

Spring 1999

Something about Carry: Supreme Court Broadens the Scope of 18 U.S.C. 924(C)

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Recommended Citation

Lynn Marsella, Something about Carry: Supreme Court Broadens the Scope of 18 U.S.C. 924(C), 89 J. Crim. L. & Criminology 973 (1998-1999)

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SOMETHING ABOUT "CARRY": SUPREME COURT BROADENS THE SCOPE OF 18 U.S.C. § 924(C).

Muscarello v. United States, 118 S. Ct. 1911 (1998)

I. INTRODUCTION

In *Muscarello v. United States*,¹ the Supreme Court held that the phrase "carries a firearm" for the purposes of 18 U.S.C. § 924(c)(1)² "applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies."³ Rejecting the argument that "carries" applies only to firearms carried on the person, the Court reasoned that the statutory language and legislative history of § 924 supported the application of the statute to firearms "carried" in vehicles as well.⁴

This Note argues that the Court properly expanded the scope of 18 U.S.C. § 924 (c)(1) to include guns "carried" in vehicles during and in relation to drug trafficking crimes.⁵ The Note explains how the text and policy goals of § 924 justify the Court's holding.⁶ In addition, this Note discusses a double standard created by the *Muscarello* decision, which results in stricter punishments for defendants who "carry" guns in a vehicle than for those who store guns nearby in a non-vehicular

¹ 118 S. Ct. 1911 (1998).

² See 18 U.S.C. § 924(c)(1) (1994), which provides for a mandatory five-year penalty enhancement for one who "uses or carries a firearm" "during and in relation to any crime of violence or drug trafficking crime."

³ *Muscarello*, 118 S. Ct. at 1913.

⁴ *Id.* at 1913-20.

⁵ See *infra* Part V.

⁶ *Id.*

situation.⁷ Ultimately, this Note concludes that amending 18 U.S.C. § 924 to replace the language “uses or carries a firearm” with the phrase “possesses a firearm” would solve the double standard created by *Muscarello*.⁸

II. BACKGROUND

A. LEGISLATIVE HISTORY OF 18 U.S.C. § 924 (C)(1)

Federal law mandates a minimum five-year sentence enhancement for anyone who, “during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.”⁹ This law, when originally adopted as part of the Gun Control Act of 1968, did not initially reach drug crimes. In 1968, 18 U.S.C. § 924 provided that,

(c) Whoever –

(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,

shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.¹⁰

In 1984, Congress amended the statute by changing the scope from “any felony” to “any crime of violence.”¹¹ In addition, it combined the “use” and “carry” provisions, and added the “during and in relation to” language.¹² The amendment also eliminated the requirement that the firearm be carried “un-

⁷ *Id.*

⁸ *Id.*

⁹ 18 U.S.C. § 924(c)(1) (1994).

¹⁰ Federal Gun Control Act of 1968, Pub. L. No. 90-618, § 924, 82 Stat. 1213, 1224 (codified as amended at 18 U.S.C. § 924(c)(1) (1994)). See *Bailey v. United States*, 516 U.S. 137, 147 (1995).

¹¹ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138, 2138-39. (codified at 18 U.S.C. § 924(c)(1)-(2) (1984), amended by U.S.C. § 924 (c)(1) (1994)). See *Bailey*, 516 U.S. at 147.

¹² Comprehensive Crime Control Act § 1005(a); see *Bailey*, 516 U.S. at 147.

lawfully," and increased the mandatory minimum sentence from one year to five.¹³

In 1986, Congress specifically added drug trafficking as a predicate offense under the Firearm Owners' Protection Act.¹⁴ This amendment corrected confusion in the courts of appeals about whether drug trafficking constituted a "crime of violence" under the statute.¹⁵ The Attorney General's Office requested that Congress further amend the language of § 924 to include drug crimes in light of the fact that "criminals involved in drug trafficking may often carry or use firearms during the commission of drug-related felonies."¹⁶ Congress complied.¹⁷ The new language made clear Congress's desire to "treat armed drug

¹³ Comprehensive Crime Control Act § 1005(a); see *Bailey*, 516 U.S. at 147. The new version read:

(c) 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.

Comprehensive Crime Control Act § 1005(a), 98 Stat. at 2138-39. See also Kristin Whiting, *The Aftermath of Bailey v. United States: Should Possession Replace Carry and Use Under 18 U.S.C. § 924(c)(1)?*, 5 J.L. & POL'Y 679, 685-86 (1997).

¹⁴ 18 U.S.C. § 924(c)(1) (1994). See generally Alan M. Gilbert, Note: *Defining "Use" of a Firearm*, 87 J. CRIM. L. & CRIMINOLOGY 842 (1997).

¹⁵ See 131 CONG. REC. S16,903 (1985) (statement of Sen. D'Amato); see also *U.S. v. Diaz*, 778 F.2d 86, 88 (2nd Cir. 1985) (holding that § 924 (c)(1) does not apply to narcotics offenses).

¹⁶ 132 Cong. Rec. S 7941 (1986) (letter from John R. Bolton, Assistant Attorney General, to Sen. Bumpers).

¹⁷ Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, § 104(a)(2)(A)-(E), 100 Stat. 449, 456-57 (1986). The amendment added "or drug trafficking crime" before "in which the firearm was used or carried." *Id.*; see also Whiting, *supra* note 13, at 687 n.28.

trafficking as seriously as we do other armed felonies threatening public safety."¹⁸

B. JUDICIAL NARROWING OF THE "USE" PRONG

The circuit courts of appeals did not agree on the proper interpretation of the term "uses" within 18 U.S.C. § 924(c)(1). The First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. circuits applied a "drug fortress" theory, premised on the idea that firearms on the premises could be used to protect drugs and cash, thereby creating a "drug fortress."¹⁹ In contrast, the Second and Third Circuits used a "ready access theory," under which the possessor of the firearm "used" the weapon if he either intended to have it available for possible use during the crime or had it "strategically located so as to be quickly and easily available for use during such a transaction."²⁰

¹⁸ 131 Cong. Rec. S16903 (1985) (statement of Sen. D'Amato). Congress amended § 924 eight times between 1968 and 1997. See Whiting, *supra* note 13, at 682 n.12 for a comprehensive listing. Included here are amendments relevant to this discussion.

¹⁹ See *United States v. Nelson*, 6 F.3d 1049, 1054 (4th Cir. 1993) (holding guns were "used" when located in same room as drugs); *United States v. Travis*, 993 F.2d 1316, 1321 (8th Cir. 1993) (holding defendant "used" weapons in locked glove compartment, even though he did not own car or have key to compartment); *United States v. Harmon*, 996 F.2d 256, 258 (10th Cir. 1993) (holding firearm used or carried when it protects drugs or emboldens defendant); *United States v. Castro-Lara*, 970 F.2d 976, 983 (1st Cir. 1992) (affirming defendant's conviction on theory he "used" unloaded firearm stored in trunk with cash when he used car to pick up drugs); *United States v. Jefferson*, 974 F.2d 201, 205 (D.C. Cir. 1992) (holding "use" can occur without actual employment of a firearm); *United States v. Head*, 927 F.2d 1361, 1366 (6th Cir. 1991) (finding shotgun in same apartment with crack cocaine constituted use); *United States v. Torres-Medina*, 935 F.2d 1047, 1050 (9th Cir. 1991) (holding that defendant "used" weapon stored in tunnel beneath house, even though defendant was a paraplegic and could not retrieve weapon himself); *United States v. Garrett*, 903 F.2d 1105, 1111 (7th Cir. 1990) (affirmed conviction of defendant who used keys to enter driver's side of car where drugs and firearm were stored under seat); *United States v. Poole*, 878 F.2d 1389, 1393 (11th Cir. 1989) (holding that presence of weapons in location where defendant distributed drugs sufficient to constitute "use"); *United States v. Molinar-Apodaca*, 889 F.2d 1417, 1424 (5th Cir. 1989) (holding that physical proximity of drugs and firearms on premises is sufficient to qualify as "use"). See generally Gilbert, *supra* note 14, at 845 n.24; Jamilla A. Moore, Comment: *These Are Drugs. These Are Drugs Using Guns. Any Questions? An Analysis of 18 U.S.C. Section 924(c)(1)*, 30 CAL. W. L. REV. 179, 180 n.4 (1993).

²⁰ *United States v. Feliz-Cordero*, 859 F.2d 250, 254 (2nd Cir. 1988) (holding that gun in dresser drawer with drugs, in apartment, did not constitute "use" under §

The Supreme Court first interpreted the "use" language of 18 U.S.C. § 924 to determine whether bartering guns for drugs constituted "use" of a firearm.²¹ The Circuits were split on the issue.²² The Courts of Appeals for the Eleventh Circuit and the District of Columbia Circuit held that using a gun as barter in a drug trade constituted "using a firearm" in relation to a drug crime under § 924(c)(1).²³ The Ninth Circuit, in contrast, held that trading a gun during a drug transaction did not qualify as using a firearm in relation to the drug offense.²⁴

In *Smith v. United States*, the Supreme Court held that trading a gun in exchange for drugs constitutes "use" under 18 U.S.C. § 924 (c)(1).²⁵ The petitioner in *Smith* argued that because he had not "fired the MAC-10, threatened anyone with it, or employed it for self-protection" he had not actually "used" the firearm under § 924.²⁶ Persuaded by the petitioner's arguments, the dissent found that "to use an instrumentality ordinarily means to use it for its intended purpose."²⁷

The Court, however, interpreted the word "use" more broadly, and reasoned that the fact "that one example of 'use' is the first to come to mind when the phrase 'uses . . . a firearm' is uttered does not preclude us from recognizing that there are

924). See also *United States v. Theodoropoulos*, 866 F.2d 587, 597 (3rd Cir. 1989) (holding that gun in plain view constituted use). See generally Gilbert, *supra* note 14, at 845 n. 25.

