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These are Drugs. These are Drugs Using Guns. Any Questions? An Analysis of the Diverse Applications of 18 U.S.C. § 924(c)(1)

Jamilla A. Moore

THESE ARE DRUGS. THESE ARE DRUGS USING GUNS. ANY QUESTIONS? AN ANALYSIS OF THE DIVERSE APPLICATIONS OF 18 U.S.C § 924(C)(1)

INTRODUCTION

Consider the following scenario—entirely plausible under current law. John Jones lives in New York City. His brother James lives in Los Angeles. Both are cocaine dealers and both own semi-automatic handguns.

One evening, DEA agents in New York and Los Angeles execute search warrants of the brothers' homes. Each brother is discovered by the agents conducting a cocaine transaction in an upstairs bedroom. In both cases, the agents discover drugs hidden among the attic insulation and handguns concealed in basement closets.

John and James are indicted and both plead guilty to federal drug trafficking charges. In addition, both men are indicted pursuant to 18 U.S.C. § 924(c)(1), a federal statute which creates a separate penalty for the use or carrying of a firearm during or in relation to a drug trafficking transaction. Both men receive three year sentences on the drug charges. However, John is acquitted of the firearms charge by a New York federal court, but James is found guilty on the same charge by the Los Angeles federal court. Following his conviction, James receives an additional five year non-concurrent sentence as mandated by the firearms statute, with no opportunity for probation or parole.

How could John and James receive different treatment when the circumstances are identical? Simply put, this inequity occurs because the brothers reside within different circuits of the United States Courts of Appeal, and the two circuits in question have reached irreconcilable constructions of 18 U.S.C. § 924(c)(1). 18 U.S.C. § 924(c)(1) provides, in pertinent part:

> Whoever, during and in relation to any . . . drug trafficking crime (including a . . . 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 . . . drug trafficking crime, be sentenced to imprisonment for five years.[1]

1. 18 U.S.C. § 924 (West Supp. 1993). The statute also establishes mandatory sentences for the use or carrying of certain types of weapons and subsequent convictions (10 year sentence for short-barrelled rifles and shotguns; 30 years for machine guns, destructive devices or guns equipped with mufflers or silencers; 20 years for second or subsequent convictions; and life imprisonment without parole for second convictions for the weapons which trigger the 30-year sentence), and prohibits the court from granting probation, suspended sentences or concurrent terms of imprisonment.

The "uses" element of the statute has been subject to varying interpretations by the federal Courts of Appeal,[2] yet it has been construed by the Supreme Court of the United States only in the context of an exchange of guns for narcotics.[3]

The majority of the circuits have construed the term "uses" broadly. According to the majority, the mere presence of firearms at the scene of a drug arrest will be enough to satisfy the statute because (i) the weapons *could* be used to protect the trafficker's drugs, cash, or paraphernalia and (ii) given the possibility of use, the weapons have in fact been used to create a "drug fortress". However, a minority of two circuits has interpreted the statute as requiring that the government prove "ready access"—i.e., that the strategic placement of the weapons supports an inference that the defendant intended to use, or would have used, the firearm during the drug trafficking transaction(s).[4] The intent to use a firearm may not be presumed from the mere fact that it was found in the same room as drugs and related items.[5]

This Comment will focus on the two irreconcilable rationales applied by the United States Courts of Appeal to construe the "uses" element of 18 U.S.C. § 924(c)(1), with a suggestion to the United States Supreme Court that the time is ripe to "clarify the meaning and scope of section 924(c)(1)".[6] Part I will offer a brief summary of the statute's legislative history; Part II will illustrate why the "ready access" doctrine is incompatible with the "drug fortress" approach. Part III will analyze the Supreme Court's opinion in *Smith v. United States*[7] (with additional focus on Justice Scalia's

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2. 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, 40 (1990).

3. Smith v. United States, 113 S. Ct. 2050 (1993) (6-3 decision; O'Connor, J.; holding that trading gun for narcotics constitutes "use" of firearm within meaning of statute). *Smith*'s failure to resolve the conflict among the federal circuits in defining "use" under different factual circumstances is discussed in Part III, *infra*.

4. The First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits apply the "drug fortress" theory; the Second and Third apply the "ready access" approach. *See infra* Part II.B. *See also* United States v. Castro-Lara, 970 F.2d 976 (1st Cir. 1992) (evidence supports conviction where defendant in car at scene of drug pickup with unloaded gun and cash in locked trunk); United States v. Nelson, 6 F.2d 1049 (4th Cir. 1993) (conviction affirmed where search pursuant to warrant revealed guns and drugs in the same rooms, but no actual drug trafficking activity at the time of the search); United States v. Garrett, 903 F.2d 1105 (7th Cir 1990) (conviction affirmed based on constructive possession of cocaine and gun; defendant used keys to gain entry to driver's side of car in which cocaine and gun were found under driver's seat); United States v. Travis, 933 F.2d 1316 (8th Cir. 1993) (weapons in locked gun compartment could support conviction even though car not registered to defendant and no key to glove compartment found on defendant's person); United States v. Torres-Medina, 935 F.2d 1047 (9th Cir. 1991) (use requirement satisfied if weapon available to defendant, even though disabled defendant was physically unable to personally retrieve the weapon); United States v. Harmon, 996 F.2d 256 (10th Cir. 1993) (firearm used or carried when it serves as source of protection for drugs or when it emboldens defendant to commit drug trafficking crime); and United States v. Poole, 878 F.2d 1389, 1393 (11th Cir. 1989) ("the presence of weapons in a location the defendant used to distribute a significant quantity of illegal drugs is sufficient to submit to the jury the issue of whether the defendant used the firearms in connection with a drug trafficking crime").

5. *See* United States v. Mukes, 1992 WL 3713 (6th Cir. 1992) (unpublished disposition), *cert. denied*, 113 S. Ct. 361, *reh'g denied* 113 S. Ct. 833 (1992); United States v. Featherson, 949 F.2d 770 (5th Cir. 1991), *cert. denied*, Langston v. United States, 113 S. Ct. 361 (1992) (White, J., dissenting).

6. 113 S. Ct. at 362 (White, J., dissenting).

7. 113 S. Ct. 2050 (1993).

dissent) and demonstrate why the holding of *Smith* does not resolve the issue of how the "uses" provision should be construed in cases that do not involve a guns-for-drugs exchange. The article concludes in Part IV in support of applying of the "ready access" approach.

