

Criminal Law—Distinction with a Difference: First Circuit Misapplies *Smith* by Holding Bartering Drugs for Guns “Use” Under 18 U.S.C. § 924(c)(1)—*United States v. Cotto*, 456 F.3d 25 (1st Cir. 2006)

In 1986, Congress amended the criminal code to make the use of a firearm in relation to a drug trafficking crime separately punishable by up to thirty years imprisonment.¹ The Supreme Court subsequently held that bartering firearms in exchange for drugs constituted “use” within the meaning of 18 U.S.C. § 924(c)(1).² In *United States v. Cotto*,³ the First Circuit Court of Appeals considered whether the reverse exchange, bartering drugs for firearms also constituted “use” under § 924(c)(1).⁴ The court held that the Supreme Court’s conclusion that bartering guns for drugs constituted “use” applied with equal force to the reverse exchange of drugs for guns.⁵

Jose Cotto, Jr. was a drug dealer.⁶ One of his clients, Amanda Tew, paid for her heroin exclusively by bartering guns, which she stole from her grandparents’ house where she was living at the time.⁷ Soon after her arrest for heroin possession, Tew agreed to cooperate with the Bureau of Alcohol, Tobacco and Firearms (ATF), and arranged for an exchange with Cotto.⁸ Cotto specifically inquired as to whether Tew had any handguns.⁹

1. 18 U.S.C. § 924(c) (1984), amended by U.S.C. § 924(c) (1986). The current version reads:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c) (2000).

2. See *Smith v. United States*, 508 U.S. 223, 228 (1993) (employing broad statutory construction). The dictionary defines barter as “to trade goods or services without the exchange of money.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 152 (3d ed. 1996).

3. 456 F.3d 25 (1st Cir. 2006).

4. See *id.* at 27 (reviewing language of § 924(c)(1)).

5. See *id.* at 28-29 (stating Supreme Court precedent required result).

6. See *id.* at 26 (detailing facts of case).

7. See 456 F.3d at 27 (detailing some twenty “heroin-for-guns” exchanges from 1999 to 2000). Cotto always inspected the firearm before paying Tew in heroin. *Id.*

8. See *id.* at 27 (explaining ATF recorded conversation). Tew arranged the exchange of a MAC-11 and two .380 caliber handguns for “a couple of bricks” of heroin in a parking lot behind a store. *Id.*

9. See *id.* at 26 (alluding to distinction some circuits made between initiating gun exchange and

Cotto met with Tew in a parking lot and, after inspecting them, he transferred the guns into his trunk.¹⁰ The police arrested Cotto before he could deliver the heroin.¹¹ Cotto pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), but pled not guilty to using a firearm during and in relation to a drug trafficking crime.¹² A jury convicted Cotto of violating § 924(c)(1) and the District Court of Massachusetts sentenced him to sixty additional months of imprisonment.¹³ Cotto appealed, arguing that bartering drugs for guns did not constitute “use” of the firearms.¹⁴

In 1986, Congress amended the Gun Control Act of 1968 to make punishable the use of a firearm “during and in relation to” a drug trafficking crime.¹⁵ The sparse legislative record at the time of enactment, as well as subsequent piecemeal amendments, made it difficult for courts to discern Congress’s intended scope for the term “use.”¹⁶ In *Smith v. United States*,¹⁷ the Court considered whether bartering firearms in exchange for drugs constituted “use” under 18 U.S.C. § 924(c)(1).¹⁸ Purporting to interpret the “ordinary or natural meaning” of the statute, the Court broadly construed “use” to include

accepting it); *see also infra* note 31 (detailing several circuit decisions distinguishing between passive acceptance and active seeking of firearm).

10. *See* 456 F.3d at 27 (describing transaction between Cotto and Tew).

11. *See* 456 F.3d at 27 (describing Cotto with two bundles of heroin and thirty-eight dollars at time of arrest).