²¹ *Smith v. United States*, 508 U.S. 223, 228 (1993).

²² Compare *Smith v. United States*, 957 F.2d 835, 837 (11th Cir. 1992) (holding that any use of a weapon, including use of weapon as barter, that facilitates the commission of the predicate offense constitutes "use" under § 924); and *United States v. Harris*, 959 F.2d 246, 261-62 (D.C. Cir. 1992) (same), with *United States v. Phelps*, 877 F.2d 28, 30 (9th Cir. 1989) (holding that trading a gun during a drug transaction does not constitute "use" under § 924). See also Gilbert, *supra* note 14, at 846; Julie D. Bettenhausen, *The Implications of Bailey v. United States on the Rise of Convicted Criminal Claims and the Fall of U.S.C. § 924(c)(1)*, 46 *DRAKE L. REV.* 677, 682-85 (1998); Jeffrey R. Kesselman, Note: *Excuse Me, Are You "Using" That Gun? The United States Supreme Court Examines 18 U.S.C. § 924(c)(1) in Bailey v. United States*, 30 *CREIGHTON L. REV.* 513, 526-35 (1997); Moore, *supra* note 20, at 180-93.

²³ *Smith*, 957 F.2d at 837; *Harris*, 959 F.2d at 261-62.

²⁴ *Phelps*, 877 F.2d at 30.

²⁵ *Smith*, 508 U.S. at 237.

²⁶ *Id.* at 228.

²⁷ *Id.* at 242 (Scalia, J., dissenting).

other 'uses' that qualify as well."²⁸ According to the Court, the "petitioner 'used' his MAC-10 in an attempt to obtain drugs by offering to trade it for cocaine," and thus "used" a weapon in relation to a drug offense in violation of § 924.²⁹ The *Smith* decision clarified that a defendant did not have to use a firearm in a traditional sense—for example, by brandishing or firing it—to have "used" it under § 924.³⁰

Two years after the *Smith* decision, the Court significantly narrowed the scope of the "use" language in *Bailey v. United States*.³¹ In a unanimous decision, the Court held that "to sustain a conviction under the 'use' prong of 18 U.S.C. § 924(c)(1), the Government must show that the defendant *actively employed* the firearm during and in relation to the predicate crime."³² The Supreme Court rejected the accessibility and proximity test, and instead held that in order to sustain a conviction under § 924, one must show "active employment" of a firearm in a manner that "makes the firearm an operative factor in relation to the predicate offense."³³ The Court based its conclusion on "the language, context, and history" of § 924. The Court went on to define active employment as including "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm," as well as "a reference to

²⁸ *Id.* at 230.

²⁹ *Id.*

³⁰ *Id.* at 231 (rejecting dissent's argument that only the use of a firearm for its intended purposes—to be "discharged . . . brandished, displayed, or possessed"—falls within the scope of § 924).

³¹ *Bailey v. United States*, 516 U.S. 137 (1995).

³² *Id.* at 150 (emphasis added). The Court reviewed two cases in *Bailey*: one involved guns stored in the trunk of an automobile and the other addressed an unloaded firearm locked in a footlocker in the defendant's bedroom closet. *Id.* at 137. See *United States v. Bailey*, 995 F.2d 1113 (D.C. Cir. 1993); *United States v. Robinson*, 997 F.2d 884 (D.C. Cir. 1993).

The Court of Appeals, after consolidating the cases, employed an "accessibility and proximity" test, holding that "one uses a gun, i.e., avails oneself of a gun, and therefore violates [§ 924(c)(1)], whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime. *Bailey v. United States*, 36 F.3d 106, 115 (D.C. Cir. 1994) (en banc). Using this test, the Court of Appeals affirmed both defendants' convictions. *Bailey*, 36 F.3d at 117.

³³ *Bailey*, 516 U.S. at 143.

a firearm calculated to bring about a change in the circumstances of the predicate offense."³⁴

This definition of "use," the Court reasoned, "preserves a meaningful role for 'carries' as an alternative basis for a charge."³⁵ A broader definition of "use" would have left virtually no meaning for "carry"—if any gun put into place near a drug crime constituted "use," the "carry" prong would be unnecessary.³⁶ The presence of the gun on the scene would satisfy the use prong, whether the defendant "carried" the gun or not; therefore, a defendant could never "carry" but not "use" a firearm.³⁷ The Court assumed that Congress "intended each term to have a particular, nonsuperfluous meaning," and thus found a narrower definition of "use" necessary to preserve the weight of the "carry" language.³⁸

C. POST-BAILEY JUDICIAL TREATMENT OF THE "CARRY" PRONG

The Court remanded *Bailey* for consideration under the carry prong of 18 U.S.C. § 924. However, lower courts differed greatly in their determinations of what actions fell within the scope of the term "carry" as well.³⁹ All the courts of appeals eventually agreed that weapons in vehicles were "carried" under § 924.⁴⁰ However, they varied considerably in the application of this general rule.

³⁴ *Id.* at 148.

³⁵ *Id.* at 146.

³⁶ *Id.*

³⁷ *Id.* Under the Court's interpretation,

a firearm can be used without being carried, e.g., when an offender has a gun on display during a transaction, or barter with a firearm without handling it; and a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction.

Id.

³⁸ *Id.* Applying its definition to the facts, the Court found that the evidence was insufficient to uphold either defendant's conviction under the "use" prong of § 924(c). *Id.* at 151.

³⁹ See cases cited *infra* notes 42-61 and accompanying text.

⁴⁰ *Muscarello v. United States*, 118 S. Ct. 1911, 1916 (1998)

The Second, Sixth, and Ninth Circuits required a showing of immediate availability of the firearm along with transport.⁴¹ Transport meant that the defendant must have carried the firearm "on or about his person," but in the case of automobiles, the vehicle carried both the weapon and the defendant, satisfying the transport requirement.⁴² Under the Second Circuit's analysis, "a person cannot be said to 'carry' a firearm without at least a showing that the gun is within reach during the commission of the drug offense."⁴³ The Ninth Circuit, after noting that "circuits all over the map are all over the map on the issue," adopted a similar approach.⁴⁴ The Sixth Circuit used a slightly more expansive definition of "immediate availability," which included a weapon "in a location where the defendant must make some effort in order to retrieve it."⁴⁵

The Fourth, Seventh, and Tenth Circuits, although requiring availability of the weapon and transport in non-vehicular cases, held that a gun could be "carried" in a vehicle without being immediately accessible.⁴⁶ The Seventh Circuit considered the issue in *United States v. Molina*, which involved drugs and a gun stored together in a secret compartment on the driver's-

⁴¹ See *United States v. Foster*, 133 F.3d 704, 708-09 (9th Cir. 1997) (holding gun in zipped bag under tarp cover in truck bed was not immediately available), *vacated and remanded*, U.S. v. Foster, 119 S. Ct. 32 (1998); *United States v. Cruz-Rojas*, 101 F.3d 283, 286 (2nd Cir. 1996) (remanding case to determine whether gun hidden in car dashboard was "accessible" to defendants); *United States v. Riasco-Suarez*, 73 F.3d 616, 623 (6th Cir. 1996) (holding gun must be "on the defendant or within his or her reach" to be "carried"); see also Amy Sullivan Broadbent, *Carrying on After Bailey v. United States: Where Will the Supreme Court Go From Here?*, 45 FED. LAW. 22, 24-25 (Apr. 1998).

⁴² *Foster*, 133 F.3d at 708.

⁴³ *Cruz-Rojas*, 101 F.3d at 285 (quoting *United States v. Feliz-Cordero*, 859 F.2d 250, 253 (2d Cir. 1988)).

⁴⁴ *Foster*, 133 F.3d at 708.

⁴⁵ *Blankenship v. United States*, 117 F.3d 1420, (6th Cir. 1997). The court expanded its earlier interpretation that the firearm needed to be "on the defendant or within his or her reach." See *Riasco-Suarez*, 73 F.3d at 623. See also Broadbent, *supra* note 41, at 24.

⁴⁶ Broadbent, *supra* note 41, at 25. See *United States v. Mitchell*, 104 F.3d 649, 654 (4th Cir. 1997) (loaded gun in passenger compartment of vehicle was "carried"); *United States v. Molina*, 102 F.3d 928, 931 (7th Cir. 1996) (defendant "carried" gun stored with drugs in secret compartment of vehicle); *United States v. Miller*, 84 F.3d 1244, 1261 (10 Cir. 1996) (gun located in back of van was "carried").

side wall of the back seat.⁴⁷ The compartment contained electronic wiring, which led investigators to believe it could be opened from the front seat.⁴⁸ The court held that it "need not conclude that the gun was within Molina's immediate reach" in order to uphold the defendant's conviction.⁴⁹ Rather, the court ruled that the movement of guns and drugs stored together in an automobile satisfies the "in relation to" and "carry" prongs of 18 U.S.C. § 924.⁵⁰ This view is consistent with the Tenth Circuit's conclusion that "when a motor vehicle is used, 'carrying a weapon' takes on a less restrictive meaning than carrying on the person."⁵¹ The automobile "carries" the weapon, just as a defendant's "hands or pocket" would carry a gun on the person.

