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Plain Language, Congressional Intent, and Common Sense: Why Courts Should Allow an 18 U.S.C. #924(c) Conviction for Each Active Employment of a Firearm during a Drug Trafficking Offense

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Plain Language, Congressional Intent, and Common Sense

Why Courts Should Allow an 18 U.S.C. § 924(c) Conviction for Each “Active Employment” of a Firearm During a Drug Trafficking Offense

I. INTRODUCTION

Marcos Anderson used a firearm on four separate occasions during a single drug trafficking conspiracy. 1 18 U.S.C. § 924(c) prescribes mandatory jail time for the use of a firearm during and in relation to a drug trafficking offense, and a jury in the District of Columbia convicted Anderson on four counts under this statute. Fortunately for Mr. Anderson, on appeal to the United States Court of Appeals for the D.C. Circuit, the court decided that the government could not seek multiple § 924(c) convictions based on a single drug trafficking offense, and thus overturned three of his four § 924(c) convictions. 3 Had his case come to trial only fifteen miles south, in the Fourth Circuit, he could have received four § 924(c) convictions for the same conduct. 4 For most statutes the number of convictions has little practical effect on the amount of punishment that a defendant receives because concurrent sentencing results in the convicted felon serving the same period of incarceration regardless of the number of convictions he receives. Section 924(c), however, requires a defendant to serve a twenty-year sentence for each subsequent § 924(c) offense, consecutively to the five-year sentence served for his first § 924(c) offense. 5

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2 The statute provides in pertinent part:
   (c) (1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.
4 United States v. Camps, 32 F.3d 102 (4th Cir. 1994), cert. denied, 115 S. Ct. 1118 (1995) (upholding three § 924(c) convictions for conduct occurring during a single conspiracy to possess cocaine with the intent to distribute).
5 Section 924(c) reads in pertinent part: “[n]or shall any term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.” 18 U.S.C. § 924(c)(1) (1994).
Because the D.C. Circuit allows only one § 924(c) conviction for an underlying drug offense, the maximum sentence Anderson could have received was five years for the use of firearms during his drug offense. In the Fourth Circuit, which allows multiple § 924(c) counts for each underlying drug trafficking offense, Anderson’s multiple uses of firearms could have resulted in four § 924(c) convictions, and, therefore, identical conduct could have resulted in a prison sentence sixty years longer than that he received from the D.C. Circuit. Such disparate sentences do not fulfill Congress’ intent, promulgated in the United States’ Sentencing Guidelines, to ensure fair and equitable punishment for identical criminal conduct.

Since Congress amended § 924(c) in 1986 to cover the use of firearms during or in relation to drug trafficking conduct, the Supreme Court has decided three cases interpreting the statute’s language. Congress originally enacted § 924(c) to harshly punish people who use a firearm while committing a violent crime. Deepening public concern over violence occurring during illegal drug trafficking led Congress to expand § 924(c) in an attempt to reduce violent drug trafficking crimes. Section 924(c) has provided a powerful deterrent against this violence through increased arrests for drug trafficking crimes and stiffer penalties for felons convicted of using a firearm during an underlying drug trafficking offense.

6 Anderson received a five year sentence from the D.C. Circuit for the use of a firearm during an underlying drug trafficking offense according to the minimum mandatory requirements for his single § 924(c) offense. Under the Fourth Circuit’s interpretation of § 924(c), Anderson would receive, in addition to a sentence for the underlying crime, five years for his first § 924(c) conviction followed by twenty years, served consecutively, for each subsequent § 924(c) conviction.

7 See United States Sentencing Commission, Sentencing Guidelines Manual of the United States Sentencing Commission 2-4 (1995). Congress created the United States Sentencing Commission to promulgate uniform federal sentencing guidelines. The Sentencing Commission describes the purpose of the Federal Guidelines as enhancing “the ability of the criminal justice system to combat crime through an effective, fair sentencing system.” Id. at 3. The Commission identifies three major ways to reach this objective: honesty, uniformity, and proportionality. The guidelines purport to promote uniformity by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Id.


9 Bailey v. United States, 116 S. Ct. 501, 506-07 (1995) (limiting “use” in § 924(c) to “active employments” of a firearm); Smith v. United States, 113 S. Ct. 2050, 2058-59 (1993) (defining “in relation to” in § 924(c) to include using a gun for barter during a drug purchase); Deal v. United States, 113 S. Ct. 1993, 1997-98 (1993) (defining “second or subsequent” in § 924(c) to allow multiple convictions to arise out of a single proceeding).

10 114 Cong. Rec. 22,229-34 (1968). Rep. Poff, sponsor of the amendment which Congress enacted as § 924(c), stated the legislation “provides that the penalties cannot be suspended and that probation cannot be granted . . . [this law] compels the court to impose the sentence to run consecutively upon the penalty previously imposed.” Id. at 22,231.


12 See United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (1991). Congress has enacted approximately 100 separate mandatory minimum penalty provisions located in sixty different criminal statutes. While courts imposed mandatory minimum sentences in almost 60,000 cases between 1984 and 1990, four statutes involving drugs and weapons violations account for approximately 94% of these cases. Id. at 10-11. Specifically, § 924(c) accounted for 1,784 convictions (three percent of total convictions). Id. at 12. Importantly, convictions under § 924(c) expanded tremendously between 1984-1990, the time after which using a firearm during or in
The courts echoed public sentiment by interpreting § 924(c) to allow prosecution not only for active uses of a firearm during an underlying drug offense, but for passive uses as well.

Unlike the active uses of firing or brandishing, a defendant engages in a passive use of a firearm when he stores or transports a firearm during the time that he commits a drug trafficking offense. Prosecutors relied on United States v. Simpson and United States v. Deal cases employing an expanded definition of use, to seek multiple § 924(c) convictions for multiple passive uses of a weapon in a single drug conspiracy. Although courts apparently found it fair, reasonable, and consistent with congressional intent to give mandatory consecutive sentences for multiple active uses of a firearm, they began to doubt the fairness of pronouncing a de facto life sentence for multiple passive uses of firearms during a single conspiracy.

In an effort to avoid this harsh result, courts soon began to stretch the plain meaning of the statute to lower the penalty resulting from a passive use of a firearm. As they realized the severity of punishment resulting from multiple § 924(c) convictions for passive uses, courts began to question whether Congress intended to punish multiple convictions arising out of a single underlying offense. While judges acknowledged that § 924(c)'s legislative history provided some authority in favor of multiple convictions; they began, however, to apply the rule of lenity and punish the defendant for only one § 924(c) violation per underlying drug offense. These courts apparently misapplied the rule of lenity, but applying the rule allowed them to pronounce what they considered a fair sentence.

relation to drug trafficking became punishable under § 924(c). Section 924(c) convictions accounted for six percent of all mandatory minimum sentences by 1990. Id.

See, e.g., United States v. Evans, 888 F.2d 891 (D.C. Cir. 1989), cert. denied, 494 U.S. 1019 (1990) (upholding conviction when defendant arrested across town from the apartment where drugs stored and weapons kept for protection of stash); see also United States v. Wilson, 884 F.2d 174, 177 (5th Cir. 1989) (sheer volume of weapons and drugs make reasonable the inference that the weapons involved were carried in relation to the predicate drug offense).

435 U.S. 6 (1978) (holding that § 924(c) constitutes a separate offense and is not merely a penalty enhancement for an underlying offense).

113 S. Ct. 1993 (1993) (allowing consecutive sentences and a penalty of 105 years for six violations of § 924(c)).

See United States v. Lindsay, 985 F.2d 666, 674 (2d Cir.), cert. denied, 114 S. Ct. 103 (1993) (stating that Congress would have clearly put forth language allowing for draconian penalties if that was its intent); Anderson I, 59 F.3d at 360 (D.C. Cir. 1994) (Silberman, J., dissenting); Anderson II, 59 F.3d at 1333 (D.C. Cir. 1995).


See, e.g., Lindsay, 985 F.2d at 676 (quoting Rep. Poff's statement: "If he uses his gun he's going to jail . . . . He should further understand that if he does so a second time, he is going to jail for a longer time." 114 Cong. Rec. 22,231 (1968)).

See, e.g., Bell v. United States, 349 U.S. 81, 83 (1955) (first holding that if Congress does not clearly fix the punishment for a federal offense, a court must use the rule of lenity and resolve doubt in favor of the defendant by not turning a single transaction into multiple offenses).

Lindsay, 985 F.2d at 672-75; Anderson II, 59 F.3d at 1334-35 (Buckley, J., concurring) (Randolph, J., concurring).

See Chapman v. United States, 500 U.S. 453 (1991). To invoke the rule of lenity, Chapman requires a "grievous ambiguity" in the language, coupled with an ambiguity in legislative history, that produces an absurd or glaringly unjust result. Id. at 469 (quoting Huddleston v. United States, 415 U.S. 814, 831 (1974)). Even if one can articulate a possible ambiguity in § 924(c)'s language, the legislative history is not so grievously ambiguous that consecutive prison sentences
In Bailey v. United States, the Supreme Court unanimously held that § 924(c) applies only to active, and not passive, uses of firearms during or in relation to drug trafficking offenses. By holding that a defendant violates § 924(c) only when he actively employs a weapon, the Court recognized that Congress intended § 924(c) to penalize a criminal each time he increased the possibility of violence during a drug trafficking offense by actively using a firearm. Prior to Bailey, however, courts had allowed only one § 924(c) conviction to arise out of a single drug trafficking offense because the prison sentence resulting from multiple counts arising out of passive uses seemed unfair. Since Bailey has eliminated this patent unfairness, courts should return to Congress' original intent behind § 924(c) and allow multiple convictions for active uses of a firearm occurring during a single underlying offense.

