.S.2d 644 (Sup. Ct. Kings County 1992).

99. *See People v. Evans*, 106 A.D.2d 527, 483 N.Y.S.2d 339 (2d Dep't 1984); *supra* notes 74-92 and accompanying text.

100. *See* N.Y. PENAL LAW § 265.15(4), *supra* note 60 and accompanying text.



*McFadden*,<sup>101</sup> Justice Miller, in *Dumas*, was looking for “something more.”<sup>102</sup> Although the result in *Dumas* differed, neither judge found enough evidence of “use” to justify the statutory sentencing enhancement.<sup>103</sup>

In *Dumas*, defendant was the wife of a gentleman who was accidentally killed by the discharge of a pistol.<sup>104</sup> Defendant, her husband, and an individual named Douglas Williams were transporting pistols from North Carolina to New York.<sup>105</sup> At some point, defendant’s husband requested Williams to display one of the guns.<sup>106</sup> When Williams withdrew the gun from a duffel bag, it discharged, struck defendant’s husband in the back, and killed him.<sup>107</sup> Defendant alerted the police in a futile attempt to save her husband’s life.<sup>108</sup> The police, however, arrested defendant and Williams, and charged them with simple possession of a firearm, criminal possession of a weapon in the third degree.<sup>109</sup> In addition, they were both charged with criminal possession of a weapon in the second degree.<sup>110</sup>

Subsequently, the *Dumas* court dismissed the charge of criminal possession of a weapon in the second degree against the defendant, holding that the district attorney’s instructions to the grand jury, both as to the automobile presumption (section 265.15(3))<sup>111</sup> together with the pre-

101. See *United States v. McFadden*, 13 F.3d 463, 469 (1st Cir. 1994) (describing the numerous steps which this defendant would have had to take in order to actually put the gun to use).

102. See *Dumas*, 156 Misc. 2d at 1030, 595 N.Y.S.2d at 648. “[I]f there had been a scintilla of evidence which might rationally support a charge that she intended to use the weapons, this indictment would be sustained.” *Id.* (citations omitted).

103. See *United States v. McFadden*, 13 F.3d at 469 (Breyer, C.J., dissenting); *Dumas*, 156 Misc. 2d at 1030, 595 N.Y.S.2d at 648.

104. *Dumas*, 156 Misc. 2d at 1026-27, 595 N.Y.S.2d at 645-46.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1027, 595 N.Y.S.2d at 646.

109. *Id.*

110. *Id.* The defendants were also charged with criminal sale of a firearm in the second degree. *Id.*

111. N.Y. PENAL LAW § 265.15(3) (McKinney 1995). Section 265.15(3) provides: The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, defaced rifle or shotgun, firearm silencer, explosive or incendiary bomb, bombshell, gravity knife, switchblade knife, pilum ballistic knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, chuka stick, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein;

sumption of intent to use unlawfully (section 265.15(4)), were improper.<sup>112</sup> What the *Dumas* court failed to suggest was that based upon a theory of acting in concert pursuant to Penal Law Section 20.00,<sup>113</sup> the defendant could have been prosecuted without resorting to the automobile presumption, thereby curing the defect in the district attorney's instructions to the grand jury.<sup>114</sup>

Nevertheless, the *Dumas* court held

that the finding that the defendant intended to use the weapons unlawfully against another did *not* flow naturally, logically or rationally from any *proven* facts, but was based entirely upon the impermissible "bootstrapping" of presumptions. If the defendant had been the actual shooter or if she had physically possessed the weapons, a different result might ensue.<sup>115</sup>

The court then cited *People v. Evans* and stated that if there had been any evidence that the defendant intended to use the weapons, the result would have been different.<sup>116</sup> In referring to *Evans*, the *Dumas* court failed to note that there was not one iota of evidence in *Evans* that the defendant intended to use the weapons in the classic and paradigmatic sense.<sup>117</sup>

The *Dumas* court further held that "[h]ere the 'intent' charges were proffered merely because defendant was present in the automobile, in which the weapons were found. This, alone, was insufficient."<sup>118</sup> In view of *Evans*, the *Dumas* court was in error on this point. Pursuant to

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(b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same.