Although it has not directly addressed the question, the Eleventh Circuit has suggested that it would not have required immediate accessibility either.⁵² In *United States v. Chirinos*, the court upheld a charge under 18 U.S.C. § 924(c)(1) where one of the defendants wore a pistol on the waistband of his pants, and a rifle rested under the back seat of his car.⁵³ Because the gun on the defendant's waistband clearly fell within the meaning of carry, the court did not need to consider whether the rifle in the car was also carried in violation of § 924.⁵⁴ The court required that the government prove transport of the gun, either on the person or "in a vehicle," but it never mentioned "immediate accessibility."⁵⁵

The Third and Eighth Circuits had not clearly decided whether § 924 (c)(1) requires immediate accessibility.⁵⁶ The

⁴⁷ *Molina*, 102 F.3d at 929.

⁴⁸ *Id.* at 929-30.

⁴⁹ *Id.* at 932.

⁵⁰ *Id.* The court noted that if the gun and drugs were located in different places in the car, the decision would hinge on the relation between the items (bringing into play the "in relation to" element of § 924(c)(1)). *Id.*

⁵¹ *United States v. Miller*, 84 F.3d 1244, 1258 (10th Cir. 1996) (quoting *United States v. Cardenas*, 864 F.2d 1528, 1535-56 (10th Cir. 1989)).

⁵² Broadbent, *supra* note 41, at 25-26. See *United States v. Chirinos*, 112 F.3d 1089, 1095-96 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 701 (1998).

⁵³ *Chirinos*, 112 F.3d at 1093-94.

⁵⁴ *Id.* at 1095-96.

⁵⁵ *Id.* at 1095.

⁵⁶ Broadbent, *supra* note 41, at 26.

Third Circuit has held that a defendant "carried" a gun which was immediately accessible, but did not address whether an inaccessible gun could likewise be "carried" under § 924.⁵⁷ In *United States v. Nelson*, the Eighth Circuit said that it would "assume, without deciding" that it has an accessibility requirement, and held that a gun behind the driver's seat was carried.⁵⁸

The First and Fifth Circuits rendered their key decisions interpreting the "carry" language in the two cases consolidated for review in *Muscarello*.⁵⁹ As discussed more fully below, neither court required immediate accessibility of the weapon.⁶⁰

III. FACTS AND PROCEDURAL HISTORY

A. DEFENDANT FRANK MUSCARELLO

On December 8, 1994, Frank J. Muscarello delivered eight pounds of marijuana to an undercover special agent of the Federal Drug Enforcement Agency ("DEA") in Louisiana.⁶¹ Muscarello had negotiated the deal and received payment for the drugs in his Ford pick-up truck.⁶² Federal agents arrested him on the scene, at which point officers seized a .38 caliber handgun locked in the glove compartment of Muscarello's truck.⁶³ Muscarello had not removed the weapon from the glove compartment at any point during the drug sale.⁶⁴

At the time of his arrest, Muscarello worked for the Tangipahoa Parish Sheriff's office as a bailiff in the Twenty-first Judicial District Courthouse.⁶⁵ Since 1954, he had held "a variety of law-enforcement positions," including constable and chief of

⁵⁷ See *United States v. Eyer*, 113 F.3d 470, 476 (3d Cir. 1997).

⁵⁸ *United States v. Nelson*, 109 F.3d 1323, 1326 (8th Cir. 1997).

⁵⁹ *Muscarello v. United States*, 106 F.3d 636 (5th Cir. 1997); *United States v. Cleveland*, 106 F.3d 1056 (1st Cir. 1997).

⁶⁰ *Muscarello*, 106 F.3d at 638; *Cleveland*, 106 F.3d at 1066. The decisions will be discussed at greater length *infra*, Part III.

⁶¹ Brief for Petitioner at 2, *Muscarello v. United States*, 118 S. Ct. 1911 (1998) (No. 96-1654); *Muscarello v. United States*, Crim.A. No. 95-2, 1996 WL 173374, at *1 (E.D. La. Apr. 10, 1996), *aff'd*, 106 F.3d 636 (5th Cir. 1997), *aff'd*, 118 S. Ct. 1911 (1998).

⁶² Brief for the United States at 3, *Muscarello* (Nos. 96-1654, 96-8837).

⁶³ Brief for Petitioner at 2, *Muscarello* (No. 96-1654).

⁶⁴ *Muscarello*, 1996 WL 173374, at *1.

⁶⁵ Brief for Petitioner at 2-3, *Muscarello* (No. 96-1654).

police.⁶⁶ Muscarello claimed that he had kept the gun in his glove compartment for "a long period of time" before his arrest.⁶⁷

The government charged Muscarello with (1) conspiracy to distribute marijuana in violation of 21 U.S.C. § 846; (2) distribution of marijuana in violation of 21 U.S.C. § 841(a)(1); and (3) "using and carrying" a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1).⁶⁸ On May 25, 1995, he pleaded guilty to all three counts in the United States District Court for the Eastern District of Louisiana.⁶⁹ Muscarello based his plea, in part, upon the following statement, prepared by the government and signed by Muscarello's attorney: "Located inside the glove compartment of the defendant Muscarello's Ford truck was a loaded firearm which the defendant knowing [sic] possessed in his vehicle and carried for protection in relation to the above described drug trafficking offense."⁷⁰

On December 6, 1995, before Muscarello had been sentenced, the Supreme Court decided *Bailey v. United States*,⁷¹ which narrowed the scope of the "use" language in 18 U.S.C. § 924(c)(1).⁷² Based on *Bailey*, Muscarello filed a motion in the district court to quash or dismiss the § 924(c) charge against him.⁷³ Although the Government agreed that, after *Bailey*, Muscarello's conviction under § 924 would not stand if it was based on the charge that he had "used" the firearm, the Government argued that he had still "carried" the weapon.⁷⁴

⁶⁶ *Id.* at 2.

⁶⁷ *Id.* at 3 (quoting pre-sentence report).

⁶⁸ *Id.* at 2; Brief for the United States at 2, *Muscarello* (Nos. 96-1654, 96-8837).

⁶⁹ Brief for the United States at 2, *Muscarello* (Nos. 96-1654, 96-8837); *Muscarello*, 1996 WL 173374, at *1.

⁷⁰ Brief for Petitioner at 2, *Muscarello* (No. 96-1654).

⁷¹ 516 U.S. 137, 143 (1995) (holding a defendant must actively employ a weapon in order to be subject to 18 U.S.C. § 924(c)(1) punishment under the "use" prong).

⁷² Brief for Petitioner at 3, *Muscarello* (No. 96-1654).

⁷³ *Id.* The motion was filed pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure. *Id.*

⁷⁴ *Id.*

The district court dismissed the 18 U.S.C. § 924 charge against Muscarello.⁷⁵ The court found that Muscarello did not “knowingly possess the firearm in relation to the drug-trafficking crime,” but rather “knowingly possessed the firearm in the glove compartment of his vehicle in furtherance of his job requirements.”⁷⁶ The Government insisted that Muscarello had admitted to carrying a firearm in his guilty plea. However, the court stressed that the plea was a “pre *Bailey* [sic] consideration by defendant and his counsel,” and thus rejected the Government’s motion for reconsideration.⁷⁷

On appeal, the Fifth Circuit reversed the district court’s decision, reinstated the conviction for carrying a firearm, and remanded the case for sentencing.⁷⁸ Relying on Circuit precedent,⁷⁹ the court stated that, “the carrying requirement of § 924(c) is met if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime.”⁸⁰ According to the court, the district court erred in two ways.⁸¹ First, the district court erroneously disregarded Muscarello’s statements in the plea agreement as a “pre *Bailey* consideration.”⁸² Because *Bailey* addressed the use prong of the statute, and *Muscarello* involved the carry prong, the plea agreement should not have been ignored.⁸³ Second, the district court gave undue weight to Muscarello’s “self-serving declaration” in the pre-sentencing report (“PSR”) that he carried the gun in relation to his employment as a bailiff.⁸⁴ In short, “the court should not have allowed the PSR to supplant the formal plea agreement.”⁸⁵

⁷⁵ *Muscarello v. United States*, Crim.A. No. 95-2, 1996 WL 173374, at *2 (E.D. La. April 10, 1996), *aff’d*, 106 F.3d 636 (5th Cir. 1997), *aff’d*, 118 S. Ct. 1911 (1998).

⁷⁶ *Id.*

⁷⁷ *Id.*; Brief for Petitioner, *Muscarello* (No. 96-1654).

⁷⁸ *Muscarello v. United States*, 106 F.3d 636, 639 (5th Cir. 1997), *aff’d*, 118 S. Ct. 1911 (1998).

⁷⁹ *United States v. Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir. 1992).

⁸⁰ *Muscarello*, 106 F.3d at 638 (quoting *Pineda-Ortuno*, 952 F.2d at 104).

⁸¹ *Id.* at 638-39.