12. *See id.* (reviewing procedural history).

13. *See id.* (noting court sentenced Cotto to eighty-four months of imprisonment for his felon-in-possession conviction).

14. *See id.* (outlining Cotto’s argument and noting court reviewed his preserved claim de novo). Cotto also argued that the judge improperly used a preponderance of the evidence standard in applying the federal sentencing guidelines. *Id.* at 30.

15. 18 U.S.C. § 924(c) (1984), amended by 18 U.S.C. § 924(c) (1986); *see also* Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224 (1968) (laying out sentencing requirements). The Gun Control Act of 1968 states:

[w]hoever (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.

Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224 (1968); *see also* Kristin Whiting, Note, *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, 682-90 (1997) (reviewing evolution of 18 U.S.C. § 924(c)).

16. *See* Thomas A. Clare, Note, *Smith v. United States and the Modern Interpretation of 18 U.S.C. § 924(c): A Proposal to Amend the Federal Armed Offender Statute*, 69 NOTRE DAME L. REV. 815, 825-26 (1994) (describing series of amendments as “piecemeal”); John K. Mehochko, Note, *18 U.S.C. § 924(c): Liability for Both Parties to a Guns-for-Drug Trade, A Criticism of United States v. Westmoreland*, 1999 U. ILL. L. REV. 327, 332 n.46, 338 n.92 (1999) (reviewing lack of clear legislative intent); *see also* Jamilla A. Moore, *These are Drugs. These are Drugs Using Guns. Any Questions? An Analysis of the Diverse Applications of 18 U.S.C. section 924(c)(1)*, 30 CAL. W. L. REV. 179, 180-81 (1993) (discussing pre-*Smith* circuit confusion).

17. 508 U.S. 223 (1993).

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

nontraditional theories of firearm use such as bartering.¹⁹ Advancing a public policy rationale for a broad construction, the Court emphasized the inherent dangerousness of firearms in a drug transaction, noting “[guns] can be converted instantaneously from currency to cannon.”²⁰ It also rejected using the rule of lenity—construing ambiguity in criminal statutes in favor of the defendant—as the majority acknowledged no such ambiguity in the plain meaning of “use.”²¹

Two years later, in *Bailey v. United States*,²² the Supreme Court reigned in

19. See *Smith v. United States*, 508 U.S. 223, 228-30 (1993) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)) (relying upon Webster’s and Black’s Law dictionaries to define “use”). The majority favored “to convert to one’s service” or “to employ” as the ordinary meaning of “use.” *Id.* at 228-29. The Court reasoned that by trading his firearm for drugs the defendant “used” it as an item for barter. *Id.* at 229. It did somewhat restrain this expansive application by requiring that the firearm be used “during and in relation to” the drug trafficking crime, noting that a defendant who “uses a firearm to scratch his head” during a drug transaction would escape sanction. *Id.* at 232. *But see id.* at 241-43 (Scalia, J., dissenting) (arguing ordinary meaning of “use” in context is “use as a weapon”). Justice Scalia reiterated 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,” concluding that in the context of a statute designed to curtail gun violence, “use” means “use as a weapon.” *Id.* at 241. He argued that non-technical common words require sensitivity to context, which he suggested also implied a more narrow construction. *Id.* at 244-46; *see also* Craig Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary When Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 401, 420-23 (2003) (criticizing use of dictionaries to define “use” in *Smith*). Hoffman argues that dictionaries are seductive, but ultimately unhelpful in discerning statutory meaning because of the disparity between ordinary language and legal terms of art. *See* Hoffman, *supra*, at 438. *See generally* Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of “Use a Firearm,”* 73 WASH. U. L.Q. 1159 (1995) (exploring difficulty when justices disagree about everyday meaning of text); John Polich, Note, *The Ambiguity of Plain Meaning: Smith v. United States and the New Textualism*, 68 S. CAL. L. REV. 259 (1994) (reviewing opposing “plain meaning” readings and criticizing approach).