I. LEGISLATIVE HISTORY

The current version of 18 U.S.C. § 924(c)(1) is the product of a series of amendments which reflected Congressional and public concern over the increasing number of narcotics-related crimes.[8]

First enacted as part of the Gun Control Act of 1968, section 924(c) initially created a separate offense for the use or the unlawful carrying of a firearm "during the commission of any felony." In addition to the penalty for the underlying felony, the defendant received a separate sentence of not less than one or more than ten years for each section 924(c) conviction.[9]

The statute was first amended as part of the Comprehensive Crime Control Act of 1984.[10] The new predicate offense was "any crime of violence" and the word "during" was replaced by the phrase "during and in relation to."[11]

The predicate offense of drug trafficking was added by a 1986 amendment.[12] It carries the same mandatory penalty as those which were previously attached to a conviction for using or carrying a firearm during and in relation to the commission of a violent crime. In comparison to the 1984 amendment, the 1986 revision was more in line with the report issued by the U.S. Attorney General's Task Force on Violent Crime, which recommended that mandatory prison terms for the use of a firearm attach not only to crimes of violence but to federal felonies in general.[13] The statute was most recently amended in 1990 to add (1) a ten-year mandatory sentence if the firearm is a short-barrelled rifle or shotgun, and (2) the classification "destructive devices" to the mandatory sentencing provisions applicable to machine guns.[14]

To successfully prosecute under section 924(c)(1), the government must prove the defendant's commission of the underlying crime of violence or drug trafficking offense.[15] Although it is frequently referred to as a "penalty enhancement" provision, section 924(c)(1) creates an offense that

8. Riordan, *supra* note 2, at 39.

9. Riordan, *supra* note 2, at 42 n.18 (citing Comment, *Federal Sentencing Enhancement: Mandatory Penalties for Firearms Use Under the Comprehensive Crime Control Act of 1984*, 19 LOY. L.A. L. REV. 823 (1986)).

10. *Id.* at 41.

11. United States v. Feliz-Cordero, 859 F.2d 250, 254 (2d Cir. 1988).

12. H.R. Rep. No. 495, 99th Cong., 2nd Sess., at 27 (1986).

13. Firearms Owners' Protection Act, Pub. L. No. 99-308 § 10, 1986 U.S.C.C.A.N,. (99 Stat.) 1353.

14. 18 U.S.C.A. § 924 (West. Supp. 1993).

15. H.R. Rep No. 495, *supra* note 12, at 9.

is *separate* from the underlying violent or drug crimes.[16] For example, if a defendant is convicted of distinct underlying drug trafficking crimes (such as the common combination of (1) conspiracy to possess with intent to distribute plus (2) possession with intent to distribute) but only a single firearm is seized, each of the two drug trafficking offenses is a predicate for a distinct section 924(c)(1) weapons conviction.[17] Under a penalty enhancement scheme, the defendant would only receive one section 924(c)(1) conviction, with a built-in extension of the mandatory incarceration period. The number of convictions is significant in light of federal recidivist statutes.[18]

Congress intended to ensure that all persons who commit crimes of violence or drug trafficking offenses[19] receive a non-concurrent mandatory sentence without possibility of probation or parole.[20] The legislative history of the 1986 amendment fails to guide courts in construing the "uses or carries" element of the statute when the underlying offense is a drug trafficking crime. However, the 1984 amendment history (which specifically addresses Congress' intent concerning "use" of a weapon in connection with violent crime) strongly suggests that more than the mere proximity of a firearm to drugs or drug-related activity is required for a section 924(c)(1) conviction:

> . . . the section was directed at persons who choose to carry a firearm as an *offensive weapon for a specific criminal act*. . . Moreover, the requirement that the firearm's use or possession be 'in relation to' the crime would *preclude its application in a situation where its presence played no part in the crime*, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.[21]

With this background of Congressional intent, we turn our attention to diverse section 924(c)(1) cases where firearms were found during searches pursuant to a warrant or incident to the defendant's arrest for a drug trafficking crime, but were not brandished offensively during or in relation to a specific drug-related transaction. The discussion will analyze which of the rationales that federal courts have applied to section 924(c)(1) prosecutions is most consistent with the apparent intent of Congress to preclude application of the statute in situations where the actual or "constructive" presence of a firearm plays no part in an attempted or completed drug trafficking offense.

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16. *Id.* at 10.

17. Riordan, *supra* note 2, at 54-55.

18. *See generally* 18 U.S.C. § 924(e) and (g) (West Supp. 1993).

19. Including those offenses which already had statutorily enhanced sentences for commission with a dangerous weapon.

20. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 3491 [hereinafter Crime Control Act].

21. *Id.* at 3492 n.10. (emphasis added); *see also* Riordan, *supra* note 2, at 44.

II. THE CONFLICT AMONG THE CIRCUITS

A. The "Ready Access" Doctrine

Appellants who seek to persuade the reviewing court that their convictions were based on evidence that was insufficient to establish the "use" element of 18 U.S.C. § 924(c)(1) can most reasonably rely on cases from the Second, Third, and (to a lesser extent) District of Columbia circuits. Although more recent decisions by these circuits may be interpreted as signalling a more expansive interpretation of the "use" provision, the cases that established the "ready access" doctrine as precedent within each circuit have not been expressly overturned.[22]

1. The Second Circuit

A 1988 Second Circuit case, *United States v. Feliz-Cordero*[23], represents the proposition that a person can possess a gun without either (i) using it, or (ii) using it during or in relation to a given crime.[24] In *Feliz-Cordero*, the Second Circuit held that a search which revealed a loaded handgun in a dresser drawer in a bedroom which also contained a small quantity of cocaine, cash, and drug records did not establish that the defendant used or carried it during or in relation to the drug trafficking offense for which he was convicted.[25]

The Second Circuit interpreted each element of the "uses or carries" provision separately, finding that:

> Neither the legislative history of 924(c)(1) nor case law in this circuit suggest that the term 'carry' should be construed as having any meaning beyond its literal meaning. . .[a] person cannot be said to 'carry' a firearm without at least a showing that the gun is within reach during the commission of the drug offense.[26]

The court then created a two-part test for construing the "uses" element:

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

22. *See* United States v. Lindsay, 985 F.2d 666 (2d. Cir 1993), and United States v. Hill, 967 F.2d 902 (3d Cir. 1992).

23. 859 F.2d 250 (2d Cir. 1988)

24. *See* United States v. Long, 905 F.2d 1572, 1579 n.10 (D.C. Cir. 1990).

25. 859 F.2d at 253-54.

26. *Id.* at 253.

easily available for use during such a transaction.[27]

The *Feliz-Cordero* court recognized the common connection between firearms and drug trafficking. However, the court found insufficient evidence to support the defendant's conviction because "*under the circumstances of this case*, the intent to use the firearm must be presumed from the fact that a loaded gun was found in the same room as drug paraphernalia during the course of a *search pursuant to a warrant*."[28]

The result of *Feliz-Cordero* is that the government must prove how the circumstances of a particular drug trafficking episode support an inference that a specific weapon was placed by the defendant so that it would be readily accessible for use during that transaction. The court's decision seems to focus on the fact that the government could only offer evidence of one drug-related activity occurring in the apartment where the gun was found—a $200 payment of money owed from an earlier drug deal that took place in a different apartment leased by the defendant's brother.[29] The brother's apartment was located directly above the defendant's, and was the location used for all of the other transactions that supported the defendant's conviction for the predicate drug offenses.[30] The court found that "on the evidence presented, there [was] no basis to conclude that the gun would have been quickly accessible as needed" during drug transactions that occurred in the upstairs apartment.[31]

The Second Circuit's holding seven months later in *United States v. Meggett*[32] could have been viewed as a movement away from the *Feliz-Cordero* rationale. The *Meggett* court was persuaded that five loaded weapons were on hand to protect an apartment used as a storage and processing point for large quantities of narcotics.[33]

However, the *Meggett* court cited *Feliz-Cordero* as its guide,[34] and took pains to distinguish the two cases on their facts in upholding the trial court's jury instruction, which said in part:

> The government need not show that the defendant actually carried the firearm on his possession. It is sufficient if you find that the defendant transported or conveyed the weapon or had possession of it in the sense that at a given time he had both the *power and intention to exercise control* over it.[35]

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27. *Id.* at 254 (emphasis added).
28. *Id.* (emphasis added).
29. *Id.* at 251-52.
30. *Id.*
31. *Id.* at 254.
32. 875 F.2d 24 (2d Cir. 1989).
33. *Id.* at 29.
34. *Id.*
35. *Id.* at 27 (emphasis added).