⁸² *Id.* at 639.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

On petition from *Muscarello*, the Supreme Court granted certiorari to determine whether "carries a firearm" under 18 U.S.C. § 924 (c)(1) includes guns located in the locked glove compartment of a vehicle.⁸⁶

B. DEFENDANTS DONALD CLEVELAND AND ENRIQUE GRAY-SANTANA

On October 18, 1994, DEA agents arrested Donald Cleveland and Enrique Gray-Santana in connection with a drug deal.⁸⁷ The agents had been conducting surveillance on an apartment in Connecticut, and had followed two cars (an Isuzu Trooper and a Lexus) to Boston.⁸⁸ The driver of the Trooper paged Cleveland and Gray-Santana, both of whom later arrived in a Mazda.⁸⁹ The police observed a series of conversations among the men, and watched them exit and reenter their cars. When the vehicles began moving again, Gray-Santana was a passenger in the Trooper, while Cleveland drove the Mazda.⁹⁰

After stopping them, agents searched both vehicles, and found six kilograms of cocaine hidden in a compartment in the Trooper.⁹¹ They also recovered firearms from the trunk of the Mazda.⁹² The weapons were all loaded, and two of them were semiautomatic.⁹³ The agents arrested Cleveland and Gray-Santana, along with two other men, and brought them to DEA headquarters.⁹⁴ Once there, Cleveland and Gray-Santana admitted to placing the guns in the Mazda trunk earlier that day, and

⁸⁶ *Muscarello v. United States*, 118 S. Ct. 621 (1997). The Court consolidated *Muscarello*, 106 F.3d 636, *aff'd* 118 S. Ct. 1911 (1998), with *United States v. Cleveland*, 106 F.3d 1056 (1st Cir. 1997), *aff'd* 118 S. Ct. 1911 (1998).

⁸⁷ Brief for Petitioner at 3, *Muscarello v. United States*, 118 S. Ct. 1911 (1998) (No. 96-8837).

⁸⁸ *Id.* at 2.

⁸⁹ *Id.* at 2-4.

⁹⁰ *Id.* at 3.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Brief for the United States at 7, *Muscarello* (Nos. 96-1654, 96-8837).

⁹⁴ Brief for Petitioner at 3, *Muscarello v. United States*, 118 S. Ct. 1911 (1998) (No. 96-8837).

to arranging the drug deal.⁹⁵ They explained that they obtained the guns in order to steal the drugs, rather than buy them.⁹⁶

On March 15, 1995, a federal grand jury indicted Cleveland and Gray-Santana.⁹⁷ In July, 1995, they pled guilty to "(1) attempting to possess cocaine with intent to distribute, and (2) using and carrying a firearm during and in relation to a drug trafficking crime."⁹⁸ Each defendant was sentenced to 180 months imprisonment and five years of supervised release.⁹⁹ After the Supreme Court decided *Bailey* in December, 1995, the defendants challenged the second count.¹⁰⁰ The trial court sustained the conviction, and agreed with the Government that the defendants had "carried" the guns within the meaning of 18 U.S.C. § 924 by having them in the trunk of the Mazda.¹⁰¹

On appeal, the First Circuit affirmed.¹⁰² The court considered the following two questions: "[f]irst, must a firearm be on a suspect's person to be 'carried' or can one also 'carry' a firearm in a vehicle? Second, if one can 'carry' a firearm in a vehicle, must the weapon be immediately accessible to the defendant to be 'carried'?"¹⁰³ In regard to the first question, the majority based its decision on one of its earlier, post-*Bailey* decisions, *United States v. Ramirez-Ferrer*.¹⁰⁴ There, the court held that a gun could be "carried" in a boat.¹⁰⁵ The *Cleveland* majority reasoned that the result from *Ramirez* was consistent with both its pre-

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 4.

⁹⁸ *Id.*

⁹⁹ Brief for the United States at 2-3, *Muscarello v. United States*, (Nos. 96-1654, 96-8837).

¹⁰⁰ *Id.* at 7-8. Gray-Santana filed a Motion to Correct Sentence and/or for Other Appropriate Relief pursuant to FED. R. CRIM. P. 35(c) and 28 U.S.C. § 2255; Cleveland brought a challenge after his sentencing pursuant to 28 U.S.C. § 2255 and on direct appeal. *Id.*

¹⁰¹ Brief for Petitioner at 4-5, *Muscarello* (No. 96-8837).

¹⁰² *United States v. Cleveland*, 106 F.3d 1056, 1069 (1st Cir. 1997), *aff'd* 118 S. Ct. 1911 (1998).

¹⁰³ *Id.* at 1065.

¹⁰⁴ *Id.* (citing *United States v. Ramirez-Ferrer* 82 F.3d 1149 (1st Cir. 1996)).

¹⁰⁵ *Ramirez-Ferrer*, 82 F.3d at 1154.

Bailey decisions interpreting "carry" and with post-*Bailey* decisions from other circuits.¹⁰⁶

Next, the court addressed the novel issue of whether the gun needed to be immediately accessible to be "carried."¹⁰⁷ The majority held, consistent with the Fourth, Seventh, and Tenth Circuits, "that a gun may be 'carried' in a vehicle for the purposes of § 924 (c)(1) without necessarily being immediately accessible to the defendant while it is being transported."¹⁰⁸ While recognizing that other circuits had reached the opposite conclusion,¹⁰⁹ the court reasoned:

We strongly doubt—given the omnipresence of automobiles in today's world and in drug dealing, and given the basic meaning of 'carry' as including transport by vehicle—that Congress . . . meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction.¹¹⁰

The court agreed with the Tenth Circuit that the "distinguishing characteristic" of the "carry" element was not immediate accessibility, but "the fact that the item is being moved from one place to another by the carrier, either personally, or with the aid of some appropriate vehicle."¹¹¹

On petition from the defendants, the Supreme Court granted certiorari¹¹² to consider whether "carries a firearm" under 18 U.S.C. § 924(c)(1) "is limited to the carrying of firearms on the person."¹¹³

¹⁰⁶ *Cleveland*, 106 F.3d at 1065-66 (citing cases from the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits).

¹⁰⁷ *Id.* at 1066.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1068.

¹¹⁰ *Id.* at 1067.

¹¹¹ *Id.* at 1068 (citing *United States v. Miller*, 84 F.3d 1244, 1260 (10th Cir. 1996)).

¹¹² *Muscarello v. United States*, 118 S. Ct. 621 (1997). The court consolidated the case with *Muscarello v. United States*, 106 F.3d 636 (5th Cir. 1997).

¹¹³ *Muscarello v. United States*, 118 S. Ct. 1911, 1913 (1998).

IV. SUMMARY OF THE OPINIONS

A. THE MAJORITY OPINION

On June 8, 1998, the Supreme Court affirmed the decisions of the First and Fifth Circuits.¹¹⁴ Writing for the majority, Justice Breyer ruled that both the statutory language and Congressional history demonstrate that the proper definition of "carry" under 18 U.S.C. § 924(c)(1) covers guns locked in the glove compartment or trunk of a vehicle, regardless of whether the guns were immediately accessible.¹¹⁵

The Court first analyzed the definition of "carry" at great length.¹¹⁶ It found that there were two relevant definitions of carry—one used to refer to carrying guns "in a wagon, car, truck, or other vehicle that one accompanies," and another meaning: the "bearing" of a gun.¹¹⁷ The Court examined numerous English dictionaries, literary sources, prior opinions, and newspapers for their use of the term "carry."¹¹⁸ Within these sources, the Court found that "carry" frequently referred to carrying items in a car, and that there was "nothing linguistically special about the fact that weapons, rather than drugs, are being carried."¹¹⁹ Based on this analysis, the majority concluded that "the word 'carry' in its ordinary sense includes carrying in a car and that the word, used in its ordinary sense, keeps the same meaning whether one carries a gun, a suitcase, or a banana."¹²⁰

Looking next at Congressional intent, the majority concluded that "neither the statute's basic purpose nor its legislative history support circumscribing the scope of the word 'carry'

¹¹⁴ *Id.* at 1920.

¹¹⁵ *Id.* at 1914-16. Justices Stevens, O'Connor, Kennedy, and Thomas joined in Justice Breyer's opinion.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1914. In colloquial language, the second definition would be "packing a gun." *Id.* at 1915.

¹¹⁸ Among the sources considered by the majority were the *Oxford English Dictionary*, *Webster's Third New International Dictionary*, *The Barnhart Dictionary of Etymology*, the *King James Bible*, *Robinson Crusoe*, *Moby Dick*, the *New York Times*, and Westlaw's "US News" database. *Id.* at 1914-15.

¹¹⁹ *Id.* at 1915.

¹²⁰ *Id.* at 1916.

by applying an 'on the person' limitation."¹²¹ The Court pointed out that the chief sponsor of the statute, Representative Richard Poff, stated that the goal was to "persuade the man who is tempted to commit a Federal felony to leave his gun at home."¹²² In light of this goal, the Court reasoned that it would be nonsensical for the statute to punish individuals who walk with a gun, but not similarly punish those who drive with a gun.¹²³

The Court disagreed with the defendants' assertion that a definition of "carry" that includes guns in cars equates the word "carry" with "transport."¹²⁴ The defendants argued that Congress had used the word "transport" in 18 U.S.C. § 924(b), which penalized one who "transports" a weapon with intent to commit a crime.¹²⁵ Had Congress intended to reach the same activity in § 18 U.S.C. § 924(c)(1), defendants argued, it would have used the term "transport," rather than "carries."¹²⁶ The Court reasoned, however, that while carry "implies personal agency and some degree of possession," the term "transport" implies "the movement of goods in bulk over great distances."¹²⁷ In addition, the Court pointed out that Congress added an exemption in 18 U.S.C. § 926A for one who carries a firearm from one place to another, when he may lawfully possess it in both places.¹²⁸ In § 926A, Congress specifically declined to exempt "the 'transportation' of a firearm if it is 'readily accessible or is

¹²¹ *Id.*

¹²² *Id.* (quoting 114 CONG. REC. H22231 (daily ed. July 19, 1968) (statement of Rep. Poff)).