20. *United States v. Smith*, 508 U.S. 223, 240 (1993) (citing 1989 statistics indicating eighty percent of murders in Washington D.C. are drug related); *see also* 114 CONG. REC. 22, 231 (1968) (recording anti-crime motivation of lawmakers). *But see* *United States v. Smith*, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting) (rejecting judicial revision of congressional ambiguity). Scalia failed to discover such a clear legislative purpose and asserted, “[s]tretching language in order to write a more effective statute than Congress devised is not an exercise we should indulge in.” *Id.* at 247.

21. See *Smith v. United States*, 508 U.S. 223, 239-40 (1993) (dismissing use of rule of lenity). The majority found that the rule of lenity was not applicable because the “common usage” of the word “use,” as well as the legislative intent, left no ambiguity as to the meaning. *Id.* *But see id.* at 246-47 (Scalia, J., dissenting) (invoking rule of lenity where meaning is debatable). Scalia noted, with apparent amusement, that their very disagreement indicated an ambiguity. *Id.* at 246; *see also* *United States v. Wiltberger*, 18 U.S. 76, 95-96 (1820) (articulating public policy rationale for rule of lenity). The Court explained that, to avoid an unaccountable judiciary wielding wide latitude in interpreting criminal statutes more severely than the legislature intended, the power to punish individuals is properly vested in the legislature. *See United States v. Wiltberger*, 18 U.S. 76, 95-96 (1820); *see also* Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 8-16 (2006) (discussing history and relative strength of rule of lenity). Greenfield argues that the Court has inconsistently defined the scope of the rule of lenity, at times articulating a powerful doctrine that required Congress to speak “in language that is clear and definite.” Greenfield, *supra*, at 10 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)). More recently, the courts have seemingly relegated the rule of lenity to cases where all other tools of statutory construction have failed to remove the ambiguity. *Id.* at 11. *See generally* Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420 (2006) (discussing quasi Due Process origins of notice rationale and evolution of rule of lenity).

22. 516 U.S. 137 (1995).

the broadest reading of its interpretation of “use” in *Smith*.²³ The Court held that § 924(c)(1) requires an “active employment” of the firearm, making the firearm an operative factor in relation to the drug trafficking offense.²⁴ While the Court made clear that bartering guns-for-drugs remained “use” under § 924(c)(1), the “active employment” requirement in *Bailey* cast some doubt on whether passive receipt of guns in exchange for drugs would constitute a violation of the statute.²⁵ Congress reacted fiercely to *Bailey*, vocally disputing the Court’s interpretation of its language.²⁶

In *Bousley v. United States*,²⁷ the Court retroactively applied its holding in *Bailey* and sparked a tidal wave of litigation in the lower federal courts.²⁸ In the years following *Bailey*, circuits have divided nearly evenly on the question of whether bartering drugs for firearms constitutes “use” under § 924(c)(1).²⁹ The circuits have split primarily on the issue of whether *Smith* stands for the more narrow proposition that bartering a firearm for drugs constitutes “use” under §924(c)(1) or whether *Smith* held that any involvement in the bartering of firearms and drugs constitutes “use.”³⁰ The Sixth, Seventh, Eleventh, and D.C.

23. See *Bailey v. United States*, 516 U.S. 137, 143, 148 (1995) (establishing “active employment” test but refusing to overrule *Smith*). The Court held that a drug dealer who kept a firearm in a bag inside a locked trunk did not violate § 924(c)(1). *Id.* at 139, 142-43. It reasoned, “use must connote more than mere possession of a firearm by a person who commits a drug offense”. *Id.* at 143.

24. See *Bailey v. United States*, 516 U.S. 137, 142-43 (1995). The court held that “active employment” includes brandishing, displaying, bartering, striking with, and firing or attempting to fire a firearm, but refused to extend to having a concealed weapon “nearby” or “at the ready” with intent to use if necessary. *Id.* at 148-49.