This Note argues that Bailey requires courts to follow the current minority position allowing multiple § 924(c) convictions for a single underlying drug offense. Bailey represents the proper approach to prosecuting conduct under § 924(c) because the Court based its holding on Congressional intent to punish only active uses of a firearm during a drug trafficking offense. The Congressional intent behind § 924(c), as identified in Bailey, shows that courts should allow multiple § 924(c) convictions for multiple active uses of a firearm occurring during a single predicate offense.

In Part II, this Note outlines a brief history of § 924(c), explains its importance to prosecutors, and lays out the legislative history behind the statute. Then, after discussing and explaining the Bailey decision in Part III, Part IV of this Note outlines the majority and minority positions regarding multiple § 924(c) convictions arising from a single predicate offense, and explains how courts have incorrectly applied the rule of lenity to this issue. Part V combines the Court's holding in Bailey with the multiple conviction issue and argues that lower courts should allow multiple § 924(c) convictions wholly independent of the number of underlying predicate offenses, especially where the defendant takes part in a single conspiracy extending over a significant period of time. Part VI details how courts should use Bailey's “active employment” test in deciding whether to allow multiple § 924(c) counts for using a firearm more than once during a single underlying offense.

resulting from multiple § 924(c) convictions arising out of a single offense would produce a glaringly unjust result. See infra note 25. The courts, therefore, do not properly follow Chapman when they invoke the rule of lenity in these cases. See Anderson II, 59 F.3d at 1394-95 (applying the rule of lenity without applying the Chapman analysis) (Buckley, J., concurring) (using the rule of lenity as a default position when the judge could not decide between the merits of two positions) (Randolph, J., concurring).

23 Id. at 508. Justice O'Connor defined active employment of a firearm as:

[T]he active employment understanding of "use" certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. We note this reading compels the conclusion that even an offender's reference to a firearm in his possession could satisfy § 924(c)(1). Thus, a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a "use," just as the silent but obvious and forceful presence of a gun on a table can be a "use."

Id.
lying offense. Finally, Part VII contains a proposal that Congress redraft § 924(c) to ensure courts understand the exact conduct that the statute addresses.

II. SECTION 924(c)—GUNS AND DRUGS DO MIX

Congress enacted § 924(c), as part of the Gun Control Act of 1968, to deter violent crime by imposing mandatory minimum sentences on people who used a firearm during a crime of violence. In 1986, Congress reacted to the tremendous increase in violent crime associated with drug trafficking by amending the statute to include mandatory minimum sentencing for firearm offenses committed during or in relation to a drug trafficking offense. Section 924(c) adds a mandatory five-year prison term to the sentence imposed for the underlying violent crime or drug trafficking offense. Second and subsequent convictions under § 924(c) require a mandatory twenty-year prison sentence on top of the sentence imposed for the underlying offense. Additionally, courts cannot suspend any sentence arising from § 924(c), and they must impose § 924(c) punishment consecutively to the punishment imposed for the underlying offense.

Despite the apparent clarity of the statute's text and underlying purposes, § 924(c) has consistently posed difficult interpretive problems for courts attempting to balance the deterrent value of § 924(c) against the harsh penalty it imposes. This balancing has led to three Supreme Court decisions, each clarifying a different part of § 924(c). Courts now differ as to whether conduct arising out of a single drug trafficking offense can

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25 See 114 Cong. Rec. 22,229-35 (1968). Rep. Casey, the original sponsor of the amendment to the Gun Control Act of 1968 which led to the adoption of § 924(c), stated: “They said that this amendment providing for mandatory sentences is too stiff and that it is too harsh. But let me tell you, your people back home do not think it is too harsh .... [L]et us have some penalties in here.” Id. at 22,230. Rep. Poff, sponsor of the legislation which eventually became section 994(c), stated: “The effect of a minimum mandatory sentence in this case is to persuade the man who is tempted to commit a felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail. He should further understand that if he does so a second time, he is going to jail for a longer time.” Id. at 22,231. Rep. Poff also stated: “The penalties in this amendment were not addressed to the base felony .... The amendment was addressed to the use of a firearm in the commission of the base felony. It was designed to persuade the man who has decided to set forth on a criminal venture to leave his gun at home.” 114 Cong. Rec. 30,583 (1968). Senator Mansfield commented: “[T]his bill provides for the first time a separate and additional penalty for the mere act of choosing to use or carry a gun in committing a crime under a federal law .... the act of choosing to use .... a gun is precisely what the legislators meant to prevent and punish, and it should be no surprise if the text of the statute accomplishes that result.” 115 Cong. Rec. 34,838 (1969). See also Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 WAKE FOREST L. REV. 199, 201-02 (1993) (reiterating the idea that Congress passes mandatory minimum statutes with the goal of deterring violence).
26 See supra note 8.
27 Section 924(c) reads in pertinent part: “In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years.” 18 U.S.C. § 924(c)(1) (1994).
28 Section 924(c) reads in pertinent part: “[t]he court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection ....” 18 U.S.C. § 924(c)(1) (1994).
29 See supra note 9.
result in multiple § 924(c) violations. The interpretive conflicts concerning the meaning of the statute arise because three different sessions of Congress enacted the component phrases now constituting § 924(c) over an eighteen year period of time.\(^{30}\) This piecemeal approach has repeatedly led courts to question whether the language of the statute means what it says. As a result, courts often consult the statute’s legislative history in an effort to better understand the intent behind § 924(c).\(^{31}\)

While § 924(c)’s text appears clear, the legislative history of the statute is sparse, and the lack of debate prior to passing the statute leads some courts to question the clarity of § 924(c).\(^{32}\) Their claim has little merit because despite the brevity of debate preceding the passage of § 924(c), the substance of the debate clearly lays out Congress’ intent to create mandatory, consecutive sentences for using a firearm during a crime of violence or a drug trafficking offense; and to impose harsher sentences for violating the statute a second time.\(^{33}\) Since the adoption of § 924(c) no bill enacted by Congress has changed the original intent behind the statute.

Prohibiting multiple § 924(c) convictions for a single drug trafficking offense became a contested issue once prosecutors claimed that passive uses of a firearm violated § 924(c). Prosecution for passive uses is contrary to the statute’s legislative history that shows Congress intended to punish the active uses normally associated with a firearm—such as firing, brandishing, or intimidating—and not the passive uses, such as storing or transporting a firearm, indirectly linked to a predicate offense. Prior to Bailey, however, a defendant arrested for a single drug offense could face three separate § 924(c) charges for the storage of three unloaded firearms found in his trunk.\(^{34}\) According to the plain language of the statute, if a jury convicted a defendant for each charge he could face forty-five years in prison for his conduct.\(^{35}\) Courts could not reconcile this long prison sentence with Congress’ apparent intent to punish only active uses of a firearm, and they thus began to look for ways to mete out a punishment more in line with that intent.\(^{36}\) Unfortunately, in the rush to reach what they considered a fair result, courts did not differentiate among § 924(c) viola-

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\(^{31}\) See, e.g., Anderson II, 59 F.3d at 1327.

\(^{32}\) See, e.g., United States v. Lindsay, 985 F.2d 666, 675 (2d Cir. 1993).

\(^{33}\) See supra note 25.

\(^{34}\) See, e.g., United States v. Freisinger, 937 F.2d 383 (8th Cir.), cert. denied, 502 U.S. 869 (1991) (defendant charged with three § 924(c) violations for three weapons found inside of a knotted pillowcase hidden inside of a plastic garbage bag).

\(^{35}\) According to the text of § 924(c) (1), the defendant should receive a five year sentence for the first conviction under § 924(c), followed by two twenty year sentences served consecutively. Total incarceration arising out of the use of a firearm, therefore, equals forty-five years. Additionally, the defendant would serve a sentence for the underlying predicate offense.

\(^{36}\) See, e.g., Anderson II, 59 F.3d at 1332-33.
By failing to do so, they overlooked the vital distinction between passive and active uses of a firearm. While Congress clearly intended to harshly punish active uses of a firearm during a drug trafficking offense, the legislative history of § 924(c) does not show Congress' intent to punish passive uses of a firearm during a drug trafficking offense. The Supreme Court recently clarified the difference between an active use and a passive use of a firearm in Bailey, and after its decision only active uses of a firearm can lead to a § 924(c) conviction.

III. The Bailey Decision

A. Background

Bailey v. United States represents a major departure from case law concerning § 924(c). Prior to this decision, the Supreme Court had only interpreted § 924(c) in ways that expanded conduct prohibited by the statute. Bailey reversed this trend by restricting the definition of use to its active context. The facts of Bailey represent a typical § 924(c) prosecution for passive use of a firearm during a drug trafficking offense and illustrate how attenuated from Congressional intent prosecution under § 924(c) had become. Thus, the Bailey decision gives insight as to why some lower courts originally chose to prohibit multiple § 924(c) prosecutions for multiple uses of a firearm occurring during a single underlying drug conspiracy.