¹²³ *Id.*

¹²⁴ *Id.* at 1917.

¹²⁵ Brief for Petitioner at 13-14, *Muscarello v. United States*, 118 S. Ct. 1911 (1998) (No. 96-8837).

¹²⁶ *Id.*

¹²⁷ *Muscarello*, 118 S. Ct. at 1917. The Court explained the difference as follows:

If Smith, for example, calls a parcel delivery service, which sends a truck to Smith's house to pick up Smith's package and take it to Los Angeles, one might say that Smith has shipped the package and the parcel delivery service has transported the package. But only the truck driver has 'carried' the package in the sense of 'carry' that we believe Congress intended. Therefore, 'transport' is a broader category that includes 'carry' but also encompasses other activity.

Id.

¹²⁸ *Id.* at 1917-18.

directly accessible from the passenger compartment of [the] transporting vehicle.”¹²⁹ If the dissent were correct that to “carry a firearm” in a vehicle means to have it immediately accessible, then “[t]he statute simply could have said that such a person may not ‘carry’ a firearm. But, of course, Congress did not say this because that is not what ‘carry’ means.”¹³⁰

The Court also refuted the defendants’ argument that since the Court construed the term “use” narrowly in *Bailey*,¹³¹ it should give “carry” a similarly limited meaning in this case.¹³² The Court drew a distinction between the two terms; although a broad definition of “use” would have “swallowed up” the term carry, the opposite is not true of a broad definition of “carry.”¹³³ One can still “carry” a gun in a car and not “use” it, so long as there is no “active employment.”¹³⁴ If the Court construed both “use” and “carry” narrowly, they would “remove the act of carrying a gun in a car entirely from the statute’s reach, leaving a gap in coverage” not intended by Congress, thus “undercutting the statute’s basic objective.”¹³⁵

Additionally, the Court rejected the argument that its definition of “carry” would extend the scope of the statute to weapons stored in luggage on buses, planes, or ships.¹³⁶ The “during” and “in relation to” language of the statute would properly limit the application of the statute to drug crimes.¹³⁷

The Court rejected a definition of “carry” requiring that a firearm be “immediately accessible,” on the grounds that neither the statutory language nor legislative history supported that standard.¹³⁸ The Court noted that “nothing in the statute’s history suggests that Congress intended that limitation;” therefore,

¹²⁹ *Id.* (quoting 18 U.S.C. § 926A (1994)).

¹³⁰ *Id.* at 1918.

¹³¹ *Bailey v. United States*, 516 U.S. 137, 143 (1995).

¹³² *Muscarello*, 118 S. Ct. at 1918.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1918-19.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1919.

"one 'carries' a gun in the glove compartment whether or not that glove compartment is locked."¹³⁹

Finally, the Court rejected the argument that the statute was so ambiguous as to require a decision in the defendants' favor based on the "rule of lenity."¹⁴⁰ It explained that it need not invoke the rule unless the Court could make "no more than a guess as to what Congress intended."¹⁴¹ The Court asserted that no "grievous ambiguity" existed here.¹⁴² It explained that the Court confronts the level of statutory interpretation that it did in *Muscarello* in many of its criminal cases, and has never held that it "automatically permits a defendant to win."¹⁴³

In sum, the Court concluded that the "generally accepted contemporary meaning" of "carry" and the purpose of 18 U.S.C. § 924 support the holding that the word "carry" includes the carrying of guns in a vehicle.¹⁴⁴ Thus, the defendants "carried a firearm" under § 924 (c)(1).¹⁴⁵

B. JUSTICE GINSBERG'S DISSENT

In dissent, Justice Ginsberg¹⁴⁶ argued that the proper definition of "carry" under 18 U.S.C. § 924(c)(1) refers to "bearing [firearms] in such manner as to be ready for use as a weapon."¹⁴⁷ She explained that § 924 functions as a penalty enhancement provision: if the defendants were not punished under § 924, they would still be subject to penalty enhancement under the Sentencing Guidelines.¹⁴⁸ Thus, a narrow reading of the statute would not result in leaving criminals unpunished.¹⁴⁹

¹³⁹ *Id.*

¹⁴⁰ *Id.* The rule of lenity would require the Court to resolve the ambiguity in favor of the defendants. *Id.*

¹⁴¹ *Id.* (quoting *United States v. Wells*, 519 U.S. 482, 499 (1997) (quoting *Reno v. Koray*, 515 U.S. 50, 64 (1995))).

¹⁴² *Id.* (citation omitted).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1919-20.

¹⁴⁶ Chief Justice Rehnquist and Justices Scalia and Souter joined in the dissent.

¹⁴⁷ *Muscarello*, 118 S. Ct. at 1920 (Ginsberg, J., dissenting).

¹⁴⁸ *Id.* at 1920-21 (Ginsberg, J., dissenting). The Sentencing Guidelines, under 28 U.S.C. § 994 (1994), provide for a two-level enhancement for firearm possession connected with a drug offense. In *Muscarello*'s case, the enhancement would be an extra

The dissent rejected the Court's assertion that literature, newspapers, and dictionaries can dispositively interpret the meaning of "carry" within 18 U.S.C. § 924(c).¹⁵⁰ However, it countered the Court's analysis with its own examination of newspapers, the bible, dictionaries, books, political speeches, and popular television and film productions.¹⁵¹ As a result of this research, the dissent concluded that "'carry' is a word commonly used to convey various messages," and that "[s]uch references, given their variety, are not reliable indicators of what Congress meant, in § 924(c) (1), by 'carries a firearm.'"¹⁵²

The dissent argued that possessing a gun in a car is no more dangerous than possessing a gun at the location of a drug sale, if it were, for example, hidden in a closet.¹⁵³ It reasoned that Congress intended to provide mandatory minimum sentences "for the most life-jeopardizing gun-connection cases," and to have the "less imminently threatening situations" governed by more flexible guidelines.¹⁵⁴ In Justice Ginsberg's view, the statute should apply to situations where the "firearm was kept so close to a person as to approximate placement in a pocket or

four months of prison time. *Id.* at 1921. See also U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a)(3) (Nov. 1995).

¹⁴⁹ *Muscarello*, 118 S. Ct. at 1920-21 (Ginsberg, J., dissenting).

¹⁵⁰ *Id.* at 1921-22 (Ginsberg, J., dissenting).

¹⁵¹ *Id.* (Ginsberg, J., dissenting). Among the sources examined by the dissent were *Black's Law Dictionary*, *The Chicago Tribune*, *The New English Bible*, *The New Jerusalem Bible*, *The Poetical Works of Oliver Goldsmith*, *Rudyard Kipling's Verse*, *Bartlett's Familiar Quotations*, *The Magnificent Seven* and *M*A*S*H*. *Id.* It quoted *M*A*S*H*'s Hawkeye Pierce:

I will not carry a gun . . . I'll carry your books, I'll carry a torch, I'll carry a tune, I'll carry on, carry over, carry forward, Cary Grant, cash and carry, carry me back to Old Virginia, I'll even 'hari-kari' if you show me how, but I will not carry a gun!

Id. at 1922 (quoting <<http://www.Geocities.com/Hollywood/8915/mashquotes.html>>).

¹⁵² *Id.* (Ginsberg, J., dissenting).

¹⁵³ *Id.* (Ginsberg, J., dissenting) (quoting *United States v. Foster*, 133 F.3d 704, 707 (9th Cir.), *cert. denied*, 118 S. Ct. 1818 (1998)) ("A drug dealer who packs heat is more likely to hurt someone or provoke someone else to violence. A gun in a bag under a tarp in a truck bed poses substantially less risk")

¹⁵⁴ *Id.* (Ginsberg, J., dissenting).

holster, e.g., guns carried at one's side in a briefcase or handbag, or strapped to the saddle of a horse."¹⁵⁵

According to the dissent, the majority relied too heavily on the legislative statements regarding the desire to convince a would-be felon to "leave his gun at home."¹⁵⁶ The dissent pointed out that Representative Poff's next sentence was that "[a]ny such person should understand that if he uses his gun and is caught and convicted, he is going to jail."¹⁵⁷ Therefore, Justice Ginsberg concluded that the congressman's statement referred to the "use," not the carry, prong of the statute.¹⁵⁸

The dissent also analyzed Congress's use of the word "transport" in other statutes to refute the Court's contention that "carry" implies personal agency, while "transport" implies moving bulk goods.¹⁵⁹ Justice Ginsberg explained that Congress often interchanged the two terms, and "sometimes employed 'transports' when, according to the Court, 'carries' was the right word to use."¹⁶⁰ Referring to 18 U.S.C. §§ 925(a)(2)(B)¹⁶¹ and 926A¹⁶² as examples, the dissent concluded that interpreting

¹⁵⁵ *Id.* at 1922 n.7 (Ginsberg, J., dissenting).

¹⁵⁶ *Id.* at 1924 n.12 (Ginsberg, J., dissenting).