The main factor distinguishing *Feliz-Cordero* and *Meggett* was that the *Meggett* defendants had placed the weapons (i.e. "used" them) in strategic locations, as compared to "the absence of proof that the defendants in *Feliz-Cordero* had placed [their] weapon to have it available for *ready use* during [their] transaction."[36]

Three months after *Meggett*, in *United States v. Alvarado*,[37] the Second Circuit found that the presence of (i) a bullet-proof vest and a stash of cocaine next to a safe containing cash and two loaded handguns and (ii) a loaded pistol in an unlocked drawer of a desk holding drug packaging paraphernalia could support a 924(c)(1) conviction. "[I]mplicitly recognizing the teaching"[38] of *Feliz-Cordero* and *Meggett* the court held:

> . . .'use' requires possession of a gun under circumstances where the weapon is so placed as to be an *integral* part of the offense. . .The evidence here supports the jury finding that the several loaded weapons in Alverado's apartment were strategically located to protect the substantial quantities of cocaine that were packaged and sold in the apartment. . .and to provide added security during drug sales. . . Thus, unlike *Feliz-Cordero*, there was ample proof 'that the defendants. . .had placed the weapon[s] to have [them] *available for ready use* during [drug] transaction[s]'.[39]

The Second Circuit has been consistent in applying *Meggett* and *Alverado* in situations where no drugs are found on the defendant's person or at the location of the arrest for the predicate drug trafficking offense(s).

In *United States v. Medina,*[40] the defendant left a gun and spare ammunition on a table in the bedroom and took $47,000 from the bedroom to the dining room to give to a government informant believed to be a cocaine dealer.[41] The court found that the jury could have reasonably concluded that the gun was strategically placed *and* readily available to protect the cash during the transaction,[42] even though the defendant's decision to leave the gun in his bedroom during the transaction made the case "close."[43]

Although a February 1993 case suggests that the Second Circuit is moving away from the *Feliz-Cordero/Meggett* ready access requirement, the circumstances of the court's appellate review make such a conclusion questionable. In *United States v. Lindsay*,[44] the Second Circuit of Appeal reviewed a 924(c)(1) conviction where 5 guns, but no drugs, were found in the defendant's home. The evidence included: (1) trial testimony where one

36. *Id.* at 29. (emphasis added)
37. 882 F.2d 645 (2d Cir. 1989).
38. *Id.* at 653.
39. *Id.* at 653-54 (emphasis added) (citation omitted).
40. 944 F.2d 60 (2d Cir. 1991).
41. *Id.* at 62-63.
42. *Id.* at 67 (relying on the two-part test enunciated in Feliz-Cordero, 859 F.2d at 254).
43. *Id.*
44. 985 F.2d 666 (2d Cir. 1993).

of Lindsay's "drug trafficking associates" stated that Lindsay discharged a gun with a silencer on an occasion when Lindsay provided him with cocaine, and another stated that he saw Lindsay fire a rifle with a silencer outside Lindsay's tavern where cocaine had been stored; and (ii) a silencer recovered during a search of Lindsay's tavern.[45]

The Court found that, on the evidence, "the jury could have concluded that the five firearms located in Lindsay's house were *strategically placed* for use during drug transactions."[46] Yet, the court did not expressly overrule *Feliz-Cordero* or *Meggett*, which require the "ready accessibility" of a weapon during or in relation to a particular drug trafficking offense.

This result is not as surprising as it may seem. *Lindsay* was reviewed by a judicial panel which included a District Court Judge from the Central District of California sitting by designation.[47] With the Ninth Circuit firmly within the "drug fortress" camp with respect to 924(c)(1) prosecutions, it is conceivable that Judge Kelleher's vote forced this panel to adopt a point of view that is a minority position within the Second Circuit.

Thus, the Second Circuit's holding in *Lindsay* should not be viewed as a departure from the *Feliz-Cordero* dual requirements of strategic location and ready accessibility. The Second Circuit remains one of the two federal appellate courts which has not yet abandoned a traditional approach to construing the "uses" provision of section 924(c)(1).

2. The Third Circuit

In *United States v. Theodoropoulos*,[48] the Third Circuit directly addressed and dismissed the "drug fortress" theory, which is frequently advanced by the government in section 924(c)(1) prosecutions and is followed in the majority of the federal circuits. The "drug fortress" approach suggests that "the mere presence of weapons in the apartment used by the drug traffickers is sufficient to constitute use . . . [by] increas[ing] the likelihood that the criminal undertaking would succeed."[49]

The *Theodoropoulos* court acknowledged that ". . . the presence in plain view of a loaded firearm . . . is evidence that the conspirators may have felt some need for security from which a jury could infer that the weapon was

45. *Id.* at 672. The evidence also included (1) over $5,000 in cash seized from Lindsay's house, including $1,500 from his bedroom; (2) testimony that Lindsay conducted his drug-trafficking business from his home; and (3) testimony that Lindsay used firearms during some of his drug transactions. *Id.*

46. *Id.* (emphasis added). However, unlike prior 924(c)(1) holdings, the Court of Appeals fails to specifically discuss precisely where the 5 weapons were found within Lindsay's home, or the proximity of the weapons to areas of the home where drug transactions were known to have occurred.

47. *Id.* at 668 (Kelleher, J., sitting by designation).

48. 866 F.2d 587 (3d Cir. 1989).

49. *Id.* at 596 (citing United States v. Matra, 841 F.2d 837, 841-43 (8th Cir. 1988)).

an integral part of the conspiracy and was 'used' therein."[50] However, the court stopped short of permitting an inference of "use" from mere possession.