25. See *Bailey v. United States*, 516 U.S. 137, 149 (1995) (providing inexhaustive list of actions not constituting use). See generally Tiffany Gulley Becker, Note, *The “Active Employment” Standard: Much-Needed Clarification for Determining Liability for “Use” of a Weapon During the Commission of Drug-Related Crime*, 61 MO. L. REV. 1065 (1996) (examining questions left unanswered by *Bailey*).

26. See Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41, 65 (2000) (finding congressional hostility toward *Bailey* decision). One senator described the decision as “soft on crime” and many viewed it as a setback for law enforcement. *Id.*; see also Angela LaBuda Collins, Note, *The Latest Amendments to 18 U.S.C. § 924(c): Congressional Reaction to the Supreme Court’s Interpretation of the Statute*, 48 CATH. U.L. REV. 1319, 1348-49 (1999) (noting Congress responded with the “Bailey Fix Act”). The legislation resulted in enhanced penalties for criminal offenders in possession of a firearm to correct the Supreme Court’s “latest blunder.” Collins, *supra* note 26, at 1349. But see Biddle, Note, *Let’s Make a Deal. Liability for “Use of a Firearm” When Trading Drugs for Guns under 18 U.S.C § 924(c)*, 38 VAL. U.L. REV. 65, 72 n.37 (2003) (noting Congress added “possession” of a firearm in furtherance of a felony to statute in 2000). Congress sought to broaden the statute’s reach in response to *Bailey*, a corollary of which is an implicit acceptance of a more narrow construction of “use.” Biddle, *supra* note 26, at 72 n.37.

27. 523 U.S. 614, 620-21 (1998).

28. See *Bousley v. United States*, 523 U.S. 614, 620-21 (1998) (applying “active employment” requirement retroactively); see also Biddle, *supra* note 26, at 82 n.79 (2003) (noting *Bousley*’s retroactive application cited in approximately 600 cases between 1998 and 2002).

29. See 456 F.3d at 28 (reviewing circuit split); see also *infra* notes 31 and 32 (detailing circuit split).

30. See John K. Mehochko, *18 U.S.C. § 924(c): Liability for Both Parties to a Guns-for-Drugs Trade, A Criticism of United States v. Westmoreland*, U. ILL. L. REV. 327, 352 (1999) (discussing difficulty of plain meaning statutory interpretation where several plausible interpretations exist); see also Biddle, *supra* note 26, at 82-90, 103 (highlighting circuit split and noting Court’s refusal to apply rule of lenity in *Smith*). The circuits

Circuit Courts of Appeals have distinguished bartering drugs for guns from the holding in *Smith*.³¹ The Second, Third, Fifth, and Ninth Circuits have decided that *Smith* binds the courts to find all bartering of guns and drugs to be “use.”³²

In *United States v. Cotto*, the First Circuit Court of Appeals considered whether one who barter drugs for firearms has “used” those firearms within the meaning of 18 U.S.C. § 924(c)(1).³³ The court began by acknowledging the merit of Cotto’s argument that the “common understanding” of the word “use” does not naturally include acceptance.³⁴ Had this been a matter of first impression, the court indicated that it may have decided in Cotto’s favor.³⁵ Instead, the court viewed *Smith* and *Bailey* as applying to bartering drugs for guns and, therefore, required the court to find “use” under § 924(c)(1).³⁶ While noting that several circuits have distinguished between “passive acceptance” of

have disagreed as to whether passive acceptance of a firearm constitutes “use” and have used the “plain meaning” method of statutory construction to arrive at conflicting results. See Biddle, *supra* note 26, at 82-87. Biddle suggests the rule of lenity could be used to construe § 924(c) narrowly. See *id.* at 104.

