Winter 1994

18 U.S.C. 924(c)(1)--The Court's Construction of Use and Second or Subsequent Conviction

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Recommended Citation
George P. Apostolides, 18 U.S.C. 924(c)(1)--The Court's Construction of Use and Second or Subsequent Conviction, 84 J. Crim. L. & Criminology 1006 (Winter 1994)
18 U.S.C. § 924(c)(1)—THE COURT'S CONSTRUCTION OF "USE" AND "SECOND OR SUBSEQUENT CONVICTION"


I. INTRODUCTION

In Smith v. United States and Deal v. United States, the United States Supreme Court broadly interpreted 18 U.S.C. § 924(c)(1), a provision that mandates a five year prison sentence enhancement for anyone who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm" and a twenty year enhancement "in the case of [a] second or subsequent conviction." In Smith, the Court held that a criminal who agrees to trade a firearm for drugs "use[s]" it "during and in relation to . . . [a] drug trafficking offense" for the purposes of § 924(c)(1). In Deal, the Court held that the portion of the statute that heightens punishment for a "second or subsequent conviction" applies when more than

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3 The full text of 18 U.S.C. § 924(c)(1) (1992) reads:
(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, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.
4 Smith, 113 S. Ct. at 2052.
one § 924(c)(1) conviction is obtained in a single proceeding.\(^5\)

This Note examines the process by which the majority and dissenting opinions in *Smith* and *Deal* interpreted the § 924(c)(1) terms "use" and "second or subsequent conviction." After providing a background to these cases and summarizing their facts and opinions, this Note argues that beyond simply expanding the scope of § 924(c)(1), the Justices in the majority and dissenting opinions in both decisions may have restricted the scope of the rule of leniency. The rule of leniency requires that when a criminal statute is "ambiguous," it should be construed in favor of the criminal defendant. The Supreme Court has found that ambiguity exists when there is a "reasonable doubt" about the construction of the statute after examining the language, the legislative history, and the underlying policy concerns of the statute. The Justices in *Smith* and *Deal* may have disparaged the rule of leniency by finding that the text of the statute unambiguously applied to the defendants in these cases. The Justices should have found that neither the statutory language, the legislative history, nor the underlying policy concerns clearly dictated the proper construction of the statute. Thus, these cases would have been a perfect opportunity to apply the rule of leniency.

II. BACKGROUND

A. THE HISTORY OF § 924(c)(1)

Congress first passed § 924(c) as part of the Gun Control Act of 1968.\(^6\) The only informative legislative history regarding § 924(c) is the debate on the floor of the House. Committee reports and congressional hearings that often provide guidance on the purposes of an act do not exist.\(^7\) Behind the debate on the Gun Control Act lay the idea that "most people can see that law enforcement and law and order have broken down.... Something must be done to return to law enforcement, where the criminal can be sure of being arrested, tried, convicted and punished, for that is the real deterrent

\(^5\) *Deal*, 113 S. Ct. at 1999.


\(^7\) Both the Supreme Court, in *Busic* v. United States, 446 U.S. 398, 405 (1980), and lower courts, in United States v. Phelps, 877 F.2d 31 (9th Cir. 1989), *en banc* review denied, 895 F.2d 1281 (1990) and United States v. Moore, 580 F.2d 360, 362 (9th Cir.), cert. denied, 439 U.S. 970 (1978), have commented on the sparse nature of § 924(c)(1)'s legislative history.
to crime."\textsuperscript{8}

The debate on the floor of the House produced the language that evolved into the current § 924(c)\textsuperscript{(1)}.\textsuperscript{9} The original version of § 924(c) provided for the seizure and forfeiture of any “firearm or ammunition ... used or intended to be used in, any violation of ... this chapter, or a rule or regulation promulgated thereunder, or ... any other criminal law of the United States.”\textsuperscript{10} Representative Casey of Texas then offered an amendment to § 924(c) which provided that “whoever during the commission of any robbery, assault, murder, rape, burglary, kidnaping, or homicide ... uses or carries any firearm ... shall be imprisoned” for not less than ten years for the first offense and for not less than twenty-five years for a second or further offense.\textsuperscript{11} Later in the debate, Representative Poff of Virginia offered a substitute to the Casey amendment.\textsuperscript{12} The Poff amendment differed from the Casey amendment in four ways. First, it provided that penalties could not be suspended and probation could not be granted.\textsuperscript{13} Second, it required that the § 924(c) sentence run consecutively with the penalty for the basic crime.\textsuperscript{14} Third, it confined the application of § 924(c) to federal felonies.\textsuperscript{15} Fourth, it lowered the mandatory sentences to one to ten years for the first offense and five to twenty-five years for a second or subsequent conviction.\textsuperscript{16} The House eventually passed the Poff amendment.\textsuperscript{17} Though the Senate passed its own version of the bill, the House version emerged from the Conference Committee with some changes.\textsuperscript{18} The two houses then passed this version of § 924(c).\textsuperscript{19}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{8} 114 Cong. Rec. 22,238 (1968).
\item \textsuperscript{9} Id. at 22,223-48.
\item \textsuperscript{10} Id. at 22,226.
\item \textsuperscript{11} Id. at 22,229.
\item \textsuperscript{12} Id. at 22,231.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id. at 22,248.
\item \textsuperscript{18} Id. at 30,179, 30,568. There were two differences between the Conference Committee’s version and Representative Poff’s version. First, the Conference Committee deleted the requirement that § 924(c) violations could not run concurrently. Second, the Conference Committee did not preclude the court from granting probation or a suspended sentence to a first offender. This difference actually led Representative Poff to speak against the Conference Committee version of the statute as well as vote against it. Id. at 30,583, 30,587.
\item \textsuperscript{19} Id. at 30,183, 30,587. In its final 1968 form, § 924(c) read:
\begin{itemize}
\item (c) Whoever—
\item (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
\item (2) carries a firearm unlawfully during the commission of any felony which may be
\end{itemize}
\end{itemize}
\end{footnotesize}
In 1971, Congress lowered the minimum punishment for a second or subsequent conviction from five years to two years and prohibited courts from imposing concurrent sentences for violations of § 924(c).²⁰

The debate on the Poff amendment in the House does not reveal Congress' intended interpretation of either "use" or "second or subsequent conviction." The legislators spoke only in broad terms about the purpose of § 924(c). Representative Poff himself made the most authoritative statement regarding the purpose of the law:

The effect of a minimum mandatory sentence in this case is to persuade the man who is tempted to commit a Federal 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.²¹

Nothing in the legislative history specifically addressed the construction of either "use" or "second or subsequent."²²

The United States Supreme Court first interpreted § 924(c) in Simpson v. United States²³ and Busic v. United States.²⁴ In both cases, the Court held that when a defendant is prosecuted for violating a statute which provides for a heightened punishment for the use of a firearm, § 924(c) did not apply.²⁵ Though the Court stated that the "overriding purpose of § 924(c) was to combat the increasing use of

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²¹ 114 Cong. Rec. at 22,231.
²² Though many House members spoke during the debate on § 924(c), two comments in particular characterize the debate. Ohio Representative Harsha stated:

[If we are going to vigorously combat this problem of crime, we are ... going to have to require a vigorous prosecution of those measures and incarceration of the guilty, so as to provide the strongest deterrent to preclude the repetition of the crimes of violence and the unlawful use of firearms in their commission.

Id. at 22,234.

Representative Rogers of Florida said that "any person who commits a crime and uses a gun will know that he cannot get out of serving a penalty in jail. And if he does it a second time, there will be a stronger penalty." Id. at 22,237.
²⁴ 446 U.S. 398 (1980).
²⁵ Simpson, 435 U.S. at 12-13; Busic, 446 U.S. at 399-400. The Court faced different issues in these cases. In Simpson, the Court had to decide whether a defendant could be sentenced under both § 924(c) and an enhancement provision in the primary statute. In
guns in the commission of federal felonies," neither Simpson nor Busic discussed the interpretation of the words "use" or "second or subsequent conviction."

After the Simpson and Busic decisions, Congress amended § 924(c) to reestablish its effectiveness. As part of the Comprehensive Crime Control Act of 1984, Congress drastically reformulated the statute. The amended statute read as follows:

Whoever, during and in relation to any crime of violence, including a crime of violence 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, 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 ten 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 in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

Congress then restructured the provision in 1986 as part of the Firearms Owners' Protection Act. First, the amendment struck the word "violence" where it appeared and inserted "violence or drug trafficking crime." Second, Congress inserted "or drug trafficking crime" before "in which the firearm was used or carried." Third, it added the language "and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for ten years" to the first and second sentences of the statute. Fourth, it defined "drug trafficking crime" and "crime of violence" for the purposes of § 924(c)(1). Two years later, Congress further amended the law as part of the Anti-Drug Abuse Amendments Act of 1988. First, it replaced the ten-year sentence

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Busic, the Court had to determine whether the government could choose to apply § 924(c)(1) instead of the enhancement of the primary statute.