The Bailey case came to the D.C. Circuit following the defendant's conviction in a district court for possession of cocaine, possession of a firearm by a felon, and use of a firearm in connection with a drug trafficking offense. Two police officers stopped Bailey's car because it did not have a front license plate or inspection sticker. After they ordered him out of the car, the officers saw him push something between the seat and console. A search of the passenger compartment revealed a bullet and twenty-seven individually packaged plastic bags of cocaine weighing a total of thirty grams. After finding these items, the officers arrested Bailey, searched the trunk of the car, and found a loaded pistol along with over $3,000 in cash. At trial, a narcotics expert connected Bailey's firearm to his drug offense through testimony that drug dealers frequently carry a firearm to protect their drugs and money, and the jury found Bailey guilty of violating

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39 See Smith v. United States, 113 S. Ct. 2050, 2058 (1993) (giving "in relation to" an expanded reading in § 924(c) and deciding Congress wanted use to have an expansive meaning in § 924(c)); Deal v. United States, 113 S. Ct. 1993, 1998 (1993) (upholding a 105 year sentence for six § 924(c) convictions).
40 United States v. Bailey, 995 F.2d 1113, 1114 (D.C. Cir. 1993) (affirming Bailey's § 924(c) convictions in the district court) [hereinafter Bailey I], reh'g en banc, 36 F.3d 106 (D.C. Cir. 1994) (5-4 decision allowing § 924(c) to encompass passive uses of a firearm) [hereinafter Bailey II], rev'd, 116 S. Ct. 501 (1995).
41 Bailey I, 995 F.2d at 1114.
42 Id.
43 Id.
§ 924(c). Bailey appealed his § 924(c) conviction, claiming the govern-
ment had not shown evidence sufficient to convict him under the statute.\textsuperscript{44}

In analyzing this point on appeal, the D.C. Circuit followed its estab-
lished multi-factor test to decide whether Bailey used a firearm during a
drug trafficking offense.\textsuperscript{45} After considering the evidence entered at trial,
the court found that a jury could reasonably infer that the firearm facili-
tated his drug trafficking activities because of its availability to protect him
during drug-related conduct.\textsuperscript{46} The court reiterated the Supreme Court's
decision to expansively define use in \textit{Smith v. United States},\textsuperscript{47} and held that a
jury could have found that Bailey used the gun for purposes of the statute
even though he never had the firearm within reach during his drug traf-
icking offense.\textsuperscript{48}

In \textit{United States v. Robinson},\textsuperscript{49} the D.C. Circuit applied the same multi-
factor test to decide whether Robinson's conduct constituted a use under
§ 924(c). Robinson's conviction under §§924(c) followed the police finding
an unloaded firearm locked in a trunk in a bedroom closet. At trial, the
jury found her guilty of violating § 924(c). The D.C. Circuit reversed the
trial court's decision, finding that Robinson's conduct did not violate
§ 924(c). Having arrived at opposite conclusions after applying the multi-
factor test to similar uses of a firearm, the D.C. Circuit vacated the \textit{Bailey}
and \textit{Robinson} decisions, and consolidated the cases to consider the viability
of the multi-factor test employed when deciding whether defendants had
used a firearm during a drug trafficking offense.\textsuperscript{50}

Sitting en banc, the Court of Appeals rejected the multi-factor test and
replaced it with a "proximity and accessibility" test.\textsuperscript{51} The court rejected a
narrow definition of use under § 924(c), which would confine uses of a
gun to obvious activities such as firing, brandishing, or displaying.\textsuperscript{52} It held
that defining use this narrowly would allow for simple disposition of cases,
but would not include all conduct that Congress intended § 924(c) to
reach.\textsuperscript{53}

Instead, the court chose to take an expansive view of the word use and
held that to prove a violation of § 924(c), the government needed to show
that the defendant had access to a firearm in proximity to the place where
an underlying drug offense occurs.\textsuperscript{54} In unveiling its new proximity and

\textsuperscript{44} Id. at 1115.
\textsuperscript{45} Id. at 1116. The D.C. Circuit established its multi-factor test in \textit{United States v. Derr}, 990
F.2d 1330, 1337 (D.C. Cir. 1993). The court set out a nonexclusive set of factors that a court
should use to decide whether a defendant used a firearm in violation of § 924(c) during a drug
trafficking offense. These factors included: accessibility of the firearm to the defendant during
the drug trafficking offense, proximity of the firearm to the drugs, whether the firearm was
loaded during the drug trafficking offense, and whether expert testimony could bolster the gov-
ernment's particular theory of use. \textit{Id.} at 1338.
\textsuperscript{46} Bailey I, 995 F.2d at 1117.
\textsuperscript{47} 113 S. Ct. 2050 (1993).
\textsuperscript{48} Bailey I, 995 F.2d at 1117-18.
\textsuperscript{49} 997 F.2d 884 (D.C. Cir. 1993), \textit{aff'd sub nom.} \textit{United States v. Bailey}, 36 F.3d 108 (D.C. Cir.
\textsuperscript{50} Bailey II, 36 F.3d at 108.
\textsuperscript{51} Id. at 115.
\textsuperscript{52} Id. at 114.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 115.
NOTE—PUNISHING "ACTIVE EMPLOYMENTS" OF FIREARMS

accessibility test, the D.C. Circuit held that a defendant violates § 924(c) when he "keeps the gun in a particular place from which one (or one's agents) can gain access to it if and when needed to facilitate a drug crime."55 In continuing offenses, the government need only show that the defendant had the gun in the place of the offense at a point when the defendant possessed the drugs.56 After the D.C. Circuit affirmed his § 924(c) convictions under the proximity and accessibility test, Bailey sought certiorari. The Supreme Court granted review because of a conflict among the circuits as to the meaning of use within § 924(c).

B. The Supreme Court's Decision in Bailey: Unveiling the "Active Employment" Test

The Supreme Court rejected the proximity and accessibility test, and clearly restricted use of a firearm under § 924(c) to situations where a defendant actively employs the firearm during the underlying offense.57 Writing for a unanimous Court, Justice O'Connor held that the government must show that the defendant actively employed the firearm during the crime through a use that makes the firearm an operative factor in relation to the predicate offense.58 This opinion explicitly repudiated the D.C. Circuit's proximity and accessibility standard, which had allowed prosecution under § 924(c) for passive use of a firearm, and defined use under § 924(c), when applied to a drug trafficking offense, as only including the active employment of a firearm.

Justice O'Connor began her analysis by showing that the proximity and accessibility analysis was flawed because it did not distinguish between mere possession of a firearm, which does not violate § 924(c), and the active use of a firearm which does violate § 924(c).59 Instead, she found that the proximity and accessibility test exceeded Congressional intent by criminalizing "simpl[e] possession with a floating intent to use."60 Justice O'Connor believed that because the D.C. Circuit's test could punish simple possession of firearms during a drug trafficking offense, its enforcement would reach farther than Congress intended when it prohibited use of firearms during drug trafficking activity. Therefore, to explain what Congress intended use to mean within § 924(c), she examined the language, context, and legislative history of the statute.61

Justice O'Connor considered the term use from two perspectives. First, she looked to recent attempts by the Court to define use through its ordinary meanings. These meanings went beyond mere possession and im-

55 Id.
56 Id.
58 Id.
59 Id. at 506. Justice O'Connor wrote that "an evidentiary standard for finding 'use' that is satisfied in almost every case by evidence of mere possession does not adhere to the obvious congressional intent to require more than possession to trigger the statute's application." See also Bailey II, 96 F.3d at 124-25 ("[I]f Congress intended [mere possession to be punishable under § 924(c)] all it need have mentioned is possession.") (Williams, J., dissenting).
60 Bailey, 116 S. Ct. at 505 (quoting Bailey II, 96 F.3d 108 at 121 (Williams, J., dissenting)).
61 Id. at 506.
plied both action and implementation of the firearm during the underly-
ing predicate offense.62 Second, Justice O'Connor looked at the way
Congress originally defined the word use in the scheme of the entire statute. Here, she highlighted the language of the original § 924(c) to show
that Congress intended to punish defendants only for active employment of the firearm during the predicate offense.63 Additionally, she noted that Congress could easily have expanded the statute to include passive uses by substituting the word possession for the word use, but that Congress had enacted no such amendment.64 From this analysis, Justice O'Connor con-
cluded that Congress intended to punish only the active uses of a firearm
during drug trafficking activities, and she forged the active employment
test which restricts punishment under § 924(c) for use of a firearm to situa-
tions where a defendant actively employs a firearm during the drug offense.65

The active employment test represents a significant change in the analysis of § 924(c).66 Prior to Bailey the Supreme Court had adopted an expansive view of the term use.67 The lower courts, in turn, interpreted § 924(c) to allow for passive uses of a firearm during a drug trafficking offense.68 Clearly, the Bailey decision stopped the expansion of conduct punishable under § 924(c) by returning to a common sense reading of the statute in an effort to restrict the expansive scope which prosecutors had given it.

Justice O'Connor's treatment of the language of § 924(c) will directly affect the way that lower courts approach the issue of multiple § 924(c) violations that arise from a single drug trafficking offense. Before Bailey, courts reacted negatively to a literal interpretation of § 924(c), because that interpretation meant harsh punishment for passive uses of a firearm and Congress did not intend that § 924(c) lead to such a result. Following Bailey, the government can use § 924(c) to prosecute only the conduct that Congress originally aimed to prevent, active uses of a firearm during a drug trafficking offense. In deciding whether to allow multiple § 924(c) convictions for conduct arising out of a single drug trafficking offense, courts should recognize that Justice O'Connor has restricted the scope of § 924(c) to Congress' original intent, and analyze the statute accordingly.