31. See *United States v. Montano*, 398 F.3d 1276, 1281-84 (11th Cir. 2005) (reading *Smith* to define bartering firearm as “use” but silent on question of bartering in general). The *Montano* court concluded that a defendant who never gained possession of the firearms could not be said to have employed or derived service from the guns. *Id.* at 1284; see also *United States v. Stewart*, 246 F.3d 728, 731 (D.C. Cir. 2001) (rejecting bartering drugs for guns as “use”). The court held “nothing in a person’s acceptance of a gun embodies the active employment demanded by the Court in *Bailey*.” *United States v. Stewart*, 246 F.3d 728, 731 (D.C. Cir. 2001). It also rejected the argument that a defendant who initiates an exchange of drugs for guns, as opposed to merely acquiescing to such a trade, should be relevant to the legal question of the scope of “use.” *Id.* at 732; *United States v. Warwick*, 167 F.3d 965, 975-76 (6th Cir. 1999) (holding “passive receipt” of firearm not “use” but noting police injected firearm into exchange negotiations); *United States v. Westmoreland*, 122 F.3d 431, 434-36 (7th Cir. 1997) (explaining “there is no grammatically correct way to express that a person receiving a payment is thereby ‘using’ the payment”). The *Westmoreland* court emphasized, however, that the transaction occurred between a government agent and that the defendant and “might well have a different case had the transaction occurred between two defendants.” *United States v. Westmoreland*, 122 F.3d 431, 436 (7th Cir. 1997).

32. See *United States v. Sumler*, 294 F.3d 579, 583 (3d Cir. 2002) (holding “brute force” of *Smith* and *Bailey* required holding of “use”). The *Sumler* court quoted Judge Learned Hand’s admonition that “it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary.” *Id.* at 583 (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945)); see also *United States v. Ramirez-Rangel*, 103 F.3d 1501, 1506 (9th Cir. 1997) (concluding “no question” bartering drugs for guns violates § 924(c)). The court did, however, express concern for the possibility of quasi-police entrapment. See *United States v. Ramirez-Rangel*, 103 F.3d 1501, 1506 (9th Cir. 1997). Specifically, it wondered whether, if a defendant’s intent is utterly immaterial, the police could simply bring machine guns to the exchange, which carry a heavier penalty, and thereby determine the penalty without him exercising any choice as to the type of firearm. *Id.*; *United States v. Ulloa*, 94 F.3d 949, 956 (5th Cir. 1996) (holding bartering drugs for guns “use” because guns an “operative factor” in drug trafficking offense); *United States v. Cannon*, 88 F.3d 1495, 1509 (8th Cir. 1996) (labeling distinction between bartering drugs-for-guns and bartering guns-for-drugs a “distinction without a difference”).

33. See 456 F.3d at 26 (acknowledging circuit split on the issue).

34. See *id.* at 28 (recognizing linguistic inelegance). The court conceded, “while it is easy to understand how he ‘used’ the heroin to get the guns, it is somewhat less natural to say that he ‘used’ the guns as well.” *Id.*

35. *Id.* (opining “natural reading” of statute precludes violation for accepting guns).

36. See *id.* at 28-29 (reviewing Supreme Court precedent). The court noted that *Smith* stands for the proposition that a firearm may be “used” as both a weapon and an item for barter. *Id.* at 28. It also emphasized that the “active employment” requirement in *Bailey* specifically included bartering a firearm. *Id.* at 29.

firearms and “deliberate activity,” the court held that Cotto’s affirmative acceptance of the firearm-for-drugs exchange prior to the transaction fell well within *Bailey*’s “active employment” requirement.³⁷ Finally, the court found additional contextual support for considering bartering drugs for guns as “use” when read together with the statutory language surrounding § 924(c).³⁸