The court reviewed the legislative history of section 924(c), focusing on the Senate Report concerning the 1984 amendment which created the "during and in relation to" language:

> [T]he requirement that the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.[51]

The court noted that "in drafting this provision, Congress required either use or carrying of a firearm"[52] and declined to adopt the position that "the mere availability of a firearm nearby, as distinguished from its open display, is equal to use 'in relation' to an offense.[53]

The *Theodoropoulos* rationale still controls section 924(c)(1) appeals in the Third Circuit, though in 1992 the court broadened the scope of *Theodoropoulos* in *United States v. Hill* when it sustained a conviction based on an unloaded rifle hidden in an unused icebox located immediately next to the defendant's illegal drugs.[54] The court distinguished *Hill* from *Theodoropoulos* by focusing on the requirement of ready accessibility. The *Theodoropoulos* holding turned on the fact that the government failed to establish that the defendant had strategically placed his weapons to have easy means of access during the predicate drug transactions,[55] while Hill "simply had to reach out and open the icebox."[56]

Similarly, in *United States v. Reyes*[57], the Third Circuit held that an unloaded pistol found in a car trunk in a bag with drug money could result in a section 924(c)(1) conviction because the government established "ready accessibility" (i.e. the proximity of the weapon to the defendant) via proof that the defendant had a key to the trunk and a bullet for the gun on his

50. *Id.* at 596-97 (The Theodoropoulos court adopted the *Feliz-Cordero* test and found that "[t]he presence of a loaded shotgun in plain sight in [the] apartment where it was *readily accessible* to the occupants was evidence that the firearm was in use during and in relation to the drug trafficking conspiracy proven in this case." *Id.* at 597 (emphasis added)).

51. *Id.* at 597 (citing S. Rep. No. 225, 98th Cong., 2d Sess., 314 n.10). *See* discussion *supra*, Part I.

52. *Id.* at 597.

53. *Id.*

54. United States v. Hill, 967 F.2d 902 (3d Cir. 1992) (holding analogous to United States v. Martinez, 919 F.2d 419, 421 (10th Cir. 1990)).

55. The *Theodoropoulos* court vacated the defendant's §924(c)(1) conviction because the jury did not specify which of four weapons was used as the basis for the conviction. However in doing so, the court found that only one shotgun found in the apartment where police had also discovered cocaine could satisfy the requirements of § 924(c)(1). Three guns found in a trash can on the apartment's back porch were held to be insufficient to support a § 924(c)(1) conviction. 866 F.2d at 598.

56. 967 F.2d at 907.

57. 930 F.2d 310 (3d Cir. 1991).

person at the time of his arrest.[58]

Even if *Lindsay* is seen as the Second Circuit's retreat from the "ready access" theory, recent Third Circuit section 924(c)(1) opinions show no movement away from the "ready access" approach. Indeed, the Third Circuit's approach to these cases has been consistently to require that the government prove *both* strategic placement and ready accessibility of weapons allegedly used during or in relation to a drug trafficking offense.

B. The "Drug Fortress" Theory

The "drug fortress" theory is employed by the majority of United States Courts of Appeal[59] to uphold section 924(c)(1) convictions in situations where weapons are not found on the person of the defendant but are found (along with drugs, drug paraphernalia or proceeds of drug trafficking) on premises under the actual or constructive possession of the defendant.[60]

1. The District of Columbia Circuit

After struggling with the varied constructions of "use" while on the District of Columbia Court of Appeals, Justice Clarence Thomas probably did not hesitate to join Justice Byron White in dissenting against the Supreme Court's failure to grant certiorari to two section 924(c)(1) appeals.[61] Justice Thomas wrote the opinion for a key District of Columbia circuit case on this issue, *United States v. Long*.[62] Additionally, shortly before his appointment to the Supreme Court, he authored an opinion which broadened the *Long* rationale.[63]

The District of Columbia Circuit's interpretation of the "use" provision can best be described as having evolved into a "modified drug fortress" approach. In 1990, the court set a minimum threshold in *Long* for finding "use" within the meaning of section 924(c)(1): "Evidence of possession, or evidence from which possession may reasonably be inferred, is a prerequisite to a conviction for 'use' under 924(c)(1)."[64]

In *Long*, a search pursuant to a warrant revealed a working but unloaded pistol handle protruding from between sofa cushions(i.e. readily accessible), in an apartment used for "drug related crime" which was visited by Long

58. *Id.* at 314 n.5.

59. Section 924(c)(1) cases from the District of Columbia circuit are discussed herein to exemplify how a "ready access" circuit evolved into a "drug fortress" circuit; and cases from the Fifth and Sixth Circuits have been selected to represent the drug fortress point of view because these circuits produced the two cases which were denied certiorari by the Supreme Court in 1992. *See supra* text accompanying note 5.

60. Riordan, *supra* note 2, at 47.

61. 113 S. Ct. 361 (1992). *See also supra* note 5.

62. 905 F.2d 1572 (D.C. Cir. 1990).

63. United States v. Harrison, 931 F.2d 65 (D.C. Cir. 1991).

64. 905 F.2d at 1579.

two to three times per week.[65] Considering these facts, the court found that:

> Even assuming [Long] visited the apartment to carry out drug transactions, there is no evidence that he exercised the degree of dominion and control over the premises to support an inference of constructive possession over their contents. . .Upholding the conviction of a defendant in the absence of any indica of possession would stretch the meaning of "use" beyond the breaking point.[66]

Citing precedent,[67] the *Long* court articulated a test for determining the nexus between a defendant and a weapon. The defendant's actual or constructive possession of a firearm was to be indicated by one or more of several factors: (1) close proximity to the firearm, (2) possessory interest in the firearm, or (3) dominion and control over the premises on which the firearm was located.[68]

However, subsequent holdings suggest that the *Long* rationale has been broadened in cases where "evidence sufficient to support a jury verdict of 'use' [appears] without fitting the technical rubric of possession."[69] Justice Thomas' opinion in *United States v. Harrison*[70], for example, holds that a jury can reasonably find that an unarmed passenger in a van constructively possessed a weapon found on the persons of his co-defendants because ". . .when and if [he] was shot at, he would either use one of his confederates' guns to shoot back, or else instruct one of them to do so. . .in other words, [he] knew he had 'some appreciable ability to guide the destiny' of the weapons . . .[and] [t]hat is sufficient to establish constructive possession. . . ."[71]

One year later, in *United States v. Jefferson*[72], the District of Columbia Circuit explained its holding in *Long* by emphasizing that the only evidence connecting Long to the gun found in the sofa was his presence in the apartment.[73] In contrast, the court found that Jefferson's statements acknowledging his possession and use of a gun found in the backyard of his mother's house (where he also lived) with over seventy grams of crack

65. *Id.* at 1575-76 n.7.

66. *Id.* at 1577 n.7.

67. United States v. Anderson, 881 F.2d 1128 (D.C. Cir. 1989) (defendant lived in apartment and had keys to bedroom where weapon was found, and had wallet and personal pictures in that bedroom); and United States v. Evans, 888 F.2d 891 (D.C. Cir. 1989) (testimony that defendant brought guns with him from New York established past connection between defendant and weapon).

68. 905 F.2d at 1578.

69. *Id.* at 1582 (Sentelle, J., concurring).

70. 931 F.2d 65 (D.C. Cir. 1991).

71. *Id.* at 72-73.

72. 974 F.2d 201 (D.C. Cir. 1992).

73. *Id.* at 206.

cocaine would support an inference of constructive possession of the weapon.[74]

Nevertheless, despite the holdings in *Harrison* and *Jefferson*, it appears that the District of Columbia Circuit is not yet willing to completely abandon the *Long* rationale that mere presence of weapons and drugs at the same time does not *compel* a finding of actual or constructive possession.