62 Id. (citing United States v. Smith, 113 S. Ct. 2050, 2054 (1993); United States v. McFadden, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting)).
63 Id. at 507.
64 Id. at 508.
65 Id.
66 See United States v. Pace, 10 F.3d 1106, 1117 (5th Cir. 1993), cert. denied, 114 S. Ct. 2180 (1994) (example of the “fortress” theory, holding that the jury may draw the reasonable inference that a large volume of firearms found at the scene of a drug offense were involved in the underlying predicate offense); see also United States v. Perry, 991 F.2d 219, 224 (6th Cir. 1990) (example of “emboldening” theory, holding that the mere presence of the firearm at the scene emboldened the defendant to commit the predicate offense). See also Clare, supra note 29, at 837-49 (explaining different theories of prosecution under § 924(c)).
67 See Smith v. United States, 113 S. Ct. 2050, 2058-59 (1993) (defining “in relation to” in § 924(c) to include using a gun for barter during a drug purchase); Deal v. United States, 113 S. Ct. 1993, 1997-98 (1999) (defining “second or subsequent” in § 924(c) to allow multiple convictions to arise out of a single proceeding).
IV. THE APPROACHES TO MULTIPLE § 924(c) CONVICTIONS ARISING FROM CONDUCT DURING A SINGLE PREDICATE FELONY

A. The Majority View: Prohibiting Multiple § 924(c) Violations For Conduct Occurring During a Single Drug Trafficking Offense

Currently, the majority of circuits who have decided this issue prohibit multiple § 924(c) convictions for conduct arising out of a single drug trafficking offense. The D.C. Circuit recently adopted this view in United States v. Anderson, basing its holding on arguments used by other circuits in their treatment of this issue. These courts held either that Congress intended the underlying drug trafficking offense to be § 924(c)’s unit of prosecution; or that courts must apply the rule of lenity when imposing punishment under § 924(c) because Congress did not clearly designate its allowable unit of prosecution. This section first examines Anderson as a representative example of how courts have analyzed § 924(c). This section also explains how courts have misapplied the rule of lenity when deciding to prohibit multiple § 924(c) convictions for conduct arising out of a single drug trafficking offense.

69 See United States v. Cappas, 29 F.3d 1187 (7th Cir. 1994) (agreeing with other circuits that the use of multiple guns in a single drug conspiracy will not support multiple § 924(c) convictions); United States v. Lindsay, 985 F.2d 666 (2d Cir. 1993) (applying the rule of lenity in holding that multiple firearms in a single drug trafficking crime may lead to only one § 924(c) charge); United States v. Sims, 975 F.2d 1225 (6th Cir. 1992), cert. denied, 507 U.S. 932 (1993) (well settled that court may not impose more than one sentence for § 924(c) violations relating to only one predicate offense); United States v. Moore, 958 F.2d 310 (10th Cir. 1992) (proper interpretation of § 924(c) allows for only one violation and conviction per underlying offense); United States v. Hamilton, 953 F.2d 1344 (11th Cir. 1992) (multiple § 924(c) convictions only proper if government links each gun count to a separate possession count); United States v. Privette, 947 F.2d 1259 (5th Cir. 1991), cert. denied, 503 U.S. 912 (1992) (two § 924(c) convictions in a single conspiracy constitute double punishment for one crime); United States v. Fontanilla, 849 F.2d 1257 (9th Cir. 1988) (holding the number of § 924(c) offenses is limited to the number of underlying offenses).

70 See Anderson II, 59 F.3d 1323 (D.C. Cir. 1995).

71 Id. at 1328 (explaining that other circuits have relied on two major strands of analysis when deciding this issue).

72 The government’s argument that defendants should face a section 924(c) conviction for each firearm found in connection with the underlying drug offense led many courts to conclude that the government sees the firearm as § 924(c)’s allowable unit of prosecution. These courts disagreed with the government and have correctly concluded that Congress did not intend the firearm as the unit of prosecution. However, proving that the individual firearm is not the unit of prosecution does not mean that § 924(c) does not have a clear unit of prosecution. Rather, the plain language of § 924(c), as well as the legislative history behind the statute [see supra note 25] show that Congress intended the use of a firearm as § 924(c)’s unit of prosecution. See also Simpson v. United States, 495 U.S. 6, 10 (1978) (stating the purpose of § 924(c) as “combat[ting] the use of dangerous weapons—most particularly firearms—to commit federal felonies.”).

73 See, e.g., Anderson I, 99 F.3d at 955; see also Mark E. Nolan, Comment, Diverging Views on the Merger of Criminal Offenses: Colorado Has Veered Off Course, 66 U. COLO. L. REV. 523, 534 (1995) (“[The] allowable unit of prosecution can best be described as the scope permitted for the charging and prosecution of a single act under the criminal code . . . . Thus, the allowable unit of prosecution is the legislature’s prescription of the extent to which a defendant can be prosecuted for a particular action.”).
1. United States v. Anderson

Marcos Anderson supervised a large cocaine distribution network with its headquarters in the District of Columbia. After his arrest, the government filed a 126 count superseding indictment alleging that eighteen co-conspirators committed multiple crimes to include a single drug trafficking conspiracy. At trial, the jury convicted Anderson of many offenses, including four violations of § 924(c): convictions under two counts arose because Anderson gave pistols to two juveniles for transport to California where he planned to use the firearms to rob a drug source; convictions under two other counts arose from pistols seized at his place of arrest and at a separately located drug cache. On appeal to the United States Court of Appeals for the D.C. Circuit, Anderson did not dispute that he used the firearms; probably because under the law at the time of his arrest his conduct constituted four uses. Rather, he argued that the jury could not convict him of four § 924(c) violations arising out of a single conspiracy charge. A three-judge panel upheld all four convictions, finding that the text of § 924(c) explicitly permitted convictions for each separate use of a firearm that furthers a distinct criminal purpose during the underlying drug trafficking offense.

Anderson argued that § 924(c)'s unit of prosecution was the underlying drug offense, and that the government could seek only a single § 924(c) count based on his involvement in a single drug conspiracy. The court disagreed, reasoning that to interpret the statute as Anderson proposed would make each subsequent use of a firearm during an ongoing criminal venture a free, unpunished use. The panel upheld Anderson's convictions, concluding that Congress did not intend to promote free uses of a firearm during a drug offense, and that the absence of a marginal penalty for subsequent uses would promote such free uses. On rehearing en banc, the full court of appeals vacated the panel's decision, and reversed three of Anderson's convictions.

74 Anderson I, 39 F.3d at 336.
75 Id. at 337.
76 Id. at 353.
77 Id.
78 Id. The uses for which the jury convicted the defendant in Anderson I and Anderson II might not stand as violations of § 924(c) following Bailey. See supra Part III.B. Because Anderson's case came to trial prior to Bailey, and its active employment test, the government put forward no substantive evidence in an effort to meet the requirements of the test. Certainly, post-Bailey, the firearm stored at a drug cache would not qualify as a § 924(c) violation. See Bailey v. United States, 116 S. Ct. 501, 508 (1995). The circumstances behind the remaining three § 924(c) counts could have constituted active employments of firearms. The government, however, did not introduce evidence as to how Bailey used the firearms in question, because prosecution under § 924(c) did not require evidence of an active employment at that time.
79 Anderson I, 39 F.3d at 353.
80 Id. at 354-55. The court found the text of § 924(c) clear and decided that Anderson was properly convicted for each separate use furthering a distinct purpose of the underlying offense. Additionally, the court reiterated that § 924(c) is not a penalty enhancement provision, and divorced § 924(c) violations from the number of underlying offenses.
81 Id. at 355.
82 Id. at 355.
83 Id.
84 Anderson II, 59 F.3d at 1324.
In *Anderson II*, the court concluded that because the language of § 924(c) was ambiguous the rule of lenity must govern how courts apply the statute.85 Conflicting government interpretations of the statute helped confirm the court's idea that § 924(c) was ambiguous. In some cases, the government sought to have the court recognize the use of a firearm as § 924(c)'s unit of prosecution, while in others it argued the firearm was § 924(c)'s unit of prosecution.86 The D.C. Circuit denied the government the ability to prosecute multiple § 924(c) violations under either theory because it found the viability of the two competing arguments exposed ambiguity in § 924(c)'s allowable unit of prosecution.87

The D.C. Circuit attempted to remove the perceived ambiguity in the statute by referring to its legislative history, but found that the legislative history did not help definitively clarify the statute's allowable unit of prosecution.88 The court noted that multiple § 924(c) convictions could bring about a de facto life sentence for passive uses of a firearm, and reasoned that had Congress condoned such a harsh penalty it would have explicitly provided for it in the statute.89 The D.C. Circuit, therefore, applied the rule of lenity and held that only a single § 924(c) conviction can arise out of a single drug trafficking offense. Carefully reviewing the rule of lenity, however, shows that the D.C. Circuit erred in applying the rule to § 924(c).

2. Misapplying the Rule of Lenity

Prior to invoking the rule of lenity, courts must follow the analysis which has evolved out of *Bell v. United States*.90 This analysis first requires that the court attempt to find the plain meaning of a statute in its text. Second, if a court finds the text of a statute ambiguous, then it should look to legislative history to clarify the ambiguity in the statute's language. Third, if still unsure as to the clarity of the statute, the court should look for Congressional intent as manifested in the overall statutory scheme.91 If a court finds ambiguity in the Congressional intent of the statute's unit of prosecution, it must then apply the rule of lenity.

Therefore, to properly apply the rule of lenity when considering prohibiting multiple § 924(c) violations arising out of a single drug offense, a court must first find that § 924(c)'s language is ambiguous as to its allowable unit of prosecution. If the court finds the unit of prosecution vague, it must then show, through an analysis of legislative history, that Congressional intent also fails to clarify the unit of prosecution. Finally, if neither § 924(c)'s language nor legislative history clearly defines the unit of prosecution, the court must seek clarification by analyzing § 924(c) in terms of the overall statutory scheme designed to regulate drug trafficking

85 *Id.* at 1333.
86 *Id.* at 1331; *see also Anderson I*, 39 F.3d at 359-60 (Silberman, J., dissenting).
87 *Anderson II*, 59 F.3d at 1332-33.
88 *Id.* at 1327-28.
89 *Id.*
91 *See, e.g.*, United States v. Lindsay, 985 F.2d 666, 672-74 (2d Cir.), *cert. denied*, 114 S. Ct. 108 (1993).
offenses. A court should invoke the rule of lenity only after undertaking these steps.