*Id.*

112. *Dumas*, 156 Misc. 2d at 1029-30, 595 N.Y.S.2d at 647. *See supra* note 60 and accompanying text.

113. N.Y. PENAL LAW § 20.00 (McKinney 1995). Section 20.00 provides:

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

*Id.*

114. *Dumas*, 156 Misc. 2d at 1029, 595 N.Y.S.2d at 647.

115. *Id.* at 1029-30, 595 N.Y.S.2d at 647 (citations omitted).

116. *Id.* at 1030, 595 N.Y.S.2d at 648 (citing *People v. Evans*, 106 A.D.2d 527, 483 N.Y.S.2d 339).

117. *See People v. Evans*, 106 A.D.2d 527, 483 N.Y.S.2d 339.

118. *Dumas*, 156 Misc. 2d at 1030, 595 N.Y.S.2d at 648.

*Evans*, the prosecution in *Dumas* could have charged the defendant with criminal possession of a weapon in the second degree via an acting in concert instruction,<sup>119</sup> and the statutory presumption of intent<sup>120</sup> to use a firearm unlawfully.<sup>121</sup> In this regard, the *Dumas* court frankly stated that defendant “appears to have knowingly participated in their transport [referring to the guns] from North Carolina to Brooklyn.”<sup>122</sup> In light of *Dumas*, it should be noted that the automobile presumption<sup>123</sup> was probably charged by the trial court in *Evans*, but not objected to nor made an issue on appeal.

To the credit of the District Attorney of Kings County, no presentation was made to a second grand jury in *Dumas*. One assumes that the prosecution was satisfied with defendant’s admission of guilt to criminal possession of a weapon in the third degree and criminal sale of a firearm.<sup>124</sup>

#### CONCLUSION

Judge Ginsburg commented upon the “widely divergent and seemingly contradictory results” in the D.C. Circuit regarding the “possession-use distinction” or lack thereof.<sup>125</sup> Obviously, the incongruity is not found solely in the federal courts.<sup>126</sup> New York has also suffered, though with much less frequency, from divergent and contradictory results caused by the judicial effort to legislate the end of the possession-use distinction. Any such endeavor unquestionably belongs in the hands of Congress and the New York State legislature. Still, it remains apparent that both the federal and New York judicial systems have blurred, and in some cases virtually eliminated, the distinction between use and possession of a firearm. What the future holds in this area will, of course, depend on the Supreme Court’s decision in *Robinson* #2.<sup>127</sup> It is my hope that the Supreme Court’s review will expose the issue, and end the confusion on the federal level, while simultaneously provoking a rethinking in New York.

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119. See N.Y. PENAL LAW § 20.00, *supra* note 113.

120. See N.Y. PENAL LAW § 265.15(4), *supra* note 60.

121. See *Evans*, 106 A.D.2d at 532, 483 N.Y.S.2d at 344-45.

122. 156 Misc. 2d at 1030, 595 N.Y.S.2d at 648.

123. See N.Y. PENAL LAW § 265.15(3), *supra* note 111.

124. See *supra* notes 109-110 and accompanying text.

125. See *United States v. Bailey*, 36 F.3d 106, 111 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 1689 (1995).

126. See *People v. Evans*, 106 A.D.2d 527, 483 N.Y.S.2d 339.

127. See *supra* note 125 for full citation.

Finally, United States Supreme Court students should have no difficulty prophesying that the key to the court's ruling in *Robinson #2* lies somewhere in the zone between *Smith*<sup>128</sup> and Justice Breyer's dissent in *McFadden*.<sup>129</sup> *Robinson #2* may be the neutral ground where the so-called liberal and conservative wings of the court meet and construe § 924(c) "use" in the classic paradigmatic sense that Congress probably intended.

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128. *United States v. Smith*, 113 S. Ct. 2050 (1993). *See supra* notes 15-19 and accompanying text.

129. *United States v. McFadden*, 13 F.3d 463, 466-70 (1st Cir. 1994) (Breyer, C.J., dissenting). *See supra* notes 32-41 and accompanying text.