2. The Fifth Circuit

On the other hand, other drug fortress circuits have found that the mere presence of a defendant, a weapon and drugs on the same premises at the same time, regardless of the physical proximity of one to another, *must* mean that the defendant had the general intent to have the weapon available for possible use during any drug transaction (the first element of the *Feliz-Cordero* test). Articulable facts which show the defendant's prior or present disposition to use weapons in relation to drug trafficking activities are not needed even in situations where it would be virtually impossible for the defendant to reach the weapon during a drug transaction gone bad (or an attack on the "fortress"), for drug fortress courts have in effect construed section 924 (c)(1) as a strict liability offense. Since the intent provision has been so broadly construed, it is not necessary for drug fortress circuits to even reach the issue of whether or not a weapon was strategically located so as to be readily accessible for use during a drug transaction (the second element of the *Feliz-Cordero* test).

For example, in *United States v. Robinson*,[75] a pistol and marijuana were found together in a boot in the defendant's laundry room, while cocaine was found in a closet elsewhere in the house. The jury used the defendant's conviction for possessing the cocaine with intent to distribute as the predicate drug trafficking offense which supported his section 924(c)(1) conviction for the pistol.[76]

The Fifth Circuit failed to articulate specific evidence to support the jury's finding that Robinson intended to use the pistol during a cocaine transaction, and that he strategically placed the gun in the basement to "use" in relation to drug transactions occurring elsewhere in the house. Yet, the Fifth Circuit announced that a jury "could reasonably have concluded that

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74. *Id.* During custodial interrogation, Jefferson made the following statement: "Mike gave me the gun to hold so in case we ever got in trouble, we could use it to keep them off us, like the time I told you about Eric coming over at us with his gun." *Id.* at 203, citing the District Court Trial Transcript, January 7, 1991 at 85-87. *But see* Williams, J., dissenting, *Id.* at 208-09 (arguing that nothing in Jefferson's statement ties the gun to the drugs and that modern America includes gangs who attack each other for reasons not related to drugs). The *Jefferson* opinion is also unusual in that the majority cites to Ice-T's controversial rap song "Cop Killer". *Id.* at 208 (maj. opinion). The dissent argues that Jefferson's situation may be more analogous to that of rapper Ice-Cube's character in the movie "Boyz 'n the 'Hood." *Id.* at 209.

75. 857 F.2d 1006 (5th Cir. 1988).

76. The facts in the appellate opinion are not clear regarding how close the closet was to the laundry room, or whether there was a sufficient quantity of marijuana in the boot to support a federal possession conviction.

Robinson 'used' at least one of the firearms found in his house as a means of safeguarding and facilitating illegal transactions and as an integral means of protecting his possession of the [drugs]."[77]

The Fifth Circuit went to the far extreme of the "drug fortress" approach in *United States v. Molinar-Apodaca* [78], where 142 pounds of marijuana were found in a detached shed behind a house which contained an Uzi, a semi-automatic handgun and ammunition for both weapons.[79] Citing *Robinson*, the Fifth Circuit held that the presence of the weapons and ammunition at the time when a considerable quantity of marijuana was seized on the premises *"compels* the conclusion that the jury's verdict is supported by the evidence."[80]

In this respect, the Fifth Circuit is the source of one of the more broad applications of the drug fortress theory. In *United States v. Beverly*[81], the Fifth Circuit upheld a section 924(c)(1) conviction finding that each of four co-defendants constructively "used" two revolvers locked in a safety deposit box under a mattress in the bedroom of an apartment which served as a cocaine distribution center.[82]

The Fifth Circuit court's holding was based upon the facts that (1) one co-defendant was armed with a semi-automatic handgun while escorting a federal informant to his car after completing a prior uncharged drug sale, and also told an undercover federal agent seventeen days before his arrest that it would "be like Vietnam around here" if someone tried to rip him off;[83] and (2) another co-defendant was found in the apartment at the time of arrest "in possession of" $2,200 in cash, including $10 in money marked by the government.[84] The appellate court found that the jury could "infer that these specific guns were used as protection 'in relation to' both the ill-gained cash and drugs found in the room."[85]

Applying the Second and Third Circuits' holdings to the facts of *Beverly* highlights the irreconcilable nature of the split among the circuits in construing the "uses" provision. Based on its decision in *Feliz-Cordero*, the Second Circuit would likely be amused but not persuaded by a government argument that the *Beverly* defendants "strategically" locked their weapons in a safe deposit box to make them "quickly and easily available"[86] during

77. *Id.* at 1010.

78. 889 F.2d 1417 (5th Cir. 1989).

79. *Id.* at 1422.

80. *Id.* at 1424 (emphasis added).

81. 921 F.2d 559 (5th Cir. 1991).

82. *Id.* at 561-63. One-half of a gram of cocaine was also found in the same bedroom as the guns.

83. *Id.* at 563. However, the informant could not pinpoint the exact date when the defendant allegedly wore the gun while escorting him to his car. The "Vietnam" comparison was made on June 6, 1989; the government searched the apartment pursuant to a warrant and found the weapons in question on June 23, 1989.

84. *Id.* Again, the appellate opinion clouds the facts by not explaining whether the defendant had actual or constructive possession of the money.

85. *Id.*

86. United States v. Feliz-Cordero, 859 F.2d 250, 254 (2d Cir. 1988).

their drug transactions. Nor would the circumstances which occurred seventeen days (and more) before the arrest allow a Second Circuit jury to presume the defendants' intent to use the firearms from the fact that the weapons were found in the same room as one of the co-conspirators "during the course of a search pursuant to a warrant."[87] Even the Second Circuit's more expansive holding in *Meggett*[88] might not support a conviction of the *Beverly* defendants—none of the *Meggett* weapons were in a locked room or storage compartment.[89]

Likewise, the Third Circuit's *Theodoropoulos* opinion plainly suggests that a weapon should be present in plain view if it is to be used to support an inference that co-conspirators considered the weapon to be an integral part of the conspiracy.[90] Further, the *Beverly* defendants also lacked the "easy means of access" to weapons not in plain view which supported the section 924(c)(1) conviction upheld by the Third Circuit in *Hill*.[91]

The Fifth Circuit's holding in *United States v. Blake*[92] further confirms that mere constructive possession is more than enough for that court to sustain a section 924(c)(1) conviction. Blake was convicted on one section 924(c)(1) count for a submachine gun found with 161 grams of crack cocaine in the baseboard of his girlfriend's living room, and on another count for four pistols found in a pillowcase in her bedroom.[93] Again, the court cited no circumstances showing that Blake intended to have the pistols available for use during drug transactions, or that they were strategically located to be easily available during such a transaction.[94]

The Fifth Circuit court merely held that "[evidence that the defendant] admitted to owning the weapons and narcotics and to having been in the apartment, and that he directed the police to the apartment's key and to the weapons and drugs was more than sufficient to support the convictions on [both] counts."[95]

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87. *Id.*

88. 875 F.2d 24 (2d Cir. 1989).

89. The *Meggett* weapons were found (1) behind a living room chair, (2) in the living room with the "precise location unknown", and (3) in the bedroom in a nightstand drawer, dresser drawer and behind the dresser. *Id.* at 26. Nevertheless, it is likely that the facts of *Beverly* are sufficiently analogous to those of *Jefferson* to support a § 924(c)(1) conviction of the Beverly defendants if their case had been heard by the District of Columbia Circuit Court of Appeal.