¹⁵⁷ *Id.* (Ginsberg, J., dissenting) (quoting 114 CONG. REC. H22231 (daily ed. July 19, 1968) (statement of Rep. Poff)).

¹⁵⁸ *Id.* (Ginsberg, J., dissenting).

¹⁵⁹ *Id.* at 1923-24 (Ginsberg, J., dissenting).

¹⁶⁰ *Id.* at 1923 (Ginsberg, J., dissenting).

¹⁶¹ 18 U.S.C. § 925(a)(2)(B) exempts from criminal penalties "the transportation of [a] . . . firearm or ammunition carried out to enable a person, who lawfully received such a firearm or ammunition from the Secretary of the Army, to engage in military training or in competitions." *Id.*

¹⁶² In pertinent part, § 926A provides that:

. . . any person who is not otherwise prohibited by this chapter . . . from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: *Provided*, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

Id. Justice Ginsberg (when refuting the Court's differentiation of "carry" and "transport") argued that the statute illustrated that Congress used the term "transport"

"carry" under § 924 to mean "on or about [one's] person" is fully compatible with the other statutes.¹⁶³

Lastly, the dissent argued that because 18 U.S.C. § 924(c)(1) is "not decisively clear one way or the other," the Court should have applied the rule of lenity and resolved its doubt in favor of the defendants.¹⁶⁴ One of the core reasons for the rule of lenity, explained Justice Ginsberg, is to ensure that legislatures, not courts, define criminal activity.¹⁶⁵

V. ANALYSIS

In *Muscarello*, the Supreme Court correctly held that the "carries a firearm" language of 18 U.S.C. § 924(c)(1) covers guns transported in vehicles.¹⁶⁶ The statutory language of § 924 and its legislative history support the Court's conclusion. An alternative holding would have frustrated congressional intent by severely limiting the reach of § 924. Although judicially correct, *Muscarello* results in a double standard for drug transactions taking place in vehicles and those occurring in houses. An amendment to replace "uses or carries a firearm" with "possesses a firearm" would result in a more consistent and effective application of the law.

A. THE COURT CORRECTLY DECIDED *MUSCARELLO v. UNITED STATES* BASED ON STATUTORY LANGUAGE, LEGISLATIVE INTENT, AND THE RULE OF LENITY.

Analysis of dictionary definitions and contemporary uses of the word "carry" illustrate that the term can be used in many ways. Justice Ginsberg concluded in her dissenting opinion that "the Court's lexicological sources demonstrate vividly that 'carry' is a word commonly used to convey various messages. Such references, given their variety, are not reliable indicators of what Congress meant, in § 924 (c)(1), by 'carries a fire-

when it attempted to "imply personal agency and some degree of possession." *Id.* at 1923 (Ginsberg, J., dissenting).

¹⁶³ *Id.* at 1924 (Ginsberg, J., dissenting).

¹⁶⁴ *Id.* (Ginsberg, J., dissenting).

¹⁶⁵ *Id.* at 1925 (Ginsberg, J., dissenting) (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)).

¹⁶⁶ *Id.* 1913-14.

arm."¹⁶⁷ The majority concluded that the phrase "carries" includes the transportation of guns in vehicles.¹⁶⁸ Given the multitude of possible definitions for "carry," dictionaries and similar tools shed little light on the meaning of the term within 18 U.S.C. § 924(c)(1). However, looking to the legislative intent behind the statute, there is no evidence that Congress intended to limit "carry" to exclude one of its possible meanings—transporting in an automobile.¹⁶⁹

Reading § 924 (c)(1) to reach guns located in vehicles is entirely consistent with legislative intent.¹⁷⁰ The clear purpose of § 924 is to combat violence in drug crimes.¹⁷¹ As the Court noted in *Smith v. United States*:

When Congress enacted the current version of § 924(c)(1), it was no doubt aware that drugs and guns are a dangerous combination. In 1989, 56 percent of all murders in New York City were drug related; during the same period, the figure for the Nation's Capital was as high as 80 percent.¹⁷²

When introducing the 1986 amendment, Senator D'Amato spoke of "threatening public safety."¹⁷³ Representative Poff referred to the need to persuade a criminal "to leave his gun at home."¹⁷⁴

As the Court correctly noted, there is "no significant indication elsewhere in the legislative history of any more narrowly fo-

¹⁶⁷ *Id.* at 1922 (Ginsberg, J., dissenting).

¹⁶⁸ *Id.* at 1914-16.

¹⁶⁹ *Id.* at 1916-17.

¹⁷⁰ *Id.* at 1916.

¹⁷¹ *Smith v. United States*, 508 U.S. 223, 240 (1993).

¹⁷² *Id.* Drugs and violence remain intertwined; a 1997 study by the Illinois Criminal Justice Information Authority found that "as crack emerged and seizure quantities began to climb, there was a concomitant and parallel increase in firearms offenses." William Recktenwald, *Police Tactics, Sentencing Take Toll, Report Finds; Study Probes Drop in State Violence*, CHICAGO TRIB., May 26, 1997, Metro Northwest, at P1. See also, Whiting *supra* note 13, at 719 (survey of 2000 convicted felons showed that "forty-three to forty-five percent were armed with a weapon during a drug deal and twenty-nine percent fired a gun at someone during a drug deal") (citation omitted).

¹⁷³ See Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, § 104(a)(2)(A)-(E), 100 Stat. 449, 456-57 (1986), discussed *supra* note 17.

¹⁷⁴ 114 CONG. REC. H22231 (daily ed. July 19, 1968) (statement of Rep. Poff).

cused relevant purpose.”¹⁷⁵ If anything more specific than a general goal of combating violence can be found in the statements, it is a particular concern about violence in the public realm—violence that threatens “public” safety and takes place outside of the home. Given these concerns, it is logical that Congress intended to reach situations like those raised in *Muscarello*, which brought guns outside of the home and endangered public safety. Therefore, the Court’s ruling properly interpreted and furthered congressional intent.

The Court also properly held that the rule of lenity did not apply in *Muscarello*.¹⁷⁶ The dissent argued that “[t]he sharp division in the Court” regarding the proper interpretation of “carries” proved “that the issue is subject to some doubt” and should therefore be “resolved in favor of the defendant.”¹⁷⁷ The Court’s decision is consistent with its refusal to apply the rule of lenity in *Smith v. United States*.¹⁷⁸ If the dissent’s view were adopted, every five to four opinion issued by the Court would potentially be subject to the rule of lenity. The rule properly applies only when the Court can make “no more than a guess as to what Congress intended.”¹⁷⁹ Here, the legislative history offers insight into Congress’s general goal of reducing violence in drug crimes. Considering this goal, as well as the statutory language analysis, the Court had much more than “a guess” as to the reach of the carry language. Therefore, it correctly declined to apply the rule of lenity.¹⁸⁰

B. THE COURT PROPERLY REJECTED THE “IMMEDIATE AVAILABILITY” STANDARD

The Court properly rejected the “immediate availability” test employed by the Second, Sixth, and Ninth Circuits.¹⁸¹ 18

¹⁷⁵ *Muscarello v. United States*, 118 S. Ct. 1911, 1917 (1998).

¹⁷⁶ *Id.* at 1919.

¹⁷⁷ *Id.* at 1924 (Ginsberg, J., dissenting) (quoting *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978)).

¹⁷⁸ *Smith v. United States*, 508 U.S. 223, 239-40 (1993).

¹⁷⁹ *Muscarello*, 118 S. Ct. at 1919 (quoting *United States v. Wells*, 519 U.S. 482, 499 (1997) (quoting *Reno v. Koray*, 515 U.S. 50, 65 (1995))).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*; see *supra* note 41 and accompanying text.

U.S.C. § 926A, cited by the dissent, refers to firearms and ammunition in a vehicle being "readily accessible" or "directly accessible."¹⁸² Section 926A demonstrates that if Congress had wanted to, it could have included the accessibility standard in 18 U.S.C. § 924. However, as currently written, § 924 contains no such language.

The immediate accessibility standard raises a number of practical difficulties as well. In *Bailey*, the Court posed a series of questions that illustrated complications in determining whether a firearm was immediately available: "How 'at the ready' was the firearm? Within arm's reach? In the room? In the house? How long before the confrontation did he place it there? Five minutes or twenty-four hours?"¹⁸³ In the context of automobiles, one can easily foresee similar questions arising: How close to the passenger was the firearm? Was it in a locked compartment? Did the ignition need to be turned off before using a key to unlock the compartment? Did the defendant need to get out of the car first, as with guns stored in the trunk? Was the weapon within reach of multiple passengers? Which passenger placed the weapon in the vehicle? As one author noted, "courts that continue to adhere to a requirement of immediate availability may be forced to resort to increasingly arbitrary line drawing and other lines of reasoning in order to free themselves from an 'availability' corner."¹⁸⁴

By holding that guns in vehicles are, by definition, "carried," the Court avoided these line drawing problems. In essence, the Court drew a line large enough to encompass all firearms located in vehicles in relation to a drug crime.

C. THE COURT'S OPINION CREATES A DOUBLE STANDARD FOR AUTOMOBILES

Under the current version of 18 U.S.C. § 924(c)(1) (as interpreted by the Court), with the exception of drug crimes committed in automobiles, guns that are not being "actively employed" or physically carried on the person will not be cov-

¹⁸² See *supra* note 163.

¹⁸³ *Bailey v. United States*, 516 U.S. 137, 149 (1995).