In Chapman v. United States, the Supreme Court clarified when courts can apply the rule of lenity. The Court held that the rule of lenity should not apply unless the language or structure of the statute contains a "grievous ambiguity" or reveals an uncertainty in the meaning of the statute's text. Additionally, courts should invoke the rule of lenity only after attempting, and failing, to ascertain the statute's meaning, and "not at the beginning of the case as an overriding consideration of being lenient to wrongdoers." In other words, a court should look to the rule of lenity only after it has used every possible aid to find intent and still finds that the statute's ambiguity causes an absurd or glaringly unjust result. Allowing multiple convictions under § 924(c) for acts committed during a single drug trafficking offense does produce a harsh penalty, but the rule of lenity does not exist to ameliorate harshness; rather, it exists to give the defendant the benefit of the doubt when he faces charges under potentially ambiguous statutes.

Judges often disagree as to the exact meaning of words in a statute, but the mere presence of debate regarding the meaning of language is not enough to permit courts to invoke the rule of lenity. Unfortunately, some courts following the majority rule prohibiting multiple § 924(c) convictions for a single underlying drug conspiracy have acted in just this way. In these situations, they have applied the rule of lenity improperly to § 924(c) because when the statute is not ambiguous, or when ambiguity yields still reasonable results, then the rule of lenity does not apply.

Properly applying Chapman to this issue after finding § 924(c)'s text ambiguous does not allow a court to invoke the rule of lenity. The legislative history of § 924(c) leaves little room for a court to conclude that the Congressional intent behind § 924(c) is ambiguous. Statements made by the original sponsors of the statute make it clear that Congress intended to punish each use of a firearm rather than simply increase the sentence for the general use of firearms in connection with an ongoing drug trafficking crime. Congressional intent to punish active uses of a firearm remains the same regardless of the number of predicate offenses.

Courts believe that Congress probably did not intend to punish passive uses as harshly as active uses. However, regardless of any subjective belief concerning the harshness of a sentence prior to Bailey, a court should not invoke the rule of lenity without meeting the requirements set out in Bell and Chapman, because to do so does not follow precedent or give proper

93 Id. (citing Huddleston v. United States, 415 U.S. 814, 831 (1974)).
94 Id. (citing Callanan v. United States, 364 U.S. 587, 596 (1961)).
95 Id. (citing United States v. Rodgers, 466 U.S. 475, 484 (1984)).
97 See Anderson II, 59 F.3d at 1340 (Douglas Ginsburg, J., dissenting).
98 Id. at 1354-35 (two judges sided with the majority opinion because they considered the opposing arguments in equipoise and felt the rule of lenity should apply because it favors the defendant) (Buckley, J., concurring) (Randolph, J., concurring); see also United States v. Lindsay, 985 F.2d 666, 676 (2d Cir.), cert. denied, 114 S. Ct. 103 (1993).
99 See supra note 25.
NOTE—PUNISHING “ACTIVE EMPLOYMENTS” OF FIREARMS 813
deference to Congressional intent. While a legitimate argument may exist regarding the clarity of § 924(c)’s allowable unit of prosecution, allowing multiple 924(c) convictions for conduct arising out of a single drug trafficking offense after Bailey does not grievously misapply Congress’ intent to punish active uses of a firearm. Thus, after applying Chapman, courts should not apply the rule of lenity to this issue.

B. The Minority View: Allowing Multiple § 924(c) Convictions For Conduct Occurring During a Single Drug Trafficking Offense

In contrast to the majority view prohibiting multiple § 924(c) convictions from arising out of a single drug offense, two circuits have avoided the previous analysis and come closer to following Congress’ intent to punish the active use of a firearm in drug offenses by allowing multiple § 924(c) convictions for conduct arising out of a single drug trafficking offense. Their interpretation follows the intent behind § 924(c) to punish active uses of a firearm harshly, and to punish subsequent uses of a firearm more harshly. The Fourth and Eighth Circuits have allowed multiple § 924(c) convictions for multiple active uses of a firearm during a single drug trafficking offense. While these circuits acknowledged the majority view, prior to Bailey, that a prosecutor could not seek multiple counts merely based on possession of multiple weapons during a single criminal occurrence, they also considered each active use of a firearm to violate § 924(c).

The Fourth Circuit initially put forth this view in a case involving multiple attempts to commit a single murder. It later refined the analysis in a case involving multiple, distinct uses of firearms during a single drug conspiracy. The Eighth Circuit began its analysis of this issue by defining § 924(c)’s allowable unit of prosecution as the individual firearm.

100 See Chapman, 500 U.S. at 464 (interpreting statutes is “not a license for the judiciary to rewrite language enacted by the legislature.”), see also Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia’s Jurisprudence of Strict Statutory Construction, 17 Harv. J.L. & Pub. Pol’y 401, 457 (1994) ("The main danger... in judicial interpretation of any law—is that the judge will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge.").

101 See United States v. Camps, 32 F.3d 102, 107 (4th Cir. 1994), cert. denied, 115 S. Ct. 1118 (1995) (stating that a court could interpret comments by Rep. Poff to support conflicting interpretations of § 924(c)).

102 See Camps, 32 F.3d at 109 (affirming three § 924(c) convictions and a 45 year sentence arising out of a single drug trafficking offense); United States v. Mabry, 3 F.3d 244 (8th Cir. 1993), cert. denied, 114 S. Ct. 1403 (1994) (affirming two § 924(c) convictions and a 25 year prison sentence arising out of a single drug trafficking offense).

103 United States v. McManus, 23 F.3d 878, 883 (4th Cir. 1994) (agreeing with defendant’s contention that the use of more than one gun during a single drug trafficking offense will not support multiple § 924(c) counts); United States v. Canterbury, 2 F.3d 305, 307 (8th Cir. 1993) (Lay, J., concurring) (refusing to extend Freisinger’s holding to authorize prosecution for each firearm a defendant possesses but does not actively use).


vtion for each active use of a firearm during a single ongoing drug conspiracy. Both circuits consider the text of § 924(c) unambiguous and allow multiple convictions for conduct during a single drug trafficking offense. They reach this result, however, using different approaches.

1. The Fourth Circuit Approach

The Fourth Circuit first analyzed the issue of multiple § 924(c) convictions arising out of a single drug trafficking offense in United States v. Luskin, a case involving three separate attempts to murder the defendant’s wife. At trial, the jury convicted Luskin of three § 924(c) offenses using the Pinkerton doctrine, and the court of appeals affirmed. Luskin appealed the sentence arising from this decision, and on rehearing, the court accepted the prior panel’s decision to uphold his three § 924(c) convictions.

107 See United States v. Lucas, 982 F.2d 1210 (8th Cir. 1991); Canterbury, 2 F.3d at 306 (holding that separate uses of a firearm during a drug trafficking offense equal separate offenses); Mabry, 3 F.3d at 249 (holding each separate use of a firearm during a drug trafficking offense is punishable under § 924(c)).


110 Id. at 6. The Pinkerton doctrine holds that every co-conspirator may be held liable for the overt acts of every other conspirator done in furtherance of the conspiracy. Pinkerton v. United States, 328 U.S. 640 (1946).


112 Luskin, 926 F.2d at 380. After analyzing the language of § 924(c), the court found no ambiguity in its text and affirmed the prior panel’s decision to impose consecutive sentences for the § 924(c) convictions. The court emphasized that imposing consecutive sentences remained the only logical interpretation of the language contained in the punishment clause of § 924(c).

113 32 F.3d 102 (4th Cir, 1994), cert. denied, 115 S. Ct. 1118 (1995) (upholding three § 924(c) violations related to specific occasions of illegal conduct. The first violation related to a shooting; the next two violations arose from an ambush of a co-conspirator during which the defendants used an AK-47 and an Uzi; the final five violations arose when police seized five semi-automatic firearms from the defendant at the time of his arrest).

114 Id. at 103, 106-08.

115 Id. at 106.

116 Id. at 107.
Further, the court found it self-evident that a defendant commits more than one offense by engaging in numerous instances of conduct that Congress specifically prohibited. Therefore, the Fourth Circuit found that the use of weapons on three separate dates, in furtherance of drug trafficking activities, clearly amounted to three separate § 924(c) offenses for which the court was required to impose consecutive sentences.

The court believed that finding multiple active uses of a firearm constituted only a single offense gave the defendant free uses of a firearm. The Camps court acknowledged the possibility that § 924(c)'s legislative history could lead to different conclusions regarding § 924(c)'s unit of prosecution, but insisted, however, that Congress clearly did not intend to allow unpunished uses of a firearm. Some courts have found § 924(c)'s allowable unit of prosecution ambiguous, but the Fourth Circuit emphasized that Congress clearly articulated its intent to punish the active use of a firearm in a drug offense. It follows, according to Chapman, the court could not invoke the rule of leniency because the legislative history of § 924(c) clarified any possible ambiguity regarding the statute's allowable unit of prosecution.

The Fourth Circuit disagreed with courts who invoked the rule of leniency to prohibit multiple § 924(c) convictions arising out of a single drug trafficking offense. The court considered their analysis flawed because § 924(c)'s plain language disallowed choosing the underlying felony as the allowable unit of prosecution. Accordingly, the Fourth Circuit decided that § 924(c) proscribes specific conduct, separate from the underlying offense, for which the court must sentence the defendant. In doing so, the court focused on the defendant's specific conduct—the use of a firearm during a drug trafficking offense, and not the number of underlying offenses.

Interpreting § 924(c) to allow multiple convictions results in harsh punishment for the defendant, but separate criminal conduct should receive separate punishment. Courts should not impose sentences based on a subjective belief that a crime's sentence punishes a defendant too harshly, because acting in this manner does not give proper deference to the Congressional intent behind the statute. Instead, courts should take the Fourth Circuit's approach and enforce the plain text of the statute.