26 Simpson, 435 U.S. at 10 n.4.
30 Id. at 457.
31 Id.
32 Id.
33 Id.
for a "second or subsequent conviction" with a twenty-year sentence, and the twenty-year sentence for a "second or subsequent conviction" with a machinegun, destructive device, or silencer with life imprisonment without release.\textsuperscript{35} Second, Congress replaced the ten-year sentence for using a machinegun, destructive device, or silencer with a thirty-year sentence.\textsuperscript{36} Congress last amended this law in 1990, when it inserted "or a destructive device" after "a machinegun" in the first and second sentence of the subsection\textsuperscript{37} and inserted "and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years" in the first sentence of the subsection.\textsuperscript{38}

Lower federal courts, left to interpret § 924(c)(1) without guidance from the Supreme Court, construed both "use" and "second or subsequent conviction" inconsistently.\textsuperscript{39} The Supreme Court granted certiorari in \textit{Smith v. United States} and \textit{Deal v. United States} to define the proper construction of those terms.\textsuperscript{40}

\section*{B. Differing Interpretations of the Word "Use" Led the Supreme Court to Grant Certiorari in \textit{Smith}}

Many courts have construed the word "use" in § 924(c)(1).\textsuperscript{41} A

\begin{thebibliography}{99}
\bibitem{35} \textit{Id.} at 4373-74.
\bibitem{36} \textit{Id.} at 4373.
\bibitem{38} \textit{Id.}
\bibitem{39} See infra notes 41-71 and accompanying text.
\bibitem{40} Justice O'Connor, in her \textit{Smith} majority opinion, specifically stated that the Court granted certiorari to "resolve the conflict among the circuits" on the interpretation of the word "use." \textit{Smith v. United States}, 113 \textit{S. Ct.} 2050, 2053 (1993). Presumably, the Court took the \textit{Deal} case to resolve the existing circuit split on the interpretation of "second or subsequent conviction."
\bibitem{41} Before the Supreme Court explicitly addressed the interpretation of the word "use" with regard to § 924(c)(1), Justice Thomas, while on the District of Columbia Circuit Court of Appeals, wrote that "use" in § 924(c)(1) is expansive. \textit{United States v. Long}, 905 F.2d 1572, 1576-77 (D.C. Cir.), \textit{cert. denied}, 498 U.S. 948 (1990). See also \textit{United States v. Hager}, 969 F.2d 883 (10th Cir.) (an empty pistol in a briefcase within a locked trunk was "used" as it may have lent coverage to a drug trafficking transaction), \textit{cert. denied}, 113 \textit{S. Ct.} 437 (1992); \textit{United States v. Featherson}, 949 F.2d 770 (5th Cir. 1991) (gun concealed under mattress was "used" because it was accessible to protect narcotics), \textit{cert. denied sub nom.} Langston \textit{v. United States}, 112 S. Ct. 1698 (1992); \textit{United States v. Munoz-Pabla}, 896 F.2d 908 (5th Cir.) (for purposes of § 924(c)(1), the weapon need not be employed or brandished and can be hidden or unloaded), \textit{cert. denied}, 498 U.S. 824 (1990); \textit{United States v. Alvarado}, 882 F.2d 645 (2d Cir. 1987) (the existence of loaded weapons in an apartment also containing cocaine was enough to sustain a § 924(c)(1) conviction), \textit{cert. denied}, 493 U.S. 1071 (1990); \textit{United States v. Anderson}, 881 F.2d 1128 (D.C. Cir. 1989) (evidence connecting the defendant to a room in which guns were found along with other evidence permitting reasonable inference that the weapons were involved in drug trafficking was enough for a § 924(c)(1) violation);
smaller number of courts have specifically addressed whether the barter or exchange of firearms for drugs constitutes a "use" for § 924(c)(1) purposes. In United States v. Harris, the United States Court of Appeals for the District of Columbia held that the barter of guns for drugs constituted a "use." The court reasoned that the word "use" is "broad enough to cover guns used in this way." Though the court recognized that Congress, "when it drafted the language of section 924(c), [may have] had in mind a more obvious use of guns in connection with a drug crime," it found that neither the language of the statute nor the legislative history manifested such intent. Ultimately, the court in Harris concluded that "[w]hether guns are used as the medium of exchange for drugs sold illegally or as a means to protect the transaction or dealers, their

United States v. Meggett, 875 F.2d 24 (2d Cir.) (possession of a gun, even if concealed, constitutes use under § 924(c)(1) if the possession is an integral part of the offense and facilitates the commission of that offense), cert. denied sub nom. Bradley v. United States, 493 U.S. 858 (1989); United States v. Matra, 841 F.2d 837 (8th Cir. 1988) (the defendant's ready access to a loaded firearm in a house containing cocaine and a large amount of cash was enough for a § 924(c)(1) violation); United States v. Robinson, 857 F.2d 1006 (5th Cir. 1988) (the discovery of seven guns plus ammunition was enough to conclude that the defendant "used" the guns to protect cocaine in the house); United States v. LaGuardia, 774 F.2d 317 (8th Cir. 1985) (firearms found in an apartment with cocaine and cash established defendant's "use" of the firearm to commit a felony despite the absence of evidence of a drug sale or transaction); United States v. Chase, 692 F.2d 69 (9th Cir. 1982) (having a gun in a house after distributing cocaine is enough for a § 924(c)(1) conviction); United States v. Mason, 658 F.2d 1263 (9th Cir. 1981) (even though the gun nearest to the defendant was holstered, a § 924(c)(1) violation was called for); United States v. Moore, 580 F.2d 360 (9th Cir.) (a § 924(c)(1) conviction for "use" of a firearm is proper when defendant was found with a gun concealed in the waistband of his pants as he prepared to engage in a bank robbery), cert. denied, 439 U.S. 970 (1978); United States v. Grant, 545 F.2d 1309 (2d Cir. 1976) (loaded and strategically located guns found in the rooms of an after-hours social club sustained a determination that the defendant had "used" them under § 924(c)(1)), cert. denied, 429 U.S. 1103 (1977); United States v. Gridley, 725 F. Supp. 398 (N.D. Ind. 1989) (the firearm need not be found on the defendant's person in order to satisfy the use requirement of § 924(c)(1)). For an example of a case in which a court found that a defendant did not "use" a gun for the purposes of § 924(c)(1), see United States v. Feliz-Cordero, 859 F.2d 250 (2d Cir. 1988) (keeping a firearm in a bedroom dresser drawer is not enough to sustain a § 924(c)(1) conviction).  

Id. at 261-62. The facts in the Harris case are similar to those in Smith. The court in Harris based its holding on United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985), cert. denied, 484 U.S. 867 (1987), in which the Ninth Circuit held that the "use" requirement under § 924(c)(1) is met if the act of possessing or controls the firearm and the circumstances show that the firearm "facilitated or had a role in the crime, such as emboldening an actor" who could display the weapon to protect himself or intimidate others. Note that the only difference between Harris and Smith is that the defendants in Harris were trading drugs for guns, while in Smith the defendant was trading guns for drugs.

Harris, 959 F.2d at 261.

Id. at 262.
introduction into the scene of drug transactions dramatically heightens the danger to society."  

On the other hand, the Ninth Circuit in United States v. Phelps held that the use of a gun for barter in a drug trafficking crime did not constitute "use" under § 924(c)(1). First, the court examined the legislative history to determine the intent behind the statute. The court expressed "doubt that Congress considered the novel use of a firearm as an item of barter" and then stated that "[t]he legislative record . . . suggests that the statute's purposes would not be served by its application here." The court went on to state that "the mere presence of a firearm does not trigger the statute" because the statute was directed at people who use or carry the weapon offensively. Second, the court applied the rule of lenity, which meant construing the ambiguous statute in favor of the criminal defendant. Ultimately, the court concluded that "[b]ecause Phelps used the gun only for barter, his conduct is excluded by the statute." After this decision, Judge Kozinski requested en banc review of the court's opinion, which was denied. In his dissent to this denial, the judge made many of the same points as the majority in the Harris case.

C. DIFFERING INTERPRETATIONS OF THE PHRASE "SECOND OR SUBSEQUENT CONVICTION" LED THE COURT TO GRANT CERTIORARI IN DEAL

Prior to the Deal decision, most federal circuits had determined that the phrase "second or subsequent conviction" applied to multiple counts of the same indictment. The first decision holding that

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46 Id.
47 877 F.2d 28 (9th Cir. 1989), en banc review denied, 895 F.2d 1281 (9th Cir. 1990).
48 Id. at 30. The facts in this case were similar to the facts in Smith. The defendant in Phelps offered guns in his possession to an undercover federal agent in exchange for drugs. Id. at 29.
49 Id. at 30.
50 Id. The Ninth Circuit in Phelps cited United States v. Stewart, 779 F.2d 538 (9th Cir. 1985), cert. denied, 484 U.S. 867 (1987) in reaching the opposite conclusion from that reached in Harris. In Phelps, the court found that the trade of guns for drugs did not facilitate or have a role in the crime by emboldening the actor. Phelps, 877 F.2d at 30-31. In Harris, on the other hand, the D.C. Circuit found that trading guns for drugs did facilitate the crime. Harris, 959 F.2d at 261.
51 Phelps, 877 F.2d at 30. The rule of lenity is discussed infra notes 72-92 and accompanying text.
52 Id.
53 United States v. Phelps, 895 F.2d 1281 (9th Cir. 1990).
54 Id. (Kozinski, J., dissenting).
55 Most circuits explicitly followed the rule and reasoning pronounced in United States v. Rawlings, 821 F.2d 1543 (11th Cir.), cert. denied, 484 U.S. 979 (1987).
a "second or subsequent" conviction could occur in the same indictment as the first conviction was the 1987 Eleventh Circuit decision in United States v. Rawlings. The court in Rawlings examined the language of § 924(c)(1) and determined that the words "second" and "subsequent" have different meanings. It noted that the word "subsequent" means "following in time, order, or place," while the word "second" means only "one more after the first." Under this reading of "second," the court found that multiple counts of an indictment triggered the enhancement. The court then made three other arguments to support its broad reading of the statute. First, the court found that the legislative history demonstrated that Congress passed § 924(c)(1) with the intent of deterring criminals from using a firearm more than once. Second, the court said that Congress could have limited the statute to recidivists but did not. Third, the court stated that as a matter of public policy, a narrow reading of § 924(c)(1) would do harm to the principle of judicial economy because a prosecutor would have to bring a separate action for each potential § 924(c)(1) violation.

