1998

Criminal Law

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Recommended Citation
29 Texas Tech L. Rev. 527 (1998)

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Among the cases decided during the survey period, two opinions stand out as particularly noteworthy. First, United States v. Branch is certainly notable because it involved the prosecution of members of a religious sect, the Branch Davidians, and their participation in a gun battle which resulted in the death of agents from the Bureau of Alcohol, Tobacco and Firearms. The case is also significant due to the variety of new issues it raised. The second case of note, United States v. Lewis, is important because the Supreme Court granted certiorari and is likely to resolve a conflict among the circuit courts as to an issue involving the Assimilative Crimes Act. In addition to these two cases, the Fifth Circuit continues to confront numerous interpretational issues involving the offense of "using or carrying a firearm" in relation to a crime of violence or drug trafficking. Finally, during the survey period the court also answered challenges that several federal laws violate the Commerce Clause based on the Supreme Court's opinion in United States v. Lopez.
I. DEFENSES

A. When Is an Instruction Required?

The Branch case raised a rather basic, yet significant, question of what standard a trial court should apply when deciding whether to instruct the jury on a defense raised. However, before discussing this issue in detail, a brief overview of the case is necessary. In Branch, eleven defendants were charged with, among other offenses, "aiding and abetting the murder of four agents of the Bureau of Alcohol, Tobacco and Firearms (ATF) while said agents were engaged in the performance of their official duties." Although the jury found all eleven not guilty of this offense, they nevertheless convicted five defendants on the lesser-included offense of aiding and abetting the voluntary manslaughter of the federal agents. Four defendants challenged their convictions on the grounds that the district court erred by not instructing the jury on self-defense. While the district court instructed on self-defense as to aiding and abetting murder, it did not instruct on this defense as to aiding and abetting voluntary manslaughter.

The panel agreed that the standard for reviewing the district court's refusal to give the self-defense instruction is abuse of discretion; however, the panel split on the question of what level of evidence is necessary to require a self-defense instruction. Unable to agree, or to be consistent, the Fifth Circuit has used three different standards as to the necessary evidentiary foundation: "(1) 'any evidence' regardless of how insubstantial; (2) 'substantial evidence' defined as 'more than a scintilla'; and (3) 'evidence sufficient for a reasonable jury to find in [the defendant's] favor.'" A majority of the panel applied the third standard, relying on the Supreme Court's precedent in Mathews v. United States.

While the opinion of the majority is more persuasive in establishing the correct level of evidence necessary for an instruction, it is interesting that in United States v. Peterson, also decided during the survey period, the court defined the standard as requiring that the requested instruction be "supported by the law and by some..."
While the correct standard was not at issue in Peterson, the court seemed to create yet a fourth standard. Thus the intra circuit conflict continues, leaving district courts with little guidance on this question.


Even applying the more stringent abuse of discretion standard, the Fifth Circuit panel in Branch was divided over the significance of evidence presented at trial. The tension between the majority and dissenting opinions regarding evaluation of the evidence presented to support a self-defense instruction centered on the extent to which the court considered each defendant's individual knowledge, versus the extent to which the court attributed knowledge of other Davidians to the four defendants convicted of aiding and abetting the voluntary manslaughter of the federal agents.\(^\text{14}\) The four defendants, in support of their claim of self-defense, contended they did not know the people attacking the compound were federal agents, or, even if they did know the identity of the agents, the defendants believed that the agents were employing excessive force.\(^\text{15}\) In the portion of the opinion evaluating the evidence relating to the identity of the federal agents, the court made no mention of any evidence to indicate that any of the four defendants were in a position to hear the agents announce themselves and that they had a search warrant.\(^\text{16}\) Nor did the court point to any evidence that any of the four defendants were in a position to see the agents with the bright yellow "ATF" lettering on their clothes.\(^\text{17}\) The court relied on the fact that several Davidians overheard their leader, David Koresh, remark that the ATF was coming.\(^\text{18}\) Yet, the court did not point to evidence that indicated any of the four defendants had heard these comments by their leader.\(^\text{19}\) In a compound large enough to house 115 people, at a minimum, the court should have relied on evidence that revealed the location of each of the four.\(^\text{20}\) The court also relied on evidence that Koresh knew the armed people were ATF agents.\(^\text{21}\) Even so, Koresh was not a defendant.\(^\text{22}\) Thus, the court improperly relied on what other

\(^\text{14}\). See Branch, 91 F.3d at 714-16, 747-49.
\(^\text{15}\). See id. at 715-20.
\(^\text{16}\). See id. at 715-16.
\(^\text{17}\). See id.
\(^\text{18}\). See id. at 715.
\(^\text{19}\). See id.
\(^\text{20}\). When the ATF decided to proceed with the