90. 866 F.2d at 596-98.

91. 967 F.2d at 906. It is also questionable whether the Third Circuit would uphold the *Beverly* convictions in light of its decision in United States v. Reyes, 930 F.2d 310 (3d Cir. 1991) (holding unloaded pistol in car trunk "used" because defendant had trunk key and bullet on his person at time of arrest). The *Beverly* opinion does not indicate that the prosecution offered proof that any of the co-conspirators possessed a key to the safety deposit box or had ammunition for the guns on their persons at the time of their arrest.

92. 941 F.2d 334 (5th Cir. 1991).

93. *Id.* at 337.

94. *Feliz-Cordero*, 859 F.2d at 254.

95. 941 F.2d at 343.

3. The Sixth Circuit

A defendant seeking to overturn a section 924(c)(1) conviction before the Sixth Circuit Court of Appeals may not be able to reasonably predict the likelihood of success. The court initially appeared to agree with the ready access approach when it held that "'uses' . . . should be construed broadly to cover the gamut of situations where drug traffickers have *ready access* to weapons with which they secure or enforce their transactions."[96]

In a later unpublished opinion, the Sixth Circuit expressly rejected the rationale of *Feliz-Cordero* and *Theodoropoulos* and confirmed its adoption of the fortress theory:

> In making [his] argument, Jackson cites United States v. Feliz-Cordero and United States v. Theodoropoulos. . . . This, however, has not been the law of the Sixth Circuit. Our circuit, in 1989, expressly adopted the fortress theory which provides that a defendant may be convicted under section 924(c) when he keeps weapons in the house but does not use or carry them at the time of the offense because "just as weapons are kept at the ready to protect military installations against potential enemy attack, so too may weapons be kept at the ready to protect a drug house, thereby safeguarding and facilitating illegal transactions." As our circuit recently endorsed the fortress theory, we should affirm the conviction under section 924(c).[97]

The Sixth Circuit remained off the record when it endorsed the drug fortress theory in 1992 in *United States v. Mukes*[98] by revisiting its *Jackson* discussion of the split between itself and the Second and Third Circuits. However, after noting that *Feliz-Cordero* "is difficult to reconcile with our circuit precedent, the court concluded that [i]nsofar as there is a conflict, . . . and unless the Supreme Court or Congress should instruct us otherwise, we must follow our own precedents."[99]

III. THE UNITED STATES SUPREME COURT ADDRESSES A PERIPHERAL ISSUE IN CONSTRUING "USES"

In the summer of 1993, the Court peripherally addressed its responsibility to clarify the "uses" element of section 924(c)(1) in *United States v.*

96. United States v. Acosta-Cazares, 878 F.2d 945, 952 (6th Cir. 1989) (emphasis added).

97. United States v. Jackson 1991 WL 11257, *2, *6 (6th Cir. 1991) (unpublished disposition), citing United States v. Acosta-Cazares, 878 F.2d 945, 951-52 (6th Cir. 1989), *cert. denied*, 493 U.S. 899 (1989), and United States v. Henry, 878 F.2d 937 (6th Cir. 1989) (citations omitted).

98. 1992 WL 3713 (6th Cir. 1992) (unpublished disposition), *cert. denied*, 113 S. Ct. 361, *reh'g denied* 113 S. Ct. 833.

99. 1992 WL 3717 at *2.

Smith.[100] John Angus Smith offered an undercover officer a MAC-10 machine gun and silencer in exchange for two ounces of cocaine. After inspecting the weapon, the officer left Smith's motel under surveillance while he arranged for Smith's arrest.[101] Smith attempted to flee before the officer returned to complete the gun-for-drugs transaction; after a high-speed chase, a search of Smith's van incident to his arrest revealed a variety of weapons, including the MAC-10 and its silencer. Smith was convicted in the United States District Court for the Southern District of Florida on drug trafficking and section 924(c)(1) counts.[102]

Appealing his conviction before the Eleventh Circuit Court of Appeal, Smith relied on *United States v. Phelps*,[103] a 1989 Ninth Circuit case holding that section 924(c)(1) did not apply to Phelps (who attempted to trade a MAC-10 for a chemical necessary for the manufacture of an illegal drug) because Phelps demonstrated no intention to use the firearm offensively—i.e. "as a weapon would normally be used."[104]

The Eleventh Circuit expressly rejected the holding of *Phelps*, believing that "the *Phelps* opinion's stress on a defendant's alleged intentions to use the weapon offensively is incorrect."[105] Citing a variety of cases where section 924(c)(1) convictions were upheld "despite the defendant's claim of non-belligerent reasons for having the weapon,"[106] the court affirmed Smith's conviction, finding that "use may be established by evidence of possession . . . 'if possession is an integral part of and facilitates the commission of the drug trafficking offense.' Furthermore, when drug purchasers trade guns for drugs, the trade not only facilitates, but also becomes, an illegal drug transaction."[107]

A. The Smith *Majority Limited Its Opinion To The Facts Presented*

Justice O'Connor began the majority opinion by setting forth an

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100. 957 F.2d 835 (11th Cir. 1992), *aff'd* 113 S. Ct. 2050 (1993) (6-3 decision; O'Connor, J.) (Blackmun, J., concurring) (Scalia, J., dissenting; joined by Stevens, J. and Souter, J.). The majority opinion and dissent are considered herein; Justice Blackmun joins "the Court's opinion in full", based on his understanding that the majority opinion does "not foreclose the possibility that the 'in relation to' language of 18 U.S.C. 924(c)(1) requires more than mere furtherance or facilitation of a crime of violence or drug trafficking crime." 113 S. Ct. at 2060. Justice Blackmun's concern is noteworthy, as it may indicate his predisposition to vote against the drug fortress theory if a case similar to those described in this Comment reaches the Supreme Court.

101. 113 S. Ct. at 2052.

102. *Id.* at 2053. Smith was also caught with ammunition and a fast-feed mechanism for the MAC-10; a MAC-11; a .45 caliber pistol; a .22 caliber pistol with homemade scope and silencer; and a 9 millimeter handgun tucked in the waistband of his pants. *Id.*

103. 877 F.2d 28 (9th Cir. 1989); *reh'g denied en banc*, 895 F.2d 1281 (9th Cir. 1990).

104. *Id.* at 30.

105. 957 F.2d at 836.

106. *Id.* at 837. The cited cases include United States v. Meggett, 875 F.2d 24, 26 (2d Cir. 1989) (where defendant claimed to be a gun collector); and United States v. Raborn, 872 F.2d 589, 595 (5th Cir. 1989) (where defendant claimed gun was for protection against muggers). *Meggett* is discussed *infra*, Part II-A.