In 1992 the Tenth Circuit, in United States v. Abreu, broke from the Rawlings rule and held that a "second or subsequent" conviction did not apply to different counts of the same indictment. The court in Abreu recognized that its decision was in conflict with the other circuits, but stated that "we simply cannot agree with those courts." The Abreu decision was in four parts. First, the court found that the words "second," "subsequent," and "conviction" were ambiguous. The court stated that "second or subsequent" can be read to describe either multiple events occurring at one time


56 821 F.2d 1543 (11th Cir.), cert. denied, 484 U.S. 979 (1987).
57 Id. at 1545.
58 Id.
59 Id.
60 Id. at 1545-46.
61 Id. at 1546.
62 Id. at 1546-47.
64 Id. at 1453-54.
65 Id. at 1453.
66 Id. at 1449-50.
or multiple events occurring in a chronological sequence. "Conviction" can refer either to the return of a jury verdict of guilt or to the court's entry of judgment on that verdict."67 Second, the court observed that the legislative history with respect to the phrase "second or subsequent conviction" was unclear.68 Third, the court applied the rule of lenity in light of the textual and statutory ambiguity.69 Finally, the court examined sentence enhancements in subsequent offender statutes and found that such enhancements generally did not apply to multiple counts of an indictment.70

Though the Tenth Circuit was the only circuit to interpret § 924(c)(1) narrowly, an Eighth Circuit panel recommended in 1992 that the circuit reconsider "second or subsequent conviction" en banc in light of the Abreu decision.71

D. THE RULE OF LENIETY

The rule of lenity is one of the most significant canons of criminal statutory construction.72 The basic formulation of the rule, stated by the Supreme Court in United States v. Bass,73 is that "when there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."74 The Court in Bass identified two public policy rationales behind the rule. First, the world should have fair warning of the legal response to certain acts.75 Second, the moral gravity of criminal penalties dictates that legislatures and not courts should define criminal activity.76

The rule of lenity has been the subject of a number of Supreme...
Court decisions, dating from the early nineteenth century. In United States v. Wiltberger, the Court explained how and why the rule confines the judicial role:

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment. . . . It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

The Court has regularly affirmed the rule of lenity without significant modification since the 1950s. The modern line of rule of lenity decisions began with United States v. Universal C.I.T. Credit Corp., in which the Court held that Congress had to speak in "clear and definite" language before the judiciary could choose the harsher of two alternative readings of a statute.

The Supreme Court has also applied the rule of lenity specifically to criminal sentencing. In United States v. Bifulco, the Court stated that "this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." In United States v. R.L.C., the Court clarified the Bifulco holding by stating that "lenity does not always require the 'narrowest' construction, and our cases have recognized that a broader construction may be permissible on the basis of noncontextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language."

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77 18 U.S. (5 Wheat.) 76 (1820).
78 Id. at 95-96.
80 344 U.S. 218 (1952).
81 Id. at 221-22.
82 447 U.S. 381 (1980).
83 Id. at 387 (citing United States v. Batchelder, 442 U.S. 114, 121 (1979) and Simpson v. United States, 435 U.S. 6, 14-15 (1978)).
85 Id. at 1338 n.6.
Courts have even applied the rule of lenity to sentencing under § 924(c)(1). The Supreme Court cited the rule as a reason for its holdings in both Simpson v. United States and Busic v. United States. The federal courts of appeals have also applied the rule to § 924(c)(1). In United States v. Lindsay, the Second Circuit addressed whether a defendant who used multiple firearms in a single drug trafficking crime could be charged with multiple violations of § 924(c)(1). The court held that when the government linked multiple firearms to a single crime, the rule of lenity dictated that only one § 924(c)(1) violation occurred. In United States v. Jones, the court addressed whether § 924(c)(1) dictated that a subsequent sentence for drug offenses imposed by a court other than the court that imposed the original sentence had to run consecutively with the original sentence. Once again applying the rule of lenity, the court held that the sentences could run concurrently. When the Supreme Court construed the term "use" in the Smith case and the phrase "second or subsequent conviction" in the Deal case, it had to consider once again whether the rule of lenity applied to § 924(c)(1).

III. FACTS AND PROCEDURAL HISTORIES

A. SMITH V. UNITED STATES

John Angus Smith and a companion traveled from Tennessee to Florida to purchase a large amount of cocaine that they planned to distribute. In Florida they met an acquaintance of Smith, Deborah Hoag, who was also a confidential informant for law enforcement officials. Hoag disclosed Smith's activities to the Brow-
ard County Sheriff’s Office. That office then sent an undercover officer posing as a pawnshop dealer to meet with Smith in Hoag’s motel room. Smith proposed the exchange of his automatic MAC-10 firearm and a silencer for two ounces of cocaine. The officer left, presumably to get cocaine for Smith; actually, he returned to the sheriff’s office to arrange for Smith’s arrest. Meanwhile, the officers conducting surveillance saw Smith leave the motel and drive away in his van. The officers reported Smith’s actions, followed him, and tried to stop him. The resulting high-speed chase ended with Smith ramming into a police car and an officer shooting and wounding him. While searching Smith’s van, the police discovered four guns besides the MAC-10, a silencer, ammunition, a fast-feed mechanism, and a scope.

At a jury trial in the District Court for the Southern District of Florida, Smith was convicted on all counts brought against him. The most important conviction for the purposes of this Note was the § 924(c)(1) count, which charged that Smith knowingly “used” the MAC-10 with a silencer during a drug-related offense.

On appeal, Smith argued that § 924(c)(1) did not apply to him because the “use” language does not cover attempted barter. The court of appeals rejected this argument, holding that violations of § 924(c)(1) do not require that firearms be fired, brandished, or even displayed during the drug trafficking offense. The court of

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95 Id.
96 Id.
97 Id. at 2052-53.
98 Id. at 2053.
100 Id. at 5.
101 Id.
102 Smith, 113 S. Ct. at 2053.
103 Id.
104 Id. The Supreme Court noted that the prosecution sought to convict Smith under § 924(c)(1) for using the gun, not carrying the gun. Id. at 2054. Since the Court limited its decision to the issue of whether Smith used the gun, this Note will not explore the possibilities of conviction for carrying the gun. For examples of how courts have interpreted the word “carry” in the context of § 924(c)(1), see United States v. Evans, 888 F.2d 891 (D.C. Cir. 1989), cert. denied sub nom. Curren v. United States, 494 U.S. 1019 (1990); United States v. Joseph, 892 F.2d 118 (D.C. Cir. 1989); United States v. Robertson, 706 F.2d 253 (8th Cir. 1983).
106 Id. at 836-37 (citing United States v. Poole, 878 F.2d 1389, 1390 (11th Cir. 1989) (firearm was “used” even though it was concealed in a different room); United States v. Rosado, 866 F.2d 967, 970 (7th Cir.), cert. denied, 493 U.S. 837 (1989) (loaded revolver in defendant’s car near the scene of the transaction constituted “use”); United States v. Coburn, 876 F.2d 372, 375 (5th Cir. 1989) (an unloaded shotgun mounted in a truck
appeals summarized its opinion by quoting the dissent from the denial of en banc review in United States v. Phelps: all that was needed was “an intent to use the weapon to facilitate in any manner the commission of the offense.”\textsuperscript{107} The United States Supreme Court granted certiorari to decide whether Smith’s actions constituted “use” under § 924(c)(1).\textsuperscript{108}

B. \textit{DEAL V. UNITED STATES}

Thomas Lee Deal robbed six banks at gunpoint in the Houston, Texas area between January and April 1990.\textsuperscript{109} At the time the offenses occurred, Deal was on parole after pleading guilty to five armed bank robberies that occurred between 1973 and 1975.\textsuperscript{110}

Deal used a similar method in all six robberies.\textsuperscript{111} Disguised in some combination of a hat, a false mustache, and a wig, he approached the bank tellers, displayed a handgun, placed a duffel bag on the counter, and ordered them to fill the bag.\textsuperscript{112} At trial, seven of the tellers identified him as the man who had committed the robberies.\textsuperscript{113}

A jury in the United States District Court for the Southern District of Texas convicted Deal on all thirteen counts of the indictment against him: six counts of bank robbery under 18 U.S.C. § 2113(a) and (d), six counts under 18 U.S.C. § 924(c)(1) for using the gun in the commission of a crime of violence, and one count of being a felon in possession of a firearm under 18 U.S.C. § 922(g).\textsuperscript{114} Considering the six counts of § 924(c)(1) as six separate convictions, the judge applied the twenty-year enhancement provision of § 924(c)(1) for “second or subsequent” convictions to the last five § 924(c)(1) counts.\textsuperscript{115} Therefore, Deal was sentenced to five years for the first § 924(c)(1) count and twenty years for each of the last five § 924(c)(1) counts.\textsuperscript{116} Thus, the total sentence for his § 924(c)(1)
counts alone was 105 years. The statute mandated that Deal had to serve the terms consecutively.