The First Circuit Court of Appeals incorrectly applied the Supreme Court precedent of *Smith* and *Bailey*.³⁹ *Bailey* represented a delicate withdrawal from *Smith*’s expansive interpretation of “use” towards Scalia’s withering dissent, which had gained traction in the intervening years.⁴⁰ Neither decision addressed the specific factual situation presented to the First Circuit: bartering drugs for guns.⁴¹ In the absence of precedent applying directly to the facts presented in *Cotto*, the First Circuit abdicated its responsibility to provide clear legal reasoning for its decision.⁴² The court’s sympathetic language for both positions, while perhaps an open invitation for guidance from the Supreme Court, only adds to the confusion among the circuits.⁴³

37. See 456 F.3d at 28-29 (demonstrating Cotto’s active employment). The court noted that Cotto actively sought out the firearms and accepted them as payment well in advance of the transaction. *Id.* at 29. The court favorably cited the reasoning in *United States v. Frederick*, 406 F.3d 754, 764 (6th Cir. 2005), that a defendant’s willingness to accept possession of a gun as consideration for drugs he wishes to sell promotes or facilitates that drug trafficking crime. *Id.* Cotto’s active acceptance of the firearms precluded the court from following several circuits in distinguishing where quasi-police entrapment exists. See *id.* at 29-30; cf. *United States v. Warwick*, 167 F.3d 965, 975-76 (6th Cir. 1999) (noting undercover officer injected firearm into transaction).

38. See 456 F.3d at 28-29 (reviewing other sections of § 924 containing word “use”). The court noted that under 18 U.S.C. § 924(d)(1), any firearm “intended to be used” in any offense listed in § 924(d)(3) is subject to sanction. *Id.* This list includes receipt of a firearm. *Id.* The First Circuit determined a broad reading of “use” advanced Congress’s rationale behind § 924(c) to deter the dangerous combination of drugs and firearms. *Id.* at 29-30.

39. See *id.* at 28-29 (restating holding in *Smith* and *Bailey*). The First Circuit reasoned *Smith*’s broad holding that use of an item for barter constituted “use,” as well as *Bailey*’s holding that bartering was “active employment,” compelled a determination that receipt of a firearm was also “use.” *Id.*

40. See *supra* notes 23-25 and accompanying text (demonstrating narrowing of *Smith* through *Bailey* holding); see also Biddle, *supra* note 26, at 90-93 (examining evolution of Supreme Court’s reasoning). Biddle implies that *Bailey* purported not to overrule *Smith* to save Justice O’Connor the embarrassment of being overruled so soon after penning the majority opinion. See Biddle, *supra* note 26, at 90-93. Nevertheless, *Bailey* represented a substantial abandonment of the sweeping language of *Smith*. *Id.* at 91. While courts could reasonably read *Smith* to sanction use of a firearm for any purpose “during or in relation to” a drug trafficking crime, *Bailey* made clear that the defendant must actively employ the firearm to satisfy the “use” requirement under § 924(c). *Id.* at 90-92. Biddle concludes that although *Bailey* is consistent with the fact-specific holding in *Smith*, the *Bailey* Court’s contention that *Smith*’s interpretation of “use” is consistent with the active employment requirement was an attempt to nullify the *Smith* Court’s broad interpretation without acknowledging the error of that interpretation. *Id.* at 90, 92-93.

41. Compare *Bailey v. United States*, 516 U.S. 137, 143 (1996) (considering whether mere gun possession during commission of drug trafficking offense constitutes “use”), and *Smith v. United States*, 508 U.S. 223, 225 (1993) (resolving specifically whether bartering guns for drugs constituted “use”), with 456 F.3d at 26 (deciding precise question of bartering drugs for guns).