107. *Id.* (citations omitted).

extremely narrow statement of the issue presented—"whether trading a firearm for drugs can constitute 'use' of the firearm within the meaning of section 924(c)(1)."[108] A few paragraphs later, she again reinforced the limited nature of the Court's review: "the only question in this case is whether the phrase 'uses . . . a firearm' in section 924(c)(1) is most reasonably read as excluding the use of a firearm in a gun-for-drugs trade."[109]

Within this extremely limited context, Justice O'Connor first construed "use" in accordance with its "ordinary or natural meaning,"[110] and held that Smith's: "handling of the MAC-10 in this case falls squarely within those definitions": "By attempting to trade his MAC-10 for the drugs, he 'used' or 'employed' it as an item of barter to obtain cocaine; he 'derived service' from it because it was going to bring him the very drugs he sought."[111] After addressing the similar arguments raised by the petitioner and Justice Scalia's dissent,[112] the Court analyzed subsection (c)(1) within the context of another provision of the statute[113] providing for mandatory forfeiture of firearms. Citing the tenet of construction that "a single word cannot be read in isolation, nor can a single provision of a statute,"[114] Justice O'Connor noted that four of the six subsections of section 924(d)(3) penalize offenses which do *not* involve "the bellicose use of a firearm":[115]

> The evident care with which Congress chose the language of section 924(d)(1) reinforces our conclusion . . . [Congress] carefully varied the statutory language in accordance with the guns' relation to the offense. For example, with respect to some crimes, the firearm is subject to forfeiture not only if it is "used" but also if it is "involved in" the offense. Examination of the offenses to which the "involved in" language applies reveals why Congress believed it is necessary to include such an expansive term . . . [For example], [b]ecause making a material misstatement in order to acquire or sell a gun is not "use" of the gun even under the broadest definition of the word "use," Congress carefully expanded the

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108. 113 S. Ct at 2054.

109. *Id.* at 2055.

110. *Id.* at 2054. The Court cites these authorities to support its interpretation of "use": WEBSTER'S NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 2806 (2d ed. 1949) ("to convert to one's service"/"to employ"); BLACK'S LAW DICTIONARY 1541 (6th ed. 1990) ("to avail oneself of"/"to carry out a purpose or action by means of"); and Astor v. Merritt, 111 U.S. 202, 213 (1884) ("to derive service from").

111. *Id.*

112. Discussed *infra* part III.B.

113. 18 U.S.C. § 924(d)(3) (West Supp. 1993).

114. 113 S. Ct. at 2056.

115. *Id.* at 2057. 18 U.S.C. § 924(d)(3)(A) and (d)(3)(B) set forth the only two circumstances where subject weapons might be used as offensive weapons, i.e. in a crime of violence or drug trafficking offense. The other § 924(d)(3) offenses involve use of a firearm as an item in commerce, i.e if intended to be "used" in an interstate transfer/sale/trade/gift/transport/ delivery of another prohibited firearm where there is a pattern of such activity (subsection C); if transferred or sold to disqualified persons such as fugitives or felons (subsection D); if intended to be used in shipping or receipt of stolen firearms, or by a felon, or with intent to commit a felony (subsection E); and if intended to be used in an federally prosecutable offense which involves exportation of firearms (subsection F). 18 U.S.C § 924(d)(3) (West Supp. 1993).

> statutory language. As a result, a gun with respect to which a material misstatement is made is subject to forfeiture because, even though the gun is not "used" in the offense, it is "involved in" it. *Congress, however, did not so expand the language for offenses in which firearms were "intended to be used"*, even though the firearms in many of those offenses function as items of commerce rather than as weapons . . . In light of the common meaning of the word "use" and the structure and language of the statute, we are not in any position to disagree.[116]

The language emphasized above suggests that the six Justices[117] who joined the majority would have difficulty accepting *either* the drug fortress or the ready access approach. Both rationales permit a section 924(c)(1) conviction if the government can prove that the subject firearm was intended to be used. The only distinction is that the drug fortress circuits see intent to use as actual use and thus permit inference of use from mere presence or possession of a firearm, while the ready access courts require a showing of strategic location and ready accessibility if intent to use is to be inferred from presence or possession.

Nevertheless, neither the carefully confined statement of the issue in the Supreme Court's review of *Smith v. United States*, nor the majority's passing comment regarding offenses in which firearms are "intended to be used", guide lower federal courts in applying section 924(c)(1) in a case where there is no affirmative act on the defendant's part which evidences her intent to derive service from a firearm.

B. The Dissent Points Out a Larger Interpretation Problem

Not surprisingly, Justice Scalia begins his dissent by honing in on "a 'fundamental principle of statutory construction (and, indeed of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'"[118] He reaches the intermediate conclusion that "[t]o use an instrumentality ordinarily means to use it for its intended purpose,"[119] and concludes:

> The ordinary meaning of "uses a firearm" does not include using it as an article of commerce. I think it perfectly obvious, for example, that the objective falsity requirement for a perjury conviction would not be satisfied if a witness answered "no" to a prosecutor's inquiry whether he had ever "used a firearm," even though he had once sold his grandfather's Enfield rifle to a collector[120]. . . [I]t seems to me inconsequential that "the words 'as a weapon' appear nowhere in the statute," they are reasonably implicit . . . [W]hen, in section 924(c)(1), the phrase "uses . . . a firearm" is not employed in a context that necessarily envisions the unusual 'use' of a

116. 113 S. Ct. at 2057 (emphasis added) (citation omitted).
117. However, only five of the six remain on the Court after Justice White's 1993 retirement.
118. 113 S. Ct. at 2060-61 (citing Deal v. United States, 113 S. Ct. 1993, 1996 (1993)).
119. *Id.* at 2061.
120. *Id.* at n.1.

> firearm as a commodity, the normally understood meaning of the phrase should prevail.[121]

In making this argument, Justice Scalia appears to be in agreement with the majority's view that "the meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it."[122] However, Justice Scalia misses the mark by arguing that the word "uses" has a reduced scope in section 924(c)(1) because it appears alongside the word "firearm."[123]

The "surrounding term" which would appear to be most probative of the meaning of "use" is "during *and* in relation to." The use of the word "and" seems to indicate that the legislature viewed a drug trafficking offense as an event of limited duration with a fixed beginning and end. Thus, a weapon would have to be "used" (i) at a point in the course of[124] a specific drug trafficking activity, and (ii) in relation to that activity. However, both the ready access and drug fortress approaches seem to view drug trafficking as an event of infinite duration (perhaps the activity only ends when the perpetrator is finally arrested). Neither approach requires the government to specify a finite time frame within the drug trafficking activity when the weapon was allegedly "used" by the defendant. Following Justice Scalia's thesis, both ready access and drug fortress courts misconstrue the second element of the statute as meaning "during *or* in relation to" drug trafficking activity.

In this light, Justice Scalia's dissent suggests not only that *Smith* does nothing to resolve the conflict in construing the "uses" element of section 924(c)(1), but that *all* of the circuits have erroneously construed the "during and in relation to" element as well.

IV. PROPOSAL

Due to its extremely limited scope, *Smith* should not be viewed as resolving the conflict among the federal circuits with respect to how "uses" must be construed in prosecutions which do not involve an exchange of firearms for drugs. In fact, as illustrated above, the reasoning applied by both the majority and dissenters in *Smith* suggest that neither the ready access nor the drug fortress approaches currently in use would survive Supreme Court scrutiny.

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121. *Id.* at 2062 (citation omitted).
122. *Id.* at 2054.
123. *Id.*
124. WEBSTER'S NEW COLLEGIATE DICTIONARY 351 (1980).