Deal appealed on the single ground that the district court imposed an improper sentence. Deal argued that "second or subsequent conviction" requires that an offender be convicted under separate indictments before the enhancement provision comes into effect. The court of appeals upheld the conviction, relying on cases from five other circuits which held that "second or subsequent" could apply to convictions obtained in the same indictment as the first conviction. The United States Supreme Court granted certiorari to resolve whether the "second or subsequent" language of § 924(c)(1) applies to separate counts of the same indictment.

IV. THE SUPREME COURT OPINIONS

A. SMITH V. UNITED STATES

1. The Majority Opinion

Justice O'Connor, writing for the Court, affirmed the judgment of the court of appeals and held that the exchange of a gun for narcotics constitutes "use" of a firearm under § 924(c)(1). The Court divided its opinion into three parts: it found that Smith "use[d]" the gun, it found that the use was "during and in relation to" a drug trafficking crime, and it rejected the application of the rule of lenity.

Since the word "use" was not defined in the statutory language, the Court first had to define "use" in § 924(c)(1). The Court applied the "ordinary meaning," citing Webster's Dictionary, which defines "to use" as "[t]o convert to one's service" or "to employ," and Black's Law Dictionary, which defines "use" as "to make use of;
to convert to one's service; to employ."

Stating that "over 100 years ago we gave the word 'use' the same gloss," the Court then found that Smith's handling of the MAC-10 clearly qualified as a "use." Since the statute utilized the word "use" without a modifier such as "as a weapon," the Court refused to read such a limitation into the statute.

The Court next rejected four arguments made by either Smith or the dissent in support of a narrower construction of "use." First, the Court rejected the dissent's "ordinary person" argument that the proximity of the words "firearm" and "use" leads an ordinary person to think, and therefore must mean, that "use" in § 924(c)(1) refers only to the discharge of a weapon. The Court stated that although the word "use" when applied to a firearm ordinarily means the discharge of the weapon, the "use" of a firearm can go beyond pulling the trigger.

Second, the Court rejected the dissent's argument that the United States Sentencing Commission Guidelines Manual, which provides for an intermediate sentencing level when a gun is "otherwise used" between the level for brandishing, displaying, or possessing a gun and the level for discharging a gun, dictates that "use" must mean "use as a weapon." The Court not only refused to interpret "otherwise use" in the Guidelines to mean "otherwise use as a gun," but also refused to analogize the Guidelines to § 924(c)(1). Third, the Court rejected the notion that a broad reading of "use" would produce § 924(c)(1) violations for trivial "uses" of a gun like scratching one's head with it while in the commission of a drug trafficking offense. The majority stated that its reading would apply to uses of a gun such as pistol-whip-

\[\text{\textsuperscript{126} Id. at 2054 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2806 (2d ed. 1949) [hereinafter WEBSTER'S DICTIONARY] and BLACK'S LAW DICTIONARY 1541 (6th ed. 1990)).}\]

\[\text{\textsuperscript{127} Id. (citing Astor v. Merritt, 111 U.S. 202, 213 (1884)).}\]

\[\text{\textsuperscript{128} Id.}\]

\[\text{\textsuperscript{129} Id.}\]

\[\text{\textsuperscript{130} Id. at 2054-55.}\]

\[\text{\textsuperscript{131} Id. at 2055. To make its point, the majority turned a colorful analogy used by the dissent on its head. The dissent argued that when someone is asked, "Do you use a cane?" it is clear to the hearer that the use of the cane is for walking. Id. at 2061 (Scalia, J., dissenting). The majority cited the infamous caning of Senator Sumner in the United States Senate in 1856 as an example of how "using" a cane can go beyond merely using it to aid one in walking. Id. at 2055.}\]

\[\text{\textsuperscript{132} Id. at 2055-56 (citing UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL §§ 2B3.1(b)(2)(A)-2B3.1(b)(2)(C) (Nov. 1992) [hereinafter SENTENCING GUIDELINES MANUAL]). The majority prefaced its attack on the dissent's use of the Sentencing Guidelines by questioning the Guidelines' relevance in this context. Id. at 2055.}\]

\[\text{\textsuperscript{133} Id. at 2055-56.}\]

\[\text{\textsuperscript{134} Id. at 2056.}\]
ping, but not to innocuous uses. The Court rejected the idea that, because the statute when originally passed in 1968 only applied to crimes of violence and not drug trafficking offenses, "use" could not have meant "barter." The Court simply examined the statute on its face to conclude that "use" in § 924(c)(1) encompasses the trade of guns for drugs.

The Court also found that the rest of § 924 elucidated the definition of "use" in § 924(c)(1). The Court cited § 924(d)(1) and § 924(d)(3), which together state that a firearm used as an item of barter or commerce is subject to seizure and forfeiture. Under § 924(d), trading guns for drugs constitutes a "use." Applying the definition of "use" in § 924(d) to § 924(c)(1), the Court stated that "[f]or our purposes, it is sufficient to recognize that, because § 924(d)(1) includes both using a firearm for trade and using a firearm as a weapon as 'us[ing] a firearm,' it is most reasonable to construe § 924(c)(1) as encompassing both of these 'uses' as well."

In the second part of its opinion, the majority determined that Smith's "use" of the MAC-10 was "during and in relation to" the drug trafficking offense. Since Smith conceded that the alleged use occurred "during" the drug trafficking crime, the point of contention was the "in relation to" language.

The majority interpreted the phrase "in relation to" broadly, citing Webster's Dictionary, the recent Supreme Court case of District of Columbia v. Greater Washington Board of Trade, and lower court interpretations of § 924(c)(1). The majority stated that at a minimum, the phrase "in relation to" meant that the firearm had some

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135 Id.
136 Id. at 2058.
137 Id.
138 Id. at 2056-57. The Court stated that "[t]o the extent there is uncertainty about the scope of the phrase 'uses . . . a firearm' in § 924(c)(1), we believe the remainder of § 924 appropriately sets it to rest. Just as a single word cannot be read in isolation, nor can a single provision of a statute." Id. at 2056.
139 Id. at 2056-57.
140 Id. at 2057.
141 Id. at 2058.
142 Id.
143 Id. at 2058-59 (citing WEBSTER'S DICTIONARY, supra note 126, at 2102 (defining "in relation to" as "with reference to" or "as regards"); District of Columbia v. Greater Wash. Bd. of Trade, 113 S. Ct. 580, 582 (1992) (§ 2(2) of the District of Columbia Workers' Compensation Equity Amendment Act of 1990 is pre-empted by ERISA, which provides that ERISA supersedes state laws that "relate to any employee benefit plan" covered by ERISA); United States v. Harris, 959 F.2d 246, 261 (D.C. Cir.), cert. denied, 113 S. Ct. 362 (1993) (firearm is used "in relation to" the crime if it "facilitate[s] the predicate offense in some way"); United States v. Phelps, 877 F.2d 28, 30 (9th Cir. 1989) ("'in relation to' is broad")).
purpose or effect with respect to the drug trafficking crime. More specifically, the Court used the standard set forth in United States v. Stewart: the gun "must 'facilitat[e], or ha[ve] the potential of facilitating,' the drug trafficking offense." Though the majority refused to delineate the exact contours of the phrase "in relation to," it found that the use of the MAC-10 in this case was integral to the transaction and thus was "in relation to" the offense.

In the final section of the opinion, the majority held that because the statute was not ambiguous, the rule of lenity did not apply to this case. On a textual level, the Court found that Smith's actions fell "squarely within the common usage and dictionary definitions of the terms 'uses . . . a firearm.'" On a public policy level, the majority stated that a broad reading of the word "use" is in accord with the purposes of the statute. The majority reasoned that at the time it passed this law, Congress was "no doubt aware that drugs and guns are a dangerous combination." Thus, the mere existence of the gun created the potential for death or violence and could be punished under § 924(c)(1).

2. Justice Blackmun's Concurrence

Justice Blackmun wrote a short concurrence in which he joined the Court's opinion in full but stated his understanding that the "in relation to" language of § 924(c)(1) could require more than "mere furtherance or facilitation of a crime of violence or drug-trafficking crime." Since Justice Blackmun believed that Smith's use of the firearm in this case met "any reasonable construction of the phrase," he found it unnecessary to determine the precise contours of the "in relation to" language.

\textsuperscript{144} Id. at 2059.
\textsuperscript{145} Id. (quoting United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985)). See also United States v. Ocampo, 890 F.2d 1363, 1371-72 (7th Cir. 1989).
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 2059-60.
\textsuperscript{148} Id. at 2060.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 2060 (Blackmun, J., concurring).
\textsuperscript{154} Id. (Blackmun, J., concurring).
3. The Dissenting Opinion

Justice Scalia's dissenting opinion\textsuperscript{155} challenged the majority's broad interpretation of the word "use."\textsuperscript{156} In construing the language of the statute, the dissent followed two principles. First, the dissent asserted that nontechnical words must be interpreted to have their ordinary meaning.\textsuperscript{157} Second, the dissent followed the "fundamental principle of statutory construction . . . that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."\textsuperscript{158} The dissent ultimately found that plain meaning of "use" in the context of § 924(c)(1) did not include the trading of guns for drugs.\textsuperscript{159}

The dissent argued that the "use" of a firearm in the context of § 924(c)(1) meant as a weapon, not as a tool of barter.\textsuperscript{160} Justice Scalia criticized the majority's broad reading of the word "use" as "not reasonable [or] normal."\textsuperscript{161} As an analogy, Justice Scalia argued that when someone asks "Do you use a cane?" the inquiry is about whether you walk with a cane, not whether you have a "silver-handled walking stick on display in the hall."\textsuperscript{162} The dissent found that the words "as a weapon" were reasonably implicit in the statute and did not need to be there explicitly.\textsuperscript{163}

The dissent also found that the United States Sentencing Guidelines reflected the "normal usage" of the word "use."\textsuperscript{164} The Sentencing Guidelines provide for enhanced sentences when firearms are "discharged," "brandished, displayed, or possessed," or "otherwise used."\textsuperscript{165} The comments to the Guidelines state that "‘otherwise used’ with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or

\footnotesize{\textsuperscript{155} Justice Scalia was joined in dissent by Justices Stevens and Souter.}

\footnotesize{\textsuperscript{156} See infra notes 123-152 and accompanying text.}


\footnotesize{\textsuperscript{158} Id. at 2060-61 (Scalia, J., dissenting) (quoting Deal v. United States, 113 S. Ct. 1993, 1996 (1993)).}

\footnotesize{\textsuperscript{159} Id. at 2063 (Scalia, J., dissenting).}

\footnotesize{\textsuperscript{160} Id. (Scalia, J., dissenting).}

\footnotesize{\textsuperscript{161} Id. at 2061 (Scalia, J., dissenting).}

\footnotesize{\textsuperscript{162} Id. (Scalia, J., dissenting).}

\footnotesize{\textsuperscript{163} Id. at 2062 (Scalia, J., dissenting).}

\footnotesize{\textsuperscript{164} Id. at 2061 (Scalia, J., dissenting).}

\footnotesize{\textsuperscript{165} Id. (Scalia, J., dissenting). See, e.g., SENTENCING GUIDELINES MANUAL, supra note 132, at § 2B3.1(b)(2).}
possessing a firearm or other dangerous weapon.”\textsuperscript{166} The dissent interpreted this commentary to indicate that “‘otherwise used’... obviously means ‘otherwise used as a weapon.’”\textsuperscript{167} The dissent then argued that “placing the gun barrel in the mouth of [a] storekeeper” is an example of an intermediate “use” of a weapon between discharging it and brandishing, displaying, or possessing it, while prying open a cash register with a gun does not constitute such an intermediate “use.”\textsuperscript{168}

The dissent proceeded to attack the majority’s contention that the explicit definition of “use” in the remainder of § 924 dictated the same reading in § 924(c)(1).\textsuperscript{169} The dissent contended that since “use” in § 924(c)(1) was not a technical term, it was “inordinately sensitive to context.”\textsuperscript{170} Thus, the dissent argued, when “the phrase ‘uses... a firearm’ is not employed in a context that necessarily envisions the unusual ‘use’ of a firearm as a commodity,” the Court should adopt the most commonly understood meaning of “use”: the discharge of a weapon.\textsuperscript{171}

The dissent then charged that the majority’s reading of the language produced a “strange dichotomy between ‘using a firearm for any purposes whatsoever, including barter,’ and ‘carrying’ a firearm.”\textsuperscript{172} The dissent suggested that the majority’s broad interpretation of the word “use” would include carrying the weapon; under such an interpretation there would not be a need for the “carrying” prong of § 924(c)(1).\textsuperscript{173} The dissent believed that its interpretation of “use” made more sense because the prong imposing liability for “carrying” the weapon would have a much clearer purpose.\textsuperscript{174}

The dissent then argued that since the “use” of a weapon in a “crime of violence” clearly means the discharge of the weapon, then the “use” for a “drug trafficking crime” must have the same connotation.\textsuperscript{175} Though Congress added the term “drug trafficking crime” to the statute in 1986, the dissent noted that the common understanding of the word “use” did not change.\textsuperscript{176}

\textsuperscript{166} Id. (Scalia, J., dissenting) (quoting Sentencing Guidelines Manual, supra note 132, at § 1B1.1, comment (n.1(g))).
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 2061 n.2 (Scalia, J., dissenting).
\textsuperscript{169} Id. at 2062 (Scalia, J., dissenting).
\textsuperscript{170} Id. (Scalia, J., dissenting) (citing Dewsnup v. Timm, 112 S. Ct. 773 (1992) (Scalia, J., dissenting)).
\textsuperscript{171} Id. (Scalia, J., dissenting).
\textsuperscript{172} Id. at 2063 (Scalia, J., dissenting).
\textsuperscript{173} Id. (Scalia, J., dissenting).
\textsuperscript{174} Id. (Scalia, J., dissenting).
\textsuperscript{175} Id. (Scalia, J., dissenting).
\textsuperscript{176} Id. (Scalia, J., dissenting).
Justice Scalia ended his opinion by arguing that the Court should invoke the rule of lenity. The dissent used a much more lenient standard to apply the rule than the majority: “the issue . . . is eminently debatable—and that is enough, under the rule of lenity, to require finding for the petitioner here.”

B. DEAL V. UNITED STATES

1. The Majority Opinion

Justice Scalia, this time writing for the majority, affirmed the judgment of the court of appeals and held that the provision of § 924(c)(1) calling for a heightened punishment for a “second or subsequent conviction” applied to multiple counts of an indictment. He divided his argument into three parts: first, he argued for a broad interpretation of the provision on plain language and public policy grounds; second, he attacked the dissent’s reasoning; and third, he argued that the rule of lenity did not apply.

The majority made its plain language argument in three subparts. First, the majority argued that the plain meaning of “conviction” in the context of § 924(c)(1) was the finding of guilt by a judge or jury that necessarily preceded the entry of a final judgment of conviction. The Court distinguished a “judgment of conviction,” an adjudication of guilt plus the sentence, from a “conviction,” a finding of guilt that preceded the entry of a final “judgment of conviction.” The Court reasoned that a “conviction” in § 924(c)(1) was not a “judgment of conviction” because otherwise the statute would incoherently prescribe a sentence longer than one already imposed. Second, the Court rejected the petitioner’s argument that the phrase “in the case of” prevents judges from heightening sentences under § 924(c)(1) without a final entry of conviction plus the sentence. The Court argued that this language simply meant “in the event of” and thus had no real significance for the construc-

177 Id. (Scalia, J., dissenting).
178 Chief Justice Rehnquist and Justices White, Kennedy, Souter, and Thomas joined in the opinion. It is interesting to note that Justice Scalia wrote the dissent in Smith, an opinion that limits the punishment of the offender, and the majority opinion in Deal, which enhances the punishment of the offender.
180 Id. at 1996. The Court stated that it is a fundamental principle of statutory construction that the meaning of a word must be drawn from the context in which it is used. Id. (citing King v. St. Vincent’s Hospital, 112 S. Ct. 570, 574 (1991); Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989); United States v. Morton, 467 U.S. 822, 828 (1984)).
181 Id.
182 Id.
183 Id. at 1996-97.
tion of the statute.\textsuperscript{184} Third, the Court found that the provision of § 924(c)(1) which prevented probation or a suspended sentence demonstrated that the statute was meant to control judgments yet to be imposed.\textsuperscript{185}

In the next part of its opinion, the majority made the public policy argument that if separate counts of an indictment did not qualify as "second or subsequent" convictions, "a prosecutor [would have] unreviewable discretion either to impose or to waive the enhanced sentencing provisions of § 924(c)(1) by opting to charge and try the defendant either in separate prosecutions or under a multicount indictment."\textsuperscript{186} The Court did not want to give prosecutors such "extraordinary new power" of discretion.\textsuperscript{187}

The majority then criticized the dissent on two points. First, the Court attacked the dissent for analogizing the phrase "second or subsequent conviction" to the phrase "subsequent offense."\textsuperscript{188} The majority stated that "to say that 'subsequent offense' means the same thing as 'second or subsequent conviction' requires a degree of verbal know-nothingism that would render government by legislation quite impossible."\textsuperscript{189} Second, the Court argued that the dissent's belief that § 924(c)(1) was directed at recidivists was based solely on "personal intuition."\textsuperscript{190} The Court stated that such intuition "is not very precise" and stressed the importance of following the text in construing a statute.\textsuperscript{191}

In the final paragraph of its opinion, the majority dismissed the rule of lenity, which Deal invoked upon receiving 105 years in prison as a result of his six § 924(c)(1) violations.\textsuperscript{192} The Court saw no reason to call the sentence "'glaringly unjust' . . . simply because [Deal] managed to evade detection, prosecution, and conviction for the first five offenses [before being] ultimately tried for all six in a single proceeding."\textsuperscript{193}

\begin{footnotesize}
\textsuperscript{184} Id. at 1997.
\textsuperscript{185} Id.
\textsuperscript{186} Id. Basically, under the dissent's reading of the statute, charging a criminal with multiple counts of a single indictment effectively would waive the twenty-year enhancement of § 924(c)(1). To utilize the twenty-year enhancement of § 924(c)(1), a prosecutor would have to bring separate indictments.
\textsuperscript{187} Id. at 1997 n.2.
\textsuperscript{188} Id. at 1997-98.
\textsuperscript{189} Id. at 1998.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at 1999.
\textsuperscript{193} Id. The majority demonstrated a misunderstanding of how the rule of lenity works in this short paragraph on the subject. The majority seems to have thought that the rule of lenity applied to the length of the sentence that the defendant received. The majority
\end{footnotesize}
2. The Dissenting Opinion

Justice Stevens, writing for the dissent, 194 argued that before applying the sentence enhancement under § 924(c)(1) for a "second or subsequent conviction," the earlier conviction had to be final and include the sentence. He divided his analysis into three parts: first, he argued that on a textual level, § 924(c)(1) applies only to recidivists; second, he asserted that even if the language was not viewed as perfectly clear, the rule of lenity dictated that the statute be construed in favor of the defendant; and third, he attacked the reasoning of the majority opinion.

In the first part of its textual argument, the dissent contended that the best way to determine the meaning of the word "subsequent" in a statute is by placing the word in the context of the statute. 195 The dissent argued that when context is not illuminating, however, the Court should use the "long-established usage of the word 'subsequent' to distinguish between first offenders and recidivists." 196 To illustrate this "long-established usage," the dissent cited Gonzalez v. United States, 197 in which the court held that a "subsequent offender" statute only applied to recidivists. 198 Thus, the dissent reasoned, "second or subsequent conviction" in § 924(c)(1) also applied exclusively to recidivists 199

Next, the dissent argued that the Court should presume that Congress was familiar with the settled usage of the language because Congress did not explicitly define "subsequent conviction" when it enacted § 924(c)(1). 200 The dissent argued that "Congressman Poff . . . felt it unnecessary to elaborate" on the precise meaning of "second or subsequent conviction" because the meaning of the phrase was so clearly settled. 201

To support its view that the meaning of the statute was clear, the dissent used prior Supreme Court treatment of § 924(c)(1). The dissent first noted that in Simpson v. United States, the defendant was not sentenced under the "second or subsequent conviction" provision despite being convicted of two offenses at two trials. 202 Then,
the dissent quoted Justice Stewart's dissent in *Busic v. United States*, in which he described § 924(c)(1) as a "general enhancement provision—with its stiff sanctions for first time offenders and even stiffer sanctions for recidivists."\(^{203}\)

The dissent next argued that until 1987, courts understood that "second or subsequent conviction" applied only to recidivists.\(^ {204}\) Justice Stevens stated that this "reading certainly would comport with the Government's submissions to this Court in *Simpson* . . . and *Busic*.\(^ {205}\) Not until the 1987 Eleventh Circuit decision of *United States v. Rawlings* did a court construe § 924(c)(1) differently.\(^ {206}\)

In the second, and much shorter, part of his opinion, Justice Stevens took a different tack: "[e]ven assuming, however, that the meaning of § 924(c)'s repeat offender provision is not as obvious as I think, its history belies the notion that its text admits of only one reading."\(^ {207}\) Even since *Rawlings*, the dissent noted, courts have routinely imposed consecutive five-year sentences when the defendants were convicted of two separate § 924(c)(1) offenses.\(^ {208}\) Thus, the dissent argued that "this equivocation on the part of those charged with enforcing § 924(c), combined with the understanding of repeat offender provisions current when § 924(c) was enacted, render the construction of § 924(c) sufficiently uncertain that the rule of lenity should apply."\(^ {209}\) The dissent cited *Simpson v. United States, United States v. Abreu*, and *United States v. Godwin*, decisions in which courts applied the rule of lenity to § 924(c)(1).\(^ {210}\)

In the third part of its opinion, the dissent attacked the reasoning of the majority opinion on two points. First, the dissent responded to the majority's close analysis of the word "conviction," particularly the majority's contention that a sentence enhancement would not make sense if "conviction" included both the final judg-

\(^{203}\) *Id.* (Stevens, J., dissenting) (quoting *Busic v. United States*, 446 U.S. at 416 (Stewart, J., dissenting)).

\(^{204}\) *Id.* at 2001 (Stevens, J., dissenting).

\(^{205}\) *Id.* (Stevens, J., dissenting).

\(^{206}\) *Id.* (Stevens, J., dissenting) (citing *United States v. Rawlings*, 821 F.2d 1543 (11th Cir.), cert. denied, 484 U.S. 979 (1987)).

\(^{207}\) *Id.* (Stevens, J., dissenting).

\(^{208}\) *Id.* at 2001-02 (Stevens, J., dissenting) (citing *United States v. Luskin*, 926 F.2d 372, 374 n.2 (4th Cir.), cert. denied, 112 S. Ct. 68 (1991); *United States v. Nabors*, 901 F.2d 1351, 1358-59 (6th Cir.), cert. denied, 498 U.S. 871 (1990); *United States v. Henry*, 878 F.2d 937, 938 (6th Cir. 1989); *United States v. Jim*, 865 F.2d 211, 212 (9th Cir.), cert. denied, 493 U.S. 827 (1989); *United States v. Fontanilla*, 849 F.2d 1257, 1258 (9th Cir. 1988); *United States v. Chalan*, 812 F.2d 1302, 1315 (10th Cir. 1987)).

\(^{209}\) *Id.* (Stevens, J., dissenting).

ment and the sentence. The dissent argued that the majority's construction of conviction "evaporates" in light of the assumption that "sentencing judges are gifted with enough common sense to understand that they may, upon entry of a second final judgment, enhance the sentence incorporated therein." Second, the dissent countered the majority's argument that the role of prosecutors would change significantly if they had the choice of bringing a multicount indictment or holding separate trials for the purpose of applying § 924(c)(1). The dissent argued that even under the majority's construction of the statute, prosecutors would have discretion in choosing how many § 924(c)(1) offenses to charge for an offense or series of offenses.

V. Analysis

With the Smith v. United States and Deal v. United States decisions, the Supreme Court greatly broadened the application of 18 U.S.C. § 924(c)(1). Thus, these decisions will have a great impact on the sentencing of criminals whose actions subject them to the statute. The impact of these cases, however, may extend beyond § 924(c)(1). In both Smith and Deal, the Justices—including the dissenters—relied almost exclusively on the statutory language to reach their conclusions. The majority and dissenting opinions all determined that the language clearly and unambiguously resolved the issue of how to interpret "use" and "second or subsequent conviction." By finding such clarity in § 924(c)(1), the Court seems to have taken a major step in limiting the application of the rule of lenity.

The essence of the rule of lenity is that ambiguous statutes should be construed in favor of the defendant. The definition of "ambiguity" for the purpose of determining whether the rule of lenity applies has never been clear. Though the Supreme Court has

211 Id. at 2003 (Stevens, J., dissenting).
212 Id. (Stevens, J., dissenting).
213 Id. (Stevens, J., dissenting).
214 Id. (Stevens, J., dissenting).
217 For a discussion of the rule of lenity, see supra notes 72-92 and accompanying text.
218 See supra notes 73-76 and accompanying text.
219 For an interesting discussion on the different ways to define "statutory ambiguity," see Gregory Maggs, Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee, 29 HARV. J. ON LEGIS. 123 (1992). The author argues that the term "statutory ambiguity" itself could have several meanings. A very strict definition might include only those portions of statutes that no court could interpret. So defined, the term would encompass very little because, outside of the criminal law,
found statutory ambiguity on many occasions, it has historically not used one clear test to determine ambiguity. Recently, however, the Court set forth a clear, workable standard in Moskal v. United States: the rule of lenity applies when "reasonable doubt" persists about the scope of a statute after resort to the language and structure of the statute, the legislative history, and the motivating policy concerns of the statute.

Under the Moskal test, the Court in both Smith and Deal ought to have found that § 924(c)(1) is ambiguous. There is a "reasonable doubt" about the construction of "use" and "second or subsequent conviction." The majority and dissenting opinions in both Smith and Deal reveal that the text admits of different, yet reasonable, interpretations. Further, the legislative history and competing policy considerations do not clearly favor one interpretation over the other in either case. Had the Court found that statutory ambiguity existed, the only appropriate measure would have been to apply the rule of lenity and find in favor of the defendant in both of these cases.

A. THE TEXT OF § 924(c)(1) DOES NOT DEFINITIVELY SUPPORT A PARTICULAR READING OF EITHER "USE" OR "SECOND OR SUBSEQUENT CONVICTION"

The majority and dissenting opinions in both Smith and Deal relied almost exclusively on the language of the statute in construing the text. Each opinion argued that the language of the text clearly supported one reading of the statute to the exclusion of all courts seldom find legislation too vague to apply. A very loose definition, by contrast, might label ambiguous any statutory provision subject to more than one reading, even if no reasonable person would disagree about what it actually means.

See supra note 79 and accompanying text.

The Court has made clear that a statute is not deemed to be ambiguous just because it is possible to articulate a narrower construction than the government's construction or because there is a division of judicial authority. See Moskal v. United States, 498 U.S. 103, 108 (1990) (citing McElroy v. United States, 455 U.S. 642, 657-58; United States v. Rodgers, 466 U.S. 475, 484 (1984)).

Moskal, 498 U.S. at 108 (applying a gloss to Bifulco v. United States, 447 U.S. 381, 387 (1980)). For a discussion of the appropriateness of a "reasonable doubt" standard written before the Moskal decision was rendered, see Batey, supra note 76, at 123.

others. An analysis of the textual arguments made by the majority and the dissent in both cases, however, reveals that the language of § 924(c)(1) is ambiguous under Moskal's "reasonable doubt" standard. In both Smith and Deal, the majority and dissenting opinions plausibly argued for totally different interpretations of "use" and "second or subsequent conviction." While somebody reading these opinions may consider one side's textual arguments stronger in one case or the other, there is at least a "reasonable doubt" about the meaning of the language. No textual interpretation of § 924(c)(1) definitively answers whether a defendant "uses" a firearm by trading guns for drugs or whether a "second or subsequent conviction" includes multiple counts of the same indictment.