117 Id. ("[I]t is 'using' . . . a firearm during any such crime that gives rise to a violation of the subsection.").
118 Id.
119 Id.
120 Id. at 108 (stating that a single § 924(c) violation would allow Camps to completely escape punishment for an ambush where he rapid-fired more than sixty rounds of ammunition that endangered the lives of innocent bystanders).
121 Id. at 107.
122 Id. at 108.
123 Id.
124 Id.
126 See supra note 100.
Congress enacted § 924 to punish active uses of a firearm, and courts meet this intent only when they impose a sentence that punishes each active use committed during an ongoing drug trafficking offense.

2. The Eighth Circuit Approach

The Eighth Circuit also allows multiple § 924(c) convictions arising out of a single drug trafficking offense. In United States v. Freisinger,127 the first Eighth Circuit case to address this issue, the court focused on the statute's language and found that the firearm was § 924(c)'s allowable unit of prosecution. This interpretation allowed multiple § 924(c) convictions for multiple passive uses such as the storage of numerous weapons during a single drug conspiracy. While this approach does not work following Bailey, this Note examines Freisinger because it offered a plausible theory for allowing multiple § 924(c) convictions independently of the number of underlying offenses prior to Bailey.

In United States v. Lucas, however, the Eighth Circuit took a better approach to this issue by allowing a § 924(c) conviction for each separate use of a firearm during a drug trafficking offense. In an argument similar to the Fourth Circuit's, the Lucas court focused on separate active uses of a firearm as the allowable unit of prosecution finding that each use amounted to a separately punishable criminal impulse. This section first details the Freisinger case, but then more closely examines Lucas because its holding closely parallels the Congressional intent behind § 924(c).

In Freisinger, police officers stopped the defendant because they suspected he was driving under the influence of alcohol. As a result of this stop they arrested Freisinger, confiscated a cased rifle found in the passenger compartment, and impounded his car. During the ensuing inventory search of the vehicle, police found eighty-one grams of cocaine and three firearms hidden inside a knotted pillowcase.128 At trial, the jury convicted Freisinger of four § 924(c) violations.129 On appeal, Freisinger questioned whether § 924(c) permitted four convictions for conduct occurring during one predicate offense. His argument centered on the theory that Congress had ambiguously defined the statute's unit of prosecution.130 He believed that the rule of lenity should apply to his case and allow the court to uphold only a single § 924(c) conviction for his conduct because it all occurred during a single underlying drug offense. The Eighth Circuit agreed that the clarity of the statute's unit of prosecution would control the outcome of the case, and interpreted § 924(c) in an effort to decide whether to invoke the rule of lenity.131

Utilizing the analysis of Bell and its progeny,132 the court began its analysis by looking for Congressional intent in the plain language of

128 Id. at 385.
129 Id. at 387.
130 Id. at 387-88.
131 Id.
132 See supra notes 90-91 and accompanying text.
§ 924(c). In deciding whether the firearm represented the statute's allowable unit of prosecution, the court looked to the "a versus any" rule of statutory construction. The Eighth Circuit cited multiple cases suggesting that use of the word "any" preceding a noun makes a statute ambiguous, whereas use of the word "a" preceding a noun suggests the statute has a clear allowable unit of prosecution. Because the language of § 924(c) reads "a firearm," the court held § 924(c) did not suffer from ambiguity and affirmed Freisinger's convictions.

The Eighth Circuit concluded that the text of § 924(c) clearly denoted that the individual firearm was the statute's allowable unit of prosecution. Finding the statute's text unambiguous, the court held that the number of § 924(c) violations depended upon the number of firearms used in the drug trafficking offense, not on the number of underlying felonies. The Eighth Circuit, therefore, affirmed Freisinger's multiple § 924(c) convictions.

The court, however, did not find § 924(c)'s punishment clause as clear as its unit of prosecution. Deciding Freisinger prior to Bailey, the Eighth Circuit believed it could punish passive uses of a firearm in a drug trafficking offense. Following this assumption, it had two options, therefore, in deciding how to punish Freisinger's four § 924(c) convictions. First, the court could interpret the statute literally and sentence Freisinger to a sixty-five year prison sentence by punishing counts II, III, and IV with twenty-year sentences served consecutively to the five-year sentence required by count I. Second, it could sentence Freisinger to only a five-year sentence by interpreting "second or subsequent" convictions to arise only from second or subsequent transactions, not from a prosecution for passive uses of multiple firearms. The court chose the second option after deciding that Congress had not clearly provided for a sentence of more than five years for conduct arising out of a single drug trafficking offense, invoked the rule of lenity, and ran the four five-year sentences concurrently.

By imposing concurrent sentences on Freisinger for his multiple § 924(c) convictions, the Eighth Circuit ignored § 924(c)'s requirement that the sentences for subsequent convictions must run consecutively to the sentence imposed for the first conviction. Freisinger's sentence, however, does reflect the court's attempt to reach Congressional intent to pun-

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133 Freisinger, 937 F.2d at 387-88.
134 See Jackson v. United States, 926 F.2d 763, 764 (8th Cir.), cert. denied, 502 U.S. 967 (1991) (upholding eight convictions under 26 U.S.C. § 5861(d) because the statute reads "a firearm"); United States v. Coliro, 922 F.2d 1008, 1014 (2d Cir.), cert. denied, 502 U.S. 1217 (1991) (statute is ambiguous when the word "any" precedes the unit of prosecution); United States v. Kinsley, 518 F.2d 665, 668 (8th Cir. 1975) (holding 18 U.S.C. § 1202(a) ambiguous because it contained the phrase "any firearm").
135 Freisinger, 937 F.2d at 390 (8th Cir. 1991).
136 Id.
137 Id.
138 Id. at 390-92.
139 Even if the court had found that second or subsequent convictions need to arise from a second or subsequent transaction, the court should have sentenced Freisinger to four consecutive five-year sentences because each use of a weapon constituted a violation of § 924(c) and this would require the court to impose a separate sentence for each offense.
ish passive uses more leniently than active uses under § 924(c). The Freisinger court correctly understood § 924(c)'s allowable unit of prosecution as the use of a firearm. Yet, punishing § 924(c) under the old definition of use, which included passive uses of a firearm, would have caused the court to impose a sixty-five year sentence for conduct that Congress may not have intended to punish at all. The Freisinger opinion represents a compromise by the Eighth Circuit in an attempt to best implement the Congressional intent of § 924(c) prior to Bailey.

In United States v. Lucas, the Eighth Circuit's analysis shifted away from a plain text analysis and towards defining the conduct which § 924(c) intended to deter. The leading Eighth Circuit case on this issue, Lucas allows multiple § 924(c) convictions to arise out of a single drug trafficking offense when the defendant engages in multiple active uses of a firearm.

In Lucas, police executed search warrants on two of defendant Shakur's residences simultaneously. At the first residence the police found drugs, drug paraphernalia, and a single firearm; while the search of the second residence revealed a crack cocaine lab and thirteen firearms available to protect the drug lab. At trial, the judge found that the defendant's uses of separate firearms for two different protective purposes would permit two § 924(c) convictions. The jury returned a guilty verdict on both § 924(c) counts and the judge sentenced Shakur to twenty-five years in prison. On appeal, the defendant did not question the court's finding that using the firearms for separate purposes constituted separate uses under § 924(c); rather, he argued that a single predicate offense may support only one § 924(c) offense.

In deciding Lucas, the Eighth Circuit thoroughly analyzed the concerns regarding § 924(c)'s ambiguity. Beginning its analysis by interpreting the meaning of use within the context of § 924(c), the court restated the fundamental idea that separate criminal impulses should result in separate criminal prosecution and punishment. The Eighth Circuit accepted the district court's finding that the defendant's different uses of firearms amounted to distinctly chargeable conduct under § 924(c). Finding the

140 Freisinger, 937 F.2d at 385. Freisinger's § 924(c) convictions all arose from passive uses of firearms.
141 See United States v. Canterbury, 2 F.3d 305, 306 (8th Cir. 1993) (Lay, J., concurring). Judge Lay questioned whether Freisinger's holding allowed multiple convictions for the distinct use of multiple firearms. If it did, he believed that the Eighth Circuit should rehear the issue en banc to decide whether Freisinger accurately reflected Congressional intent. However, Judge Lay did support the right of the government to prove that separate uses of a firearm occurred during a single underlying predicate felony and to prosecute these uses as separate § 924(c) violations. The opinion emphasizes the theory that prior to Bailey courts did not believe that passive uses satisfied the Congressional intent behind § 924(c).
142 932 F.2d 1210 (8th Cir. 1991).
143 Id. at 1215.
144 Id.
145 Id. at 1221.
146 Id.
147 Id.
148 Id. at 1222. See also supra note 125 (explaining that courts use the Blockburger test to decide whether conduct constitutes a single offense or multiple offenses); John Whitaker, Wrongful Death and Double Jeopardy, 26 CUMB. L. REV. 231, 250-51 (1995) (explaining the Supreme Court's return to Blockburger's "same elements" test as the standard for determining what constitutes single or multiple offenses).
separate uses to constitute separate criminal impulses, the court concluded it could punish each criminal impulse separately under § 924(c).\footnote{149}

In an argument similar to that put forth by the Fourth Circuit, the Eighth Circuit interpreted Congress' intent behind § 924(c) to be the deterrence of individual uses of firearms during drug crimes or crimes of violence.\footnote{150} The court held that punishing only the first use of a firearm during an ongoing drug trafficking offense limited the ability to "persuade wrongdoers to leave their guns at home" to only those drug traffickers who had never violated § 924(c).\footnote{151} The court reasoned that interpreting § 924(c) in this manner would place it at odds with Congress' intent to punish each use of a firearm during a drug trafficking offense.\footnote{152}

Three Eighth Circuit cases after Lucas buttress its holding and the argument for punishing distinct uses of a weapon independently of the underlying drug trafficking offense.\footnote{153} The Eighth Circuit now considers it well-settled that a court must punish each "distinct use" of a firearm under § 924(c), regardless of the relationship of that conduct to any underlying offense. Following Bailey's creation of the active employment test, it appears that the Eighth Circuit's distinct use doctrine most closely follows Congressional intent to punish each active use of a firearm under § 924(c).

V. A Return to Congressional Intent: § 924(c) Convictions Independent of the Underlying Drug Trafficking Offense

Courts could interpret § 924(c) in two ways following Bailey. First, they could view the Supreme Court's decision to restrict the term use in § 924(c) to active employments as a return to the statute's original scope. By taking this approach, courts return to Congress' intent to impose harsh, mandatory penalties for the active use of a firearm during a drug trafficking offense. To implement Congress' intent, courts should allow multiple § 924(c) counts to arise out of a single drug trafficking offense. Alternatively, courts could look past the clear language and intent of § 924(c) to view Bailey as a general restriction on the power of this statute. Should courts choose this view, the majority position prohibiting multiple § 924(c) prosecutions for a single underlying offense will become more dominant.

In fact, Justice O'Connor's active employment test does not represent a general restriction on § 924(c). Rather, she has returned the statute to its original scope, and courts following the active employment test should punish crime violating the statute as Congress originally intended. Mis-

\footnote{149} Lucas, 932 F.2d at 1223.  
\footnote{150} Id. See also supra notes 113-24 and accompanying text.  
\footnote{151} Lucas, 932 F.2d at 1223 (quoting Rep. Poff's statement discussing punishing the criminal for using a weapon during a felony. 114 Cong. Rec. 22,231(1968)).  
\footnote{152} Id. See also supra note 25.  
\footnote{153} United States v. Mabry, 3 F.3d 244, 250 (8th Cir. 1993) (holding defendant liable for two § 924(c) violations following uses of a firearm committed thirteen months apart but during a single drug conspiracy); United States v. Canterbury, 2 F.3d 305, 306 (8th Cir. 1993) (holding that § 924(c) authorizes multiple prosecutions for separate uses of a firearm independent of the number of predicate crimes); United States v. Edwards, 994 F.2d 417, 424 (8th Cir. 1993), cert. denied, 114 S.Ct. 701 (1994) (affirming conviction on two counts of using firearms in connection with drug trafficking offense where the two counts were based on two separate seizures of a firearm in the defendant's home).
characterizing Bailey as a general restriction, and using the rule of lenity to prohibit multiple § 924(c) convictions for multiple active uses of a firearm during a single drug conspiracy, improperly favors the defendant by drastically reducing his prison sentence without considering his culpability for individual criminal acts. Furthermore, this interpretation ignores the Congressional intent behind § 924(c), and clearly misapplies the rule of lenity. Instead, courts should look to Bailey as the cornerstone in adjudicating and punishing multiple § 924(c) violations as Congress originally intended.

The majority of circuits who have decided this issue currently prohibit multiple § 924(c) convictions from arising out of a single drug trafficking offense. These courts should recognize that they decided this issue at a time when § 924(c) to allow for prosecuting passive uses, and the statute punished this conduct entirely out of proportion to that intended by Congress. Because they had allowed the statute to include passive uses, they needed a mechanism to control the amount of punishment imposed for multiple passive uses of a firearm.

The rule of lenity provided this mechanism, and resulted in punishments more in line with what Congress intended. While courts previously made the tenuous argument that ambiguity in § 924(c) allowed them to apply the rule, Bailey brought the meaning of use in line with Congressional intent. After Bailey, the rule of lenity has become inapplicable to the issue of multiple § 924(c) convictions arising out of a single drug trafficking conspiracy because § 924(c) only applies when a defendant actively employs a firearm during a drug trafficking offense. Congress intended to punish this type of conduct, and courts should now begin to punish each § 924(c) violation independent of its underlying offense.

Circuits holding the minority view employ a plain language analysis of § 924(c) to conclude that it allows multiple convictions to arise out of a single underlying drug trafficking offense. Courts currently espousing the majority view should acknowledge that the plain language of § 924(c), along with its legislative history, clearly recognizes each and every active use of a firearm as the statute’s allowable unit of prosecution. Additionally, the fact that the Supreme Court considers § 924(c) a separately punishable statute, and has clearly defined use under that statute, should allow the government to seek multiple § 924(c) violations for active uses of a firearm regardless of the number of underlying offenses charged to the defendant.

VI. HOW COURTS SHOULD TREAT COMMON § 924(C) SITUATIONS FOLLOWING BAILEY

Endorsing the current minority view allowing for multiple § 924(c) convictions to arise from a single underlying offense does not end this anal-

154 See supra Part IV.A.2.
155 See supra note 69.
156 See supra Part IV.A.2.
ysis, because courts will still encounter difficult cases of interpretation concerning the number of § 924(c) convictions allowed in a particular situation. This section considers four common scenarios which courts are likely to encounter when they review conduct resulting in multiple charges under § 924(c). While these scenarios present potential interpretive difficulties, a consistent application of the active employment test will ensure that a court properly interprets § 924(c).

A. Multiple Active Uses During the Life of a Single Conspiracy

Multiple active uses of a firearm during the life of a single conspiracy will provide the most common scenario from which multiple § 924(c) violations committed during a single predicate offense arise. Consider an ongoing criminal enterprise where the defendant threatens a drug buyer early in the conspiracy by showing a firearm in an attempt to scare the buyer into paying a drug debt. Six months later, the defendant brandishes the same weapon at a second buyer, during a transaction, in an effort to intimidate him and prevent a drug “ripoff.” Six months later, the police arrest the defendant, and upon searching his house, find a separate firearm hidden in a storage closet.

Of course, the use of the weapon during the two brandishing episodes constitutes two active employments of a firearm during the single underlying drug conspiracy. Under the active employment test, the government could seek convictions for each of these two offenses even though the defendant committed them during a single drug trafficking conspiracy. Just as clearly, the mere presence of the firearm in the storage closet at the time of arrest is a passive use that does not qualify as an active employment of the firearm after Bailey. Therefore, in this hypothetical, the government could not seek a third conviction under § 924(c) for the firearm found in the closet. In this scenario, the defendant would receive a twenty-five year sentence for his uses of a firearm as well as a sentence for the underlying drug predicate offense.

Seeking multiple § 924(c) convictions in this situation makes good sense. Congress intended to punish defendants for actively using a weapon during a drug trafficking offense. Each active use of a firearm during a drug trafficking offense constitutes a separate risk of harm to individuals, and it would run contrary to Congressional intent for the defendant to escape punishment for causing harm to a second person merely because he has committed a prior firearms violation during the underlying drug offense. Applying the current majority view to this scenario by allowing only one § 924(c) conviction would give the defendant a free use of a firearm. Congress did not intend such a result; on the contrary, Congressional intent requires the punishment of each active use of a firearm independently of the underlying predicate offense.

159 See supra note 23.
160 Bailey, 116 S. Ct. at 508.
161 The defendant would receive a five-year sentence for the initial threatening of an individual with a firearm, and a twenty-year sentence to be served consecutively for the second active employment of a weapon.
B. The Simultaneous Seizure of an Active and Dormant Firearm

Consider the situation in which police officers break up an ongoing drug deal and the defendant immediately attempts to flee the scene in his vehicle. During his escape attempt, the defendant fires multiple shots at the police with a pistol. Following a protracted chase, the police corner the defendant and arrest him. Upon searching his car, the police find a cache of five loaded weapons in the back seat.

In this situation, the defendant actively employed a firearm during the underlying drug offense when he fired shots at the police. The government, however, can seek only one § 924(c) conviction, assuming that no further evidence arises to show that the defendant actively employed any of the other five firearms during the drug trafficking offense because Bailey makes it clear that storage of a firearm, without somehow actively employing it, does not distinguish it from possession.162

Again, this result makes sense because Congress intended to punish each active use of a firearm, and the single § 924(c) count will accomplish that goal in this situation. Unlike the prior scenario, the defendant receives no free use of a firearm here. Imposing a sentence for a single § 924(c) conviction, however, meets Congressional intent without the court ever having to consider the number of underlying offenses.

C. Use = Criminal Impulse = § 924(c) Violation

In a third scenario, the defendant burglarizes a home. Upon entering the house he interrupts a poker game with three players. During the robbery he brandishes a firearm at all three players threatening to kill them unless they turn over the game’s proceeds to him. A fourth player, arriving late, sees the robbery in progress and leaves to get the police. The police arrive and arrest the defendant. Prosecutors can seek only a single § 924(c) conviction because the defendant’s active employment of a firearm occurred within a single criminal impulse.

Some might argue that the defendant actively employed the weapon three times: once for the harm inflicted on each of the three victims by brandishing the weapon at them individually.163 This argument must fail, however, because the government may charge only a single violation of a given statute for conduct arising out of a single criminal impulse.164 Here, the entire robbery constitutes a single criminal impulse, and the number of people threatened by the active use of a single firearm does not allow the prosecutor to seek additional § 924(c) convictions for the one crime. Courts should not attempt to stretch the idea of a criminal impulse beyond its common meaning when deciding what constitutes a use under § 924(c).

162 Bailey, 116 S. Ct. at 508.
163 See Anderson II, 59 F.3d at 1339 n.9 (arguing that taking the “separate uses” doctrine to its extreme will make each shot fired from a firearm a separate violation of § 924(c)). The court makes an academic argument in Anderson II. Courts have the experience to properly exercise their discretion as they gauge what constitutes a separate use, and should be allowed to use that discretion in discerning the facts of individual cases.
164 See supra note 125.
Rather, judges should explain the law of criminal impulse to a jury based upon common sense and their practical experiences with the law.\textsuperscript{165}

**D. Active Employment of Multiple Firearms Used During the Same Criminal Impulse**

In a fourth scenario, the defendant flees from the police after they interrupt a drug deal. During the chase the defendant fires multiple rounds at the police from one pistol as well as multiple rounds from a second firearm. In this case, the defendant actively employed two separate firearms during the chase, and the prosecutor can seek two § 924(c) convictions, one for the active use of each weapon. While the defendant may claim that his conduct occurred during a single criminal impulse, the defendant's active employment of separate firearms during a single crime amounts to separate criminal impulses, each punishable under § 924(c).

Courts must distinguish the above situation from one in which a defendant actively employs a firearm by firing at the police as he flees the drug deal, and the police find a second weapon on the defendant's person when they arrest him. In the latter scenario, prosecutors can seek only one § 924(c) conviction for use of a firearm because Bailey requires independent evidence of active employment for each firearm.\textsuperscript{166}

These four scenarios will arise often, but careful scrutiny by judges as to how many active employments occur during an underlying drug trafficking offense will guide courts in properly determining the number of § 924(c) counts that a prosecutor can charge. By using Bailey's active employment test, courts can make principled distinctions as to the exact conduct that the government can charge under § 924(c) and ensure that defendants receive the punishment Congress intended for the active use of a firearm in a drug trafficking crime.

**VII. Amending § 924(c) to Ensure Courts Implement Congressional Intent**

In light of Bailey, the statutory language and legislative history of § 924(c) make it clear that multiple § 924(c) counts may be based on a single underlying drug trafficking offense. However, if courts continue to consider the underlying predicate offense as § 924(c)'s allowable unit of prosecution, Congress should amend the statute. Currently, the small amount of legislative history behind the statute provides courts the potential latitude to interpret § 924(c) in different ways and to find ambiguity in the language of the statute. Congress should make § 924(c) even easier to

\textsuperscript{165} For example, courts can easily classify attempts to escape and single crimes which threaten many people as examples of single criminal impulses. All uses of a single firearm during the time period making up a single criminal impulse must constitute a single use under § 924(c). As a second example, a conspiracy is a separate criminal impulse from other substantive crimes, but each of the substantive crimes committed during the period of the conspiracy amount to separate criminal impulses.

\textsuperscript{166} Bailey v. United States, 116 S. Ct. 501, 509 (1995). After Bailey, the government could attempt to gain a § 924(c) conviction under the carrying prong of § 924(c) for the firearm which the defendant carried but never actively employed during the chase.
interpret by changing its language to definitively set forth the statute’s allowable unit of prosecution. Additionally, these proposed amendments should clarify the baseline conduct for which prosecutors can seek a § 924(c) conviction. Congress can accomplish these objectives by amending the statute in three ways.

First, Congress should redraft the statute to extinguish any doubt that use of a firearm is the allowable unit of prosecution. Congress can accomplish this by changing the language in § 924(c) so that it will read in part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for 5 years. . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years. . . . If a defendant is convicted of multiple uses of a firearm during and in relation to a crime of violence or a drug trafficking crime, the court shall impose a separate § 924(c) sentence for each separate use of the firearm. These sentences shall run consecutively.

This amendment deletes carrying as separate conduct from use in the context of § 924(c) and drastically reduces the possibility that defendants will face § 924(c) charges for passively carrying a firearm. The Supreme Court remanded Bailey to the D.C. Circuit to determine whether Bailey and Robinson violated § 924(c) by carrying firearms during their drug trafficking offense. While the active employment test clearly defined what constitutes a use of a firearm under § 924(c), the Supreme Court has not put forward a test which defines when carrying a firearm violates § 924(c). After Bailey, Congress should amend § 924(c) to avoid punishing passive conduct under the statute brought on by the passive carrying of a firearm.

Keeping use separate from carrying, as the current § 924(c) does, would enable the government to prosecute § 924(c) cases for multiple carrying offenses when a defendant transports multiple weapons. These counts would arise because of passive uses of a firearm, and the Bailey decision clearly seeks to avoid prosecuting exactly this type of conduct under § 924(c). Deleting carrying from the text of the statute does not proscribe prosecuting a defendant for actively carrying a firearm to facilitate a drug trafficking offense. Rather, the statute would incorporate active carrying into its definition of use and require the defendant to actively employ the firearm to violate § 924(c).

Second, the language added to the end of the statute would enhance the already clear intent of Congress to establish use of a firearm as the allowable unit of prosecution. This change would definitively show courts

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167 Proposed amendment language emphasized.
168 Bailey, 116 S. Ct. at 509.
169 Showing that a defendant carried a weapon on his person in an attempt to intimidate a drug buyer will constitute an offense under a new § 924(c). Merely transporting a firearm in a vehicle will not constitute carrying under the amended § 924(c). Instead, to violate the statute, the defendant must have physical control over the weapon while in the vehicle. Physically transporting a firearm in a bag or satchel of any kind will constitute a carrying under this amendment even though the defendant does not actually have the firearm on his person.
that the government can now seek a conviction for each separate active employment of a firearm, independent of the number of underlying drug trafficking offenses, and that a court must impose consecutive sentences for each subsequent § 924(c) conviction. Additionally, this language would ensure that the problem of incorrectly sentencing multiple § 924(c) convictions concurrently does not reoccur. This new language supports harsh penalties under the proposed § 924(c), but Congress has specifically endorsed these penalties to reduce the violence resulting from drug trafficking. These changes definitively put forth the statute’s allowable unit of prosecution and reduce the chance for courts to claim that Congress has not expressed its clear intent through the language of § 924(c).

Finally, Congress should codify Bailey’s active employment test. This additional language would help specifically define the conduct for which prosecutors can indict defendants under § 924(c). Specifically, the statute should define use as:

A defendant uses a firearm in accordance with this statute when he fires or attempts to fire the firearm; strikes or attempts to strike another with the firearm; uses a firearm as goods in barter; actively facilitates the offense through carrying a firearm on his person; or makes a reference to a firearm in an effort to intimidate or cause a change in circumstances which facilitates the completion of the underlying violent felony or drug trafficking offense.

Putting Justice O’Connor’s active employment test into the statute most accurately captures Congress’ intent to properly restrict § 924(c) violations to active uses of a firearm.

These changes reinforce the original intent of the statute, establish active use as the definitive allowable unit of prosecution, and define that unit of prosecution according to the Supreme Court’s holding in Bailey. Amending the statute ensures that courts will properly interpret the statute and provides the government with a clear indication of the specific conduct which violates § 924(c).

VIII. Conclusion

Congress intended § 924(c) to punish conduct that increases the chance of violence occurring during a drug trafficking offense, and passive uses of a firearm do not fall into that category of conduct. Currently, the majority of Federal Circuits that have addressed the issue prohibit multiple § 924(c) convictions for a single underlying offense in order to avoid harsh punishment for passive uses of a firearm. Courts have invoked the rule of lenity to reach this conclusion after finding § 924(c) ambiguous. This may represent a noble effort to restrict § 924(c)’s reach to only the conduct which Congress intended, but courts have erred in two ways by making this analysis.

First, no court has analyzed the statute, prior to invoking the rule of lenity, according to the standards set out by the Supreme Court in Chap-

170 See supra note 25.
Second, the courts have punished the legislature for acting efficiently in passing and amending § 924(c) by claiming that the lack of legislative history behind the statute makes it ambiguous. Congress can enact its intent, using simple language, in a short period of time, and the legislative history behind this statute shows that Congress acted in this way when it enacted and amended § 924(c). Congress intended § 924(c) to punish only active uses of a firearm, and because Bailey has removed the possibility of prosecuting passive uses of a firearm, the courts should adopt the current minority view by allowing multiple § 924(c) convictions independent of the underlying offense.

The Fourth and Eighth Circuits allow § 924(c) charges independent of the number of underlying drug trafficking offenses. This approach punishes each criminal impulse because each one causes a separate harm. A prosecutor can seek independent criminal sanctions when separate defendants cause separate criminal impulses. Not to allow the prosecutor to charge separate crimes for multiple active uses of a firearm under § 924(c) allows free uses of a firearm merely because one defendant has committed multiple offenses. Courts acting in this way erode the relationship between criminal liability and moral culpability, and Congress certainly did not enact § 924(c) to sever that relationship by allowing free uses of a firearm when one defendant commits multiple crimes.

Bailey's active employment test gives courts a valuable tool to properly handle difficult interpretive situations concerning § 924(c). Justice O'Connor has concisely interpreted Congress' intent behind the statute and established clear guidelines as to what conduct will rise to the level of a § 924(c) offense. Following her guidelines, and using the traditional rules defining criminal impulse, ensures that the punishment for § 924(c) violations fits the crime.

Although clear in its current form, Congress should amend § 924(c) to ensure that federal courts properly apply the statute. Language clearly mandating that courts must punish each use of a firearm accomplishes this goal and makes it impossible for the courts to improperly invoke the rule of lenity when analyzing § 924(c). Second, Congress must include active carrying of a firearm in the definition of use contained within § 924(c). This change prevents the possibility of punishing defendants for passive carrying of a firearm, precisely in accord with Bailey's mandate not to punish passive conduct under § 924(c). Finally, Congress should codify Justice O'Connor's "active employment" test. This addition will provide prosecutors with an easily understood baseline of conduct that constitutes a § 924(c) offense.

Enacting these amendments ensures that courts and prosecutors can easily interpret § 924(c) and that defendants receive punishment for violating § 924(c) in accord with Congressional intent. In the absence of Congressional action to amend § 924(c), courts should return to the plain language of § 924(c) and seek to fulfill Congress' original intent behind
the statute by allowing a § 924(c) conviction for each active employment of a firearm during a drug trafficking offense.

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