A. An Appeal For Supreme Court Certiorari: Smith *Has Not Resolved The Conflict*

A petition for a writ of certiorari will only be granted if there are "special and important reasons" for the Supreme Court to exercise its power of supervision. Though a review on a writ of certiorari is not a matter of right, the Court does have the discretion to grant certiorari "when a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter."[125] In fact, the Court itself has said that a principal purpose for use of its certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals concerning the meaning of provisions of federal law. Although Congress can eliminate a conflict concerning a statutory provision by amending the statute, the Court regards the task of clarifying federal law "as initially and primarily ours."[126]

This Comment's brief survey of the philosophical differences between "ready access" circuits and "drug fortress" circuits gives greater weight to the arguments of petitioners seeking Supreme Court review of section 924(c)(1) convictions. By carefully and explicitly limiting the scope of its opinion in *Smith*,[127] the Supreme Court sidestepped its responsibility to bring closure to the issue of how "uses" should be construed in section 924(c)(1) cases which do not involve a trade or attempted trade of firearms for drugs, or any other *affirmative act* by the defendant which evidences his intent to use or carry the subject firearm during or in relation to a drug trafficking activity.

Clearly, over the past seven years, cases raising the issue of how the "uses" element of section 924(c)(1) should be construed have frequently arisen. And, the conflict among the circuits "shows no signs of abating."[128] Indeed, though unpublished, the Sixth Circuit's opinion in *Mukes*[129] should be viewed as an acknowledgment of the existence of a dispute which requires the intervention of the nation's highest court, as well as a possible signal of that circuit's discomfort with its own precedent.

B. In the Absence of Legislative Intent to the Contrary, The Supreme Court Should Adopt the Ready Access Approach

In choosing an appropriate standard for construing section 924(c)(1), the Court only needs to follow the most fundamental rule of statutory construction. When the "resolution of a question of federal law turns on a statute and the intention of Congress, [the federal courts must] look first to

125. Sup. Ct. Rep. 10.
126. Braxton v. United States, 111 S. Ct. 1854, 1857 (1991).
127. Discussed *supra* Part III.
128. Langston v. United States, 113 S. Ct. 361, 362 (1992) (White, J., dissenting).
129. *See supra* note 98 and Part II.B.3.

the statutory language, and then to the legislative history if the statutory language is unclear" or supports an interpretation which defies common sense.[130]

In section 924(c)(1) cases, binding federal courts to the plain meaning of use creates no conflict with the dictates of common understanding. "Use" is "that enjoyment of property which consists in its employment, occupation, exercise or practice."[131] Rather than focusing on a presumed relationship between all weapons and drug trafficking activities, it is more consistent with the word's plain meaning to focus on whether there is "a concrete showing"[132] that a section 924(c)(1) defendant intentionally positioned himself a weapon, and drugs or drug implements in such a manner as to enable himself to exercise dominoin and control over both at the same time.

Inferences drawn from the limited legislative history of the statute support a plain meaning approach. "It is important to note that Congress did not make it a crime to *possess* a gun with the intent to use it in relation to a drug trafficking crime."[133] In the absence of amendments or a clear legislative history to the contrary, section 924(c)(1) only makes it a crime to affirmatively *use* a gun in relation to a drug trafficking offense.[134]

In allowing section 924(c)(1) convictions in situations where "an operable [or inoperable] firearm is found in close proximity to a room or rooms in which drug distribution, processing or storage occurs",[135] the drug fortress approach focuses solely on the fact-finders perceptions of relationships between objects, but not between objects and people. In drug fortress circuits, defendants prosecuted under section 924(c)(1) are being convicted and receiving long-term mandatory sentences based on the establishment of a nexus between weapons to drugs or implements of the drug trade, but not to the *person* who must exercise dominion and control over the weapons in order for them to be enjoyed, employed, occupied, exercised or practiced. In effect, drug fortress circuits have reached the comfortable conclusion that "people don't use guns and drugs—drugs use guns and people."

This approach provides no readily identifiable standards for fact-finders, because the drug fortress circuits have in effect created a novel theory of law which suggests that drugs, money or physical premises are capable of "possessing" and/or "using" weapons that may be available for their protection, and that these inanimate objects exercise some sort of inherent pernicious control over the individuals who must themselves control the

130. United States v. Brown, 915 F.2d 219, 223 (6th Cir. 1990), citing Blum v. Stenson, 465 U.S. 886, 896 (1984).

131. BLACK'S LAW DICTIONARY 801 (Abridged 5th ed. 1983). *See also* WEBSTER'S NEW COLLEGIATE DICTIONARY 1279 (1980).

132. 915 F.2d at 225.

133. United States v. Bruce, 939 F.2d 1053, 1055 (D.C Cir. 1991) (emphasis added).

134. *Id.*

135. United States v. Hager, 969 F.2d 883, 889 (10th Cir. 1992).

weapons if the weapons are to be "used."

Although "[t]he point at which conduct becomes unlawful should be a question for the jury", every criminal statute should contain readily identifiable standards which mandate the minimum level of culpability which the prosecution must prove to obtain a conviction.[136] A jury may be entitled "to draw a vast range of reasonable inferences from [proffered] evidence, but [it] may not base a verdict on mere speculation."[137] Because it forces fact finders to speculate regarding whether the defendant intentionally positioned firearms and drugs in a manner that would create a relationship between the two inanimate items, the drug fortress theory is deficient in its ability to provide consistently identifiable standards for determining "use" under section 924(c)(1).

V. CONCLUSION

The circuit courts of appeal should establish readily identifiable standards for finders of fact in the lower federal courts. In section 924(c)(1) prosecutions, the government should be required to prove beyond a reasonable doubt that there was a proximate relationship between the defendant's control over *and* extraction of service from each weapon cited in his indictment and the drug-related activity (be it actual possession, inchoate possession or trafficking) which forms the predicate offense.

The happenstance presence of firearms and drugs at the same time and in the same place, without more, does not support a conviction under the current version of 18 U.S.C. § 924(c)(1), just as the mere presence of a gun in the pocket of a person engaged in hand-to-hand physical violence would not provide grounds for a conviction under the pre-1986 version of the statute.[138] In this light, the drug fortress approach is inconsistent with the legislative history of section 924(c)(1), as well as with the plain meaning of "use" and traditional notions of the law as it relates to possessory interests and determinations of individual culpability.

The drug fortress and ready access rationales are incompatible by nature, the drug fortress analysis is bad law, and the time has come for the intervention of the United States Supreme Court to adopt the ready access doctrine as the standard for section 924(c)(1) prosecutions.

Jamilla A. Moore[*]

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136. Matthew T. Fricker & Kelly Gilchrist, United States v. Nofziger *and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the* Mens Rea *Requirements of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803, 821-22 (1990) (arguing, *inter alia*, that "conduct elements" in a criminal statute should require a knowledge mens rea to give greater predictability and certainty to statutory interpretation).

137. United States v. Long, 905 F.2d 1572, 1576 (D.C. Cir. 1990).

138. Crime Control Act, *supra* note 21, at 3491.

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