42. See 456 F.3d at 29 (making cursory statutory review and pointing to public policy reasons for interpretation).

43. See 456 F.3d at 28-29 (expressing contradictory impulses). The court characterized Cotto’s argument as “not without merit” but also found “other reasons” for rejecting Cotto’s position beyond Supreme Court

Whether bartering drugs for guns constitutes “use” under § 924(c)(1) is a more vexing question—as the “plain meaning” method of statutory interpretation, employed in *Smith* for “using” a firearm to barter for drugs—is decidedly more tenuous when applied to bartering drugs for guns.⁴⁴ Just as Justices O’Connor and Scalia differed on the “plain meaning” of the statute, such a method of interpretation has borne conflicting results among the circuits considering the reverse exchange.⁴⁵ While *Bailey* made clear that bartering a firearm for drugs was “active employment,” it is harder to say that a person who receives a firearm has actively employed it.⁴⁶ In the absence of a clear meaning, the court should have employed the rule of lenity to construe the statute more narrowly.⁴⁷

A narrow construction, however, may run counter to the likely public policy objective of the statute: to deter the combination of firearms and drug transactions.⁴⁸ Criminalizing the act of bartering a firearm but not receiving one in the same exchange will also have the unsettling effect of punishing the drug user more severely than the drug dealer.⁴⁹ Furthermore, if congressional reaction to *Bailey* is any indication, there is little legislative appetite for leniency for drug offenders.⁵⁰ Yet, the Supreme Court has the power to clarify its holding in *Smith* and Congress can, and often does, revisit statutes it believes the Supreme Court has misinterpreted.⁵¹ As long as such ambiguity persists, the First Circuit has a responsibility to resolve that uncertainty in favor of the defendant.⁵²

In *United States v. Cotto*, the First Circuit Court of Appeals considered whether one who barter drugs for firearms has “used” those firearms within

precedent. *Id.* See also *supra* notes 31-32 (summarizing post-*Bailey* circuit split).

44. See *Smith v. United States*, 508 U.S. 223, 237-40 (1993) (struggling with statutory construction); see also Polich, *supra* note 19, at 279-82 (critiquing textual analysis employed in *Smith*). Polich argues both O’Connor’s broad dictionary reading and Scalia’s “ordinary” interpretation of “use . . . for its intended purpose” are reasonable but grounded in little more than intuition. See Polich, *supra* note 19, at 279-82.

45. See *supra* notes 31-32 (illustrating circuits on both sides acknowledge reading of “use” counterintuitive); see also Cunningham & Fillmore, *supra* note 19, at 1165 (explaining failure of “plain meaning” interpretation when justices disagree about everyday meaning of text).

46. *Bailey v. United States*, 516 U.S. 137, 148 (1995) (listing bartering as type of “active employment”).

47. See *supra* note 21 and accompanying text (describing rule of lenity and its application to ambiguous statutory language).

48. See 114 CONG. REC. 22, 231 (1968) (floor amendments proposed by Representative Poff). Representative Poff advocated for the amendment to “persuade the [criminal] to leave his gun at home.” *Id.*; see also 18 U.S.C. § 924(c) (1982), as amended by 18 U.S.C. § 924(c) (Supp. IV 1987) (amending statute to include drug trafficking crimes).

49. See Mehochko, *supra* note 16, at 353-56 (exploring public policy effects of both constructions).

50. See *supra* note 26 and accompanying text (describing congressional hostility towards perceived leniency).

51. See 18 U.S.C. § 924(c) (2006); *Smith v. United States*, 508 U.S. 223, 228 (1993) (deciding issue broadly); see also Clare, *supra* note 16, at 825-26 (reviewing frequent congressional intervention).

52. See *supra* notes 21 and accompanying text (articulating argument for use of rule of lenity); see also *Smith v. United States*, 508 U.S. 223, 247 n.4 (1993) (Scalia, J., dissenting) (disparaging intuiting public policy justification for ambiguous statutory language).

the meaning of 18 U.S.C. § 924(c)(1). The court gave improperly broad meaning to the Supreme Court's holding in *Smith*, which prevented the court from providing clear legal reasoning to support its determination. Absent unambiguous language from Congress, the First Circuit should have construed "use" under § 924(c)(1) narrowly to protect the rights of the criminal defendant.

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