In the Smith case, the majority and the dissent reached opposite conclusions on the breadth of the word "use." Though an interpreter of § 924(c)(1) may find one opinion's construction of "use" more palatable than the other, both constructions are logically valid and reasonable. The decision to define "use" either broadly or narrowly ultimately appears to have been little more than a normative judgment by the Justices. Since both constructions of "use" could readily apply to § 924(c)(1), there is a "reasonable doubt" about which construction is more appropriate. The Justices in both the majority and the dissent should not have determined that the text of § 924(c)(1) unambiguously dictates one particular reading instead of the other.

Even though the majority and dissent in Smith agreed that in construing the language of a statute words should be given their "ordinary meaning," the two sides reached different conclusions on the construction of "use." The difference in the opinions lay in their definition of "ordinary meaning." The majority based its reading of "use" in § 924(c)(1) on a broad, dictionary definition of "use." From this starting point, the majority argued for a broad construction of "use" in § 924(c)(1). The majority asserted that "use" should be read broadly since it was not limited by a modifier such as the phrase "as a firearm." The dissent, in contrast, defined the "use" of an instrumentality as a use for its normal purpose. From this narrower definition of "use," the dissent proposed that "using a firearm" in the context of § 924(c)(1) means

224 See Perrin v. United States, 444 U.S. 37, 42 (1979), a case cited by both the majority, Smith v. United States, 113 S. Ct. 2050, 2054, reh'g denied, 114 S. Ct. 13 (1993) and the dissent, Id. at 2061 (Scalia, J., dissenting).
225 Smith, 113 S. Ct. at 2054.
226 Id.
227 Id. at 2060-61 (Scalia, J., dissenting).
“using it for its distinctive purpose, i.e., as a weapon.” The dissent contended that the word “use” has too many possible applications under the majority’s broad interpretation. For much of the two opinions, the two sides engaged in a dialogue in which they not only argued for their construction of the word, but also attempted to discredit the other side’s construction. Unfortunately, neither side did much more than insist that its reading was the correct one.

The Smith opinions then tried to justify their reading of “use” in § 924(c)(1) by comparing it to the word “use” in other contexts. First, the Smith opinions clashed on the phrase “otherwise used” in the United States Sentencing Guidelines. On the Guidelines’ sentencing continuum, “otherwise use” falls between “discharging” and “brandishing, displaying, or possessing” a weapon. The majority in Smith argued that “otherwise use” should be broadly construed to include an activity like barter. The dissent, on the other hand, argued that “otherwise use” should be narrowly construed to mean “otherwise use[] as a weapon.” How each side decided the issue depended on little more than the definition of “use” on which it premised its interpretation.

Second, the two sides clashed on how other language in § 924 and related statutory provisions affected the breadth of “use” in § 924(c)(1). The majority based its argument on the premise that a court should approach reading different provisions of a statute as a “holistic endeavor” and apply meaning from different parts of the statute to the language at issue. Thus, the majority reasoned, since the barter of a firearm constitutes a “use” under § 924(d), the same meaning must be given to “use” in § 924(c)(1). The dissent, on the other hand, did not think that “use” in other provisions of § 924 dictated the meaning of “use” in § 924(c)(1). Instead, the dissent focused exclusively on § 924(c)(1), arguing that since the provision when first passed applied only to crimes of violence, “use”

Id. (Scalia, J., dissenting).
Id. at 2061 (Scalia, J., dissenting).
Id. at 2056 (Scalia, J., dissenting).
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Id. at 2061 (Scalia, J., dissenting).
Id. at 2056 (Scalia, J., dissenting).
Id. at 2061 (Scalia, J., dissenting).
Id. at 2056 (Scalia, J., dissenting).

Id. at 2057. On the basis of this contextual analysis, the majority found that the proper interpretation of “use” in § 924(c)(1) was to treat it the same as “use” in § 924(d). 

Id. at 2056.
Id. at 2062 (Scalia, J., dissenting).
could only mean "use as a weapon." Since these techniques of statutory interpretation are both valid, neither interpretation is correct beyond a "reasonable doubt."

In *Deal*, the majority and the dissent disagreed on the breadth of the phrase "second or subsequent conviction." The majority argued that the phrase applied to multiple counts of the same indictment, while the dissent argued that the phrase did not apply to multiple counts of the same indictment. The Justices reached different conclusions because they had different views of the context in which to place the statute. The majority interpreted the statutory language in the narrow context of § 924(c)(1). The dissent, on the other hand, construed the language in a broader context that went beyond the provision in question. Since both techniques are valid and plausible, in the end a "reasonable doubt" exists regarding the proper construction of the statute.

The majority placed the "second or subsequent conviction" language in the context of § 924(c)(1). The majority began by correctly arguing that the word "conviction" in § 924(c)(1) means a "finding of guilt." The sentence in § 924(c)(1) following the phrase "second or subsequent conviction" reads: "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." Thus, the majority reasoned, under § 924(c)(1) a "conviction" comes before the sentence and must include no more than an adjudication of guilt. Thus, each count of an indictment is a distinct finding of guilt. This thinking led the majority to sub-

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236 Id. at 2063 (Scalia, J., dissenting).
237 Deal v. United States, 113 S. Ct. 1993, 1996-97 (1993). Note that the majority spent an unduly large amount of time arguing that "conviction" meant "finding of guilt" on bases other than the clear statutory text. The majority began by distinguishing a "conviction" in § 924(c)(1) from a "judgment of conviction." Id. The majority contended that a "conviction" did not mean anything more than a "finding of guilt." Id. at 1996. In order to define "conviction" as a "finding of guilt," the majority first turned to the Federal Rules of Criminal Procedure, which define a "judgment of conviction" to include both the adjudication of guilt and the sentence imposed. Id. (citing FED. R. CRIM. P. 32(b)(1)). The majority distinguished the phrase "judgment of conviction" in the Federal Rules from the lone word "conviction" in § 924(c)(1). Id. The majority argued that a § 924(c)(1) "conviction" occurs before the sentence is announced and, hence, before the entry of the "judgment of conviction" as defined by the Federal Rules. Id. This had to be the case, the majority argued, because if a "conviction" included the sentence, then the enhancement would have to be imposed after the sentence had already been handed down. Id. For some reason, the majority discussed the statute's clear use of "conviction" only after making this more complex argument.
239 Deal, 113 S. Ct. at 1997.
240 Id.
ject defendant Deal to the twenty-year enhancement on each of the last five counts of his indictment.

In contrast, the dissent approached the phrase “second or subsequent conviction” in the broader context of criminal law. The dissent argued that “second or subsequent conviction” should be given its “long-established usage.” This “long-established usage” was reflected by “subsequent offender” statutes, which apply almost exclusively to recidivists. Though the word “offender” in these other statutes is not the same as the word “conviction” in § 924(c)(1), the two types of statutes ultimately seek to do the same thing: punish criminals who break the law more than once. Thus, the dissent reasoned, “second or subsequent conviction” in § 924(c)(1) must apply only to recidivists.

Along with presenting their own views of the proper context and interpretation of the statute, the two sides engaged in a dialogue about the dissent’s interpretation of the language. Ultimately, this dialogue only serves to reinforce that there is a “reasonable doubt” about the interpretation of the statute. The majority attacked the dissent’s reasoning, calling the analogy of “subsequent offense” language to “second or subsequent conviction” in § 924(c)(1) “verbal know-nothingism.” Further, the majority accused the dissent of being directed by nothing but personal intuition. The dissent, on the other hand, noted that many lower courts have read “second or subsequent conviction” to apply only to recidivists. Despite § 924(c)(1)’s language mandating that a person who receives a second or subsequent conviction “shall” be sentenced to the enhancement, many courts have imposed multiple five-year sentences on defendants convicted of multiple § 924(c)(1) violations. Indeed, such a reading was once noted by a justice of the Supreme Court. Justice Stewart, in his dissenting opinion in Busic, described § 924(c)(1) as a “general enhancement provision—with its stiff sanctions for first offenders and even stiffer sanctions

241 Id. at 1999 (Stevens, J., dissenting).
242 Id. at 1999-2000 (Stevens, J., dissenting). The dissent cited Gonzalez v. United States, 224 F.2d 431, 434 (1st Cir. 1955), in which the court noted that “subsequent offender” statutes generally apply to recidivists.
243 Deal, 113 S. Ct. at 2000-01 (Stevens, J., dissenting).
244 Id. at 1998.
245 Id. at 1998-99.
246 Id. at 2001-02 (Stevens, J., dissenting).
247 Id. (citing United States v. Luskin, 926 F.2d 372 (4th Cir.), cert. denied, 112 S. Ct. 68 (1991); United States v. Nabors, 901 F.2d 1351 (6th Cir.), cert. denied, 498 U.S. 871 (1990); United States v. Henry, 878 F.2d 937 (6th Cir. 1989); United States v. Jim, 865 F.2d 211 (9th Cir.), cert. denied, 493 U.S. 827 (1989); United States v. Fontanilla, 849 F.2d 1257 (9th Cir. 1988); United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987)).
for recidivists."^{248}

Since a "reasonable doubt" remained after an examination of the text, the Court should have examined the legislative history of § 924(c)(1) to see if it helped clarify the proper construction of "use" and "second or subsequent conviction" in § 924(c)(1).

B. THE LEGISLATIVE HISTORY OF § 924(c)(1) DOES NOT Dictate THE PROPER CONSTRUCTION OF "USE" AND "SECOND OR SUBSEQUENT CONVICTION"

When the language of a statute is ambiguous on its face, a court should examine the legislative history to determine the intent and purpose of the statute.^{249} No opinion in Smith or Deal mentioned the legislative history because each author found clarity in the text of § 924(c)(1). This Note contends, however, that since the language of the statute was not as clear as the Justices believed, the Court should have examined the legislative history in an attempt to determine the proper scope of "use" and "second or subsequent conviction." However, since the legislative history is as unavailing as the text of § 924(c)(1), the Court should have found, under Moskal, that "reasonable doubt" exists about the meaning of the statute.

The legislative history of § 924(c)(1) is scant. The floor debate in the House that led to the passage of then-§ 924(c) is the only telling legislative history on the provision.^{250} Other records such as committee reports, congressional hearings, and a formal statement of the intent of the law do not exist.^{251} Because of the dearth of legislative history, the only way to determine Congress' intent for § 924(c)(1) is to examine the legislators' statements on the floor.

The floor debate did not elucidate the specific intent of the legislators with regard to "use" and "second or subsequent conviction." The legislators who debated the Gun Control Act of 1968 spoke very generally about their intent in passing the law, making no specific comments on the breadth of "use" or "second or subsequent conviction." The reason that nobody commented on the precise language of § 924(c) during the floor debate is that the debate itself had very little to do with the precise text of the statute. The debate consisted primarily of a battle over whether to adopt the amendment to § 924(c) submitted by Representative Casey or the

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^{250} See supra note 7 and accompanying text.

^{251} Id.
18 U.S.C. § 924(c)(1)

substitute to the amendment submitted by Representative Poff. Under the Casey amendment, the sentence enhancement would have been triggered if a firearm that had been transported in inter-state or foreign commerce was used in the commission of "any" robbery, assault, murder, rape, burglary, kidnaping, or homicide other than involuntary manslaughter. The Poff substitute was very similar to the Casey amendment but limited the application of the statute to federal crimes and called for mandatory sentences. Concerns about the federalism implications of the Casey amendment appear to have caused its eventual downfall. Details about the expected application of the language of the Poff substitute simply did not arise during the floor debate.

The general purpose of § 924(c)(1), however, is clear from the floor debate: to deter criminals from using firearms during the commission of federal crimes. It became clear during the debate that the bill was a reaction to the outbreak of violent crime in American society. The most often-cited statement regarding the purpose of the law is Representative Poff’s declaration that the law was meant "to persuade the man who is tempted to commit a federal felony to leave his gun at home." Other representatives echoed Poff’s sentiment. For example, Representative Cramer said, "I am very much in favor of the approach suggested by [Representative Poff] providing for an adequate deterrent." Likewise, Representative Harsha advocated "vigorous prosecution" and "incarceration" under the statute "so as to provide the strongest deterrent." Harsha also stated his belief, repeated constantly throughout the debate, that the law was too soft on crime and criminals. Representative Whitten echoed this belief, saying "[the Poff amendment] is trying to reach the judges who are turning [criminals] loose . . . on a defenseless public.”

Despite these many statements that Congress sought to deter criminals from using guns in crime, a “reasonable doubt” clearly exists regarding the intended scope of § 924(c)(1). Whether Congress sought to deter the use of a gun as an article of trade as well as its use as a firearm is not clear from the legislative history. Similarly,

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253 Id. at 22,231.
254 Id. at 22,229-48.
255 See supra notes 8, 21-22 and accompanying text.
256 114 Cong. Rec. at 22,231.
257 Id. at 22,233.
258 Id. at 22,234.
259 Id.
260 Id. at 22,239.
whether Congress intended the "second or subsequent conviction" language to apply to multiple counts of the same indictment as well as to recidivists is also unclear from the legislative history. Perhaps the most perceptive statement on the House floor during the debate that produced § 924(c)(1) was made by Representative Hunt, who noted that the "haste in this legislation" would lead to "considerable confusion as to the meaning of words [in the statute]." Because the legislative history fails to clarify the "reasonable doubt" regarding the scope of the statute that existed after analyzing the text, the Justices should have given more consideration to the public policy concerns underlying the statute.

C. PUBLIC POLICY CONSIDERATIONS DO NOT RESOLVE THE "REASONABLE DOUBT" REGARDING THE SCOPE OF THE STATUTE

The "reasonable doubt" about the scope of "use" and "second or subsequent conviction" in § 924(c)(1) is not resolved in favor of either a broad or a narrow reading of the statute by public policy considerations. The Justices in Smith and Deal discussed public policy arguments in their opinions very briefly, once again because they determined that the language was dispositive of the construction of the statute. Had they examined the public policy considerations more closely, however, they would have recognized that these interests do not clearly dictate either a broad or narrow reading of the statute.

The two interests that weigh in favor of a broad construction of § 924(c)(1) are the interest in being "tough on crime" and the interest in judicial efficiency. The interest in being "tough on crime" suggests that society should deter and punish any criminal who either trades or discharges a firearm or commits multiple crimes with a firearm. If regarded as the paramount public policy concern, this interest would dictate the broadest possible reading of "use" and "second or subsequent conviction." With regard to Smith, the law would want to punish anyone who introduced a firearm into a crime for the simple reason that such an injection heightens the

261 Id. at 22,243.

262 The fact that both Smith and Deal were six to three decisions expanding the application of § 924(c)(1) might lead one to conclude that the Justices in both majority opinions held a strong "law and order" mentality favoring a tough stance on crime. This is not the case, however. It is interesting to note that only Chief Justice Rehnquist and Justices White, Kennedy, and Thomas were in the majority in both cases.
danger associated with the crime.\textsuperscript{263} In Deal, this interest dictates vigorous prosecution of the defendant under the twenty-year enhancement. Otherwise, the law would actually be rewarding criminals who evaded arrest while committing other crimes, for such criminals would not be subject to the twenty-year enhancement. If the twenty-year enhancement applies only to recidivists, then the only criminals faced with the enhancement would be those who committed another crime after previously being caught and sentenced.

The second interest, the interest in judicial economy, suggests that society should want to prosecute as many criminals as it can, as efficiently as it can. In Smith, a broad reading of "use" would make it easier for courts to apply the statute without concern for the different nuances of the statutory language. With regard to Deal, a broad reading of "second or subsequent conviction" would permit prosecutors to use the enhancement during consolidated trials. Prosecutors would have to waste their time on separate trials if "second or subsequent conviction" did not apply to multiple counts of the same indictment. Under the Deal fact pattern, the prosecution would have had to bring six different indictments for the six bank robberies that Deal committed during his robbery spree.\textsuperscript{264}

The interests that weigh in favor of a narrow construction of "use" and "second or subsequent conviction" are the interests underlying the rule of lenity.\textsuperscript{265} First, all people should have a clear understanding of the probable legal response to their acts. Here, defendants Smith and Deal could not know that their acts would be prosecuted as they were under § 924(c)(1), as no court had previously faced the issues decided in these cases.\textsuperscript{266} Second, as a matter of public policy it is wise for the power to define criminal offenses to rest in the hands of the legislature, not the courts. For the court to interpret language as flexible as "use" and "second or subsequent conviction" without a clear legislative or textual mandate is a risky extension into the power to make law.

\textsuperscript{263} See, e.g., United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985), cert. denied, 484 U.S. 867 (1987).


\textsuperscript{265} Supra notes 75-76 and accompanying text.

\textsuperscript{266} On the subject of fair warning to the criminal, Justice Holmes stated that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." McBoyle v. United States, 283 U.S. 25, 27 (1931).
VI. Conclusion

Though the Court in *Smith* and *Deal* addressed the breadth of "use" and "second or subsequent conviction" in 18 U.S.C. § 924(c)(1), these decisions are significant because of how the Justices reached their conclusions. The majority and dissenting opinions in both cases concluded that the statutory language was so clear and unambiguous as to dictate the proper construction of § 924(c)(1). These conclusions beg the question: How can the text "unambiguously" dictate two completely different but entirely plausible interpretations of the same word or words? The answer is that it cannot. The Justices, both majority and dissent, betrayed the test for ambiguity and lenity set forth in *Moskal*. Since the Justices hardly looked beyond the language of § 924(c)(1), they did not consider the legislative history of the statute and the policy concerns underlying it in any depth. Had the Justices examined these other factors, they would have found that neither the legislative history nor the policy concerns offer a definitive resolution to the question of the proper breadth of the statute. Thus, had the Court considered all of the Moskal factors, it would have found that a "reasonable doubt" existed regarding the proper construction of the statute and that the rule of lenity applied.

The decision not to find statutory ambiguity in § 924(c)(1) could signal a diminished role for the rule of lenity in the future. The *Smith* and *Deal* opinions suggest that the Court may not be willing to recognize ambiguity where it may exist in future cases. Under the factors set forth in the *Moskal* test, "use" and "second or subsequent conviction" in § 924(c)(1) are ambiguous. The rule of lenity should have been applied to the defendants in these cases.

George P. Apostolides