¹⁸⁴ Broadbent, *supra* note 41, at 27.

ered under the statute.¹⁸⁵ A gun in a locked glove compartment or in the trunk will be "carried," and will thus be punished under the statute.¹⁸⁶ However, a gun hidden near a person during a drug crime, in a home or any other non-vehicular context, will not be "carried."¹⁸⁷ Cases not covered under the "carry" prong could be considered under the "use" prong. The situations would be subject to the "use" analysis of *Bailey*. Under *Bailey*, unless the defendant "actively employs" the weapon, he will not be subject to the penalty enhancement of § 924.¹⁸⁸

For example, in *United States v. Moore*,¹⁸⁹ a defendant found asleep in a bedroom with four immediately accessible weapons escaped a conviction under 18 U.S.C. § 924 on the grounds that he had not "transported" the weapons.¹⁹⁰ The case caused at least one scholar to ask (pre-*Muscarello*), "what if Moore had been discovered sleeping in a vehicle parked in his driveway which contained guns and drugs?"¹⁹¹ After *Muscarello*, the defendant might be convicted under § 924 (on the theory that firearms in a vehicle are considered "carried").¹⁹² The disparate treatment of the two situations seems illogical, as well as unjust.

One possible justification for the harsher treatment is that carrying a gun in a car brings firearms into the public domain; "[i]f the purpose of 18 U.S.C. § 924(c) (1) is to reduce danger to society . . . perhaps drug selling which occurs on the streets and out among the public warrants harsher sanctions than selling from a private residence in light of its higher attendant risk."¹⁹³

¹⁸⁵ See generally Gilbert, *supra* note 14, at 856 ("Astute statutory construction, however, should not yield punishment under the statute in situations where a gun is merely stored in proximity to a drug transaction and is accessible during that transaction.") (citing *Bailey v. United States*, 516 U.S. 137 (1995)).

¹⁸⁶ *Muscarello v. United States*, 118 S. Ct. 1911, 1913-14 (1998).

¹⁸⁷ See e.g. *United States v. Moore*, 76 F.3d 111, 113 (6th Cir. 1996).

¹⁸⁸ *Bailey v. United States*, 516 U.S. 137, 143 (1995).

¹⁸⁹ *Moore*, 76 F.3d at 111.

¹⁹⁰ *Id.* See Broadbent, *supra* note 41, at 27.

¹⁹¹ Broadbent, *supra* note 41, at 27.

¹⁹² See *Muscarello v. United States*, 118 S. Ct. 1911, 1913-14 (1998). The result in a case with a defendant sleeping in a car is not certain. It is possible that the Court could hold that a defendant sleeping in a vehicle had not "carried a firearm" if the drugs and guns never actually moved. *Muscarello* involved a defendant "who knowingly possesse[d] and convey[ed]" firearms. *Id.* (emphasis added).

¹⁹³ Broadbent, *supra* note 41, at 28.

This view could be seen as consistent with Representative Poff's statement about convincing criminals to leave their guns at home.¹⁹⁴ Under this reasoning, although both situations are undesirable and dangerous, it makes sense that a penalty-enhancement provision should impose stricter sentencing for the act that endangers the public welfare.¹⁹⁵

There are a number of problems with this argument, however. The current interpretation of the statute not only creates a dichotomy between the punishment for using or carrying guns in cars and using or carrying guns in houses—it also results in different treatment for drug deals conducted on street corners, in the woods, or on front lawns as well. Having guns in these situations would endanger public safety just as much as, if not more than, transactions occurring within automobiles. However, unless the gun was "actively employed" or physically carried, the defendant would be free from the punishment of 18 U.S.C. § 924.

Additionally, the idea that drug deals that take place in homes are free from the public domain is unrealistic. Children and innocent parties are likely to be present in homes or buildings where drugs and violence mix.¹⁹⁶ Harsher treatment for guns in the public realm may merely push firearms into homes, rather than eliminating their use. It may also suggest that those who enter homes where drugs are sold are not worthy of protection or statutory concern. At least one author has suggested that the policy may be motivated by a desire to "keep undesirable members of society stationary, i.e. where the drugs are—presumably in lower income areas, and to discourage migration to other more affluent neighborhoods."¹⁹⁷ The idea that this

¹⁹⁴ 114 CONG. REC. H22231 (1968) (statement of Rep. Poff); *see also* 131 CONG. REC. S16903 (1985) (Sen. D'Amato proposed amendment to add narcotics crimes to § 924 (c)(1) "to guarantee that we treat drug trafficking as seriously as we do other armed felonies *threatening public safety*." (emphasis added); 132 CONG. REC. S7941 (1986) (Sen. Bumpers explained that the statute was working "to keep many dangerous defendants *off the streets* while awaiting trial") (emphasis added).

¹⁹⁵ Broadbent, *supra* note 41, at 28.

¹⁹⁶ In a CBS News/New York Times poll conducted in April, 1998, 15% of teenagers polled said they owned their own gun, 38% said someone else in their house owned one, and 60% claimed to know how to use a gun. Reuters, *Poll: Violence, Drugs are Top Teen Worries*, ORLANDO SENTINEL, April 30, 1998, at A9.

other more affluent neighborhoods.”¹⁹⁷ The idea that this motivated Congress to pass the statute seems unlikely, but it may well be an unintended effect.

The manner in which 18 U.S.C. § 924(c)(1) is currently applied, although correct from a judicial standpoint, is illogical in practice. Not only does the statute suffer from an inconsistency in its application to different locations (non-vehicular and vehicular), but it lacks realistic effectiveness as well. By failing to reach guns hidden nearby during a drug deal, the statute misses exactly what it is intended to punish; “[t]he typical drug transaction does not occur with each party holding the other at gunpoint.”¹⁹⁸ Rather, guns are more likely to be kept nearby, where they can easily be reached when necessary. If visible, the guns may be said to have been “used” under the definition (“active employment”) in *Bailey*, which included the brandishing of a gun so as to facilitate the crime.¹⁹⁹ However, if hidden in a cabinet or drawer, the guns would not fall under § 924 liability as the statute is currently interpreted.

D. “POSSESSION” AMENDMENT WOULD ELIMINATE DOUBLE STANDARD

In response to the difficulty interpreting 18 U.S.C. § 924(c)(1), legislators have proposed a number of amendments over the years that would alter the statutory language to replace “uses or carries” with “possesses.”²⁰⁰ Unlike “use” or “carry,” possession would apply to situations in which the gun is not physically on a defendant’s person, or necessarily within his/her

¹⁹⁷ See Broadbent, *supra* note 41, at 28.

¹⁹⁸ See Kesselman, *supra* note 22, at 559. Kesselman argues that the Supreme Court’s definition of “active uses” in *Bailey v. United States*, 516 U.S. 137 (1995) should have included guns hidden within the immediate reach of the perpetrator. *Id.* at 559-60.

¹⁹⁹ See *supra* note 33 and accompanying text. See also *United States v. Ramos*, 147 F.3d 281, 285 (3rd Cir. 1998) (holding that firearms laid on table during drug transaction satisfied “use” prong of § 924(c)(1)).

²⁰⁰ See, e.g., H.R. 810, 105th Cong. § 2123 (1997) (Anti-Gang and Youth Violence Control Act of 1997) (striking “uses or carries a firearm” and replacing it with “possesses a firearm”); H.R. 3155, 105th Cong., 2nd Sess. (1998) (adding a penalty enhancement for one who “possesses a firearm” “during and in relation to” a drug crime). See generally Whiting, *supra* note 13, at 689-90.

reach.²⁰¹ Thus, a "defendant keeping a gun in the bedside table or in a closet with drugs would receive the same punishment as a defendant who puts a gun in the change compartment of a car during a drug transaction."²⁰² Both will be found to have possessed the weapon.

The term "possesses" will of course raise some line-drawing problems of its own. The same criticisms expressed in regard to the immediately availability standard could apply.²⁰³ However, courts frequently apply the term "possession" in the context of narcotics offenses, as well as other firearms statutes, and thus have an established standard to use.²⁰⁴

"Possession" would likely be construed by a court to include not only "actual possession," but "constructive possession" as well.²⁰⁵ In *United States v. Rogers*, the First Circuit found no error in the following jury instructions defining possession:

The term "possess" as used in [§ 922(g)] *is not necessarily equated with legal ownership* of the firearm here at issue. The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then said to be in actual possession of that thing. A person who, although not in actual possession, knowingly *has both the power and the intention* at a given time to exercise dominion or control over a thing, or *to exercise dominion or control* over the area in which that thing is found, whether di-

²⁰¹ See Tonya Swackhamer, Note, *Smith v. United States: The Supreme Court Defines Use*, 20 OHIO N.U.L. REV. 1093, 1100 (1994) (citing *United States v. Torres-Medina*, 935 F.2d 1047, 1049 (9th Cir. 1991)).

²⁰² See Whiting, *supra* note 13, at 721.

²⁰³ See *supra* notes 183-84 and accompanying text. Constructive possession, discussed *infra* notes 205-08 and accompanying text, would answer most of these questions. Under that standard, a defendant would probably possess the weapon regardless of how close the passenger was to the firearm, whether it was in a locked glove compartment, and whether the defendant needed to go to the trunk to obtain it. The questions regarding multiple passengers, and who placed the firearm in the vehicle, would be considered with regard to ownership, control, and dominion over the weapon. See *United States v. Rogers*, 41 F.3d 25, 30 (1st Cir. 1994) (quoting *United States v. Zavala Maldonado*, 23 F.3d 4, 7 (1st Cir. 1994)).

²⁰⁴ See, e.g., *United States v. Torres-Medina*, 935 F.2d 1047 (9th Cir. 1991); *Rogers*, 41 F.3d at 25.

²⁰⁵ See *Rogers*, 41 F.3d at 29 ("Under settled law, 'possession' includes not merely the state of . . . hands-on physical possession but also 'constructive' possession") (quoting *United States v. Zavala Maldonado*, 23 F.3d 4, 6 (1st Cir. 1994)).

rectly or through another person, is then in constructive possession of the thing.²⁰⁶

A shorter, commonly used definition of constructive possession is "the power and intention to exercise control, or dominion and control, over an object not in one's 'actual' possession."²⁰⁷

Although the "possession" standard appears to be similar to "immediate availability," when applied the two terms work quite differently. For example, in *United States v. Torres-Medina*, the Ninth Circuit held that the defendant "possessed" narcotics when he had them hidden in a tunnel beneath his house, even though the defendant was a paraplegic, in a wheelchair, and could not get in the tunnel to retrieve them himself.²⁰⁸ The same charge would likely fail under an immediate availability standard, given the location of the gun and the considerable effort required to retrieve it.

Some may argue that constructive possession is overly broad for the purposes of 18 U.S.C. § 924. It could include a firearm "while it is hidden at home in a bureau drawer, or while held by an agent, or even while it is secured in a safe deposit box at the bank."²⁰⁹ In order to prevent the statute from overreaching, Congress could consider specifically providing that § 924 cover only "actual possession" of a firearm. This would limit the statute to reach only those firearms that a defendant has "direct physical control over . . . at a given time."²¹⁰

²⁰⁶ *Id.* at 30 (emphasis in original).

²⁰⁷ *Id.* (quoting *Zavala Maldonado*, 23 F.3d at 7).

²⁰⁸ *Torres-Medina*, 935 F.2d at 1050. The court also held that the defendant violated the "use" prong of § 924 by having a firearm stored with the drugs. Assuming that someone (a witness who had testified to assisting the defendant in drug deals) could withdraw the gun for him, the court found that the gun was "available" to him, and thus "emboldened him in the commission of his crime." *Id.* at 1050. This analysis is probably incorrect after *Bailey*. See *Bailey v. United States*, 516 U.S. 137, 143 (1995).

²⁰⁹ *Rogers*, 41 F.3d at 29 n.2 (quoting *Zavala Maldonado*, 23 F.3d at 7).

²¹⁰ *Id.* at 30. To maintain the result reached in *Muscarello*, a court would probably need to apply a constructive possession standard, rather than actual possession (since the defendants stored the guns in the trunk, and needed considerable effort to retrieve them). Congress could specifically apply constructive possession to vehicles, but if actual possession were applied elsewhere, that would create an equally problematic double standard.

However, the "actual possession" limitation would raise the same practical difficulties as the immediate availability standard.²¹¹ With constructive possession, courts will still be drawing lines, but they will be the same lines that they draw for narcotics and gun possession statutes all the time. The statute would reach many more situations involving the mix of guns and drugs, and would become infinitely more effective.

Focusing on the "in relation to" language of the statute would allay the fear that "possession" could punish the possession of guns incidentally in proximity to a crime, and "instances where the gun is stored in the home for some legitimate purpose."²¹² Careful scrutiny of the "in relation to" element "will ensure that possession unrelated to the illegal conduct will not be punished."²¹³ Situations where firearms "'played' no part in the crime" will be free from § 924 liability.²¹⁴ Thus, individuals would be protected from unfair sentence-enhancement when their firearms have truly performed no role in the drug crime.

Some might argue that mandatory sentences, in general, are not be the most effective way to combat crime. According to the Federal Bureau of Justice Statistics, between 1984 and 1994, "the number of convicts admitted each year to the nation's state and federal prisons grew by 120 percent, from 246,260 [in 1984] to 541,434 [in 1994]. The taxpayer's bill for corrections also more than doubled, to \$31.5 billion."²¹⁵ Yet the problem of drugs and violence in our country has hardly disappeared. By some estimates, "there is a gun for every man, women and child

²¹¹ See *supra* notes 183-84 and accompanying text.

²¹² See Whiting, *supra* note 13, at 720.

²¹³ *Id.*

²¹⁴ *Muscarello v. United States*, 118 S. Ct. 1911, 1919 (1998). The "in relation to" requirement does create some oddities of its own. Defendants who could show that they carried their guns for purposes other than the drug offense would be more likely to escape punishment than those who carried guns only during the crime. So, in essence, carrying a gun *more* often could benefit a crafty defendant. In oral arguments before the Supreme Court in *Muscarello*, the defendant's attorney was asked: "So it follows from your analysis that the informed drug dealer . . . will have a gun in his car at all times, when he goes shopping, when he goes to church, and when he distributes the drugs." United States Supreme Court Official Transcript at 11-12, *Muscarello* (Nos. 96-1654, 96-8837).

²¹⁵ David Anderson, *Retribution vs. Intervention*, STAR-TRIBUNE (Minneapolis-St. Paul), June 5, 1997, at 24A.

in America.”²¹⁶ Mandatory sentencing conflicts with our ideal vision of a criminal justice system that looks to every defendant’s individual problems, needs, and deservedness of punishment before fashioning a sentence. However, given the docket load in our court system, and the degree to which guns and drugs remain inexorably linked, mandatory sentences may currently be the only way to decrease gun use in the drug trade.

There are strong policy arguments for expanding the reach of 18 U.S.C. § 924 to cover guns hidden nearby during a drug transaction in a non-vehicular environment. Many of these arguments were raised in support of expanding the scope of the “use” definition before (and as criticism after) *Bailey v. United States*.²¹⁷ As one author wrote, “in an ‘imminent confrontation’ case the weapon could be discharged at any moment . . . [I]t is hard to rationalize how the drug dealer in an ‘imminent confrontation case’ does not increase the danger to society even more so than in *Smith*.”²¹⁸ The Supreme Court declined to extend the definition of “use” in *Bailey* to cover such situations,²¹⁹ and as currently written and interpreted by the Court, the “carry” phrase will not reach them either. A gun hidden in a nearby cabinet is in no way being “carried.” If Congress wants to reach these cases, it must amend § 924.

Amending 18 U.S.C. § 924 to cover cases of “possession” would provide for a more efficient and consistent application of the penalty-enhancement provisions of the statute. A Congressional amendment would greatly increase the effectiveness of § 924: “A uniform standard would send a clear signal to take the guns away from the drug crime by raising the cost to a level which might affect a defendant’s decision to carry or use a gun during the transaction.”²²⁰ Not every defendant will rationally

²¹⁶ Evan Moore, *Most Guns Start With Legal Sale*, SEATTLE POST-INTELLIGENCER, October 21, 1997, at A1.

²¹⁷ 516 U.S. 137 (1995).

²¹⁸ See Kesselman, *supra* note 22, at 560. “Imminent confrontation” is used to refer to cases in which the gun is hidden within immediate reach during a drug transaction. *Id.* at 559.

²¹⁹ See generally Gilbert, *supra* note 14.

²²⁰ Whiting, *supra* note 13, at 721. See also Broadbent, *supra* note 41, at 28 (citing *United States v. Malcuit*, 104 F.3d 880, 886, (6th Cir. 1997) (§ 924(c)(1) did not apply

consider this cost, but as long as "a gun is as easy to get as a pack of cigarettes,"²²¹ amending § 924 may be Congress's most viable alternative.

VI. CONCLUSION

The Supreme Court correctly decided *Muscarello v. United States*, holding that the "carry" language of 18 U.S.C. § 924 (c)(1) reaches firearms "carried" in vehicles in relation to drug trafficking crimes.²²² The statutory language and legislative history of the provision supported the Court's interpretation. The Court reasoned correctly when it rejected the "immediate availability" standard used by a number of circuits, which went beyond the language of the statute.

However, the Court's decision in *Muscarello* does create a double standard: drug transactions involving firearms in automobiles will be punished more frequently than in non-vehicular cases. *Muscarello* significantly broadened the scope of 18 U.S.C. § 924 (c)(1) after a narrow holding in *Bailey*. However, *Muscarello* does not preclude the need to amend the statute.²²³ As the statute currently stands, firearms hidden nearby during a drug transaction in a dwelling will not be punished, while a gun locked away in the trunk of a car will. Amending § 924 to replace "uses or carries a firearm" with "possesses a firearm" will eliminate this double standard and expand the statute's coverage to effectively combat violence in drug crimes.

Lynn Marsella

to defendant who conducted drug transaction in his car with guns in the backseat, when evidence showed his father had given him the gun that day for protection of his new home)).

²²¹ See Moore, *supra* note 216, at A1 (quoting 34-year-old murderer Evan Jean Lollless, who is currently serving a life sentence).

²²² 118 S. Ct. 1911 (1998).

²²³ Legislators and commentators alike have been suggesting the amendment for years. See *supra* note 200; Bettenhausen, *supra* note 22, at 715 ("overhaul of § 924 (c)(1) is needed. . ."); Whiting, *supra* note 13, at 722 ("legislature should amend the statute to replace the 'carrying' or 'using' of a gun under § 924(c) with 'possession' of a gun during or in relation to a drug trafficking offense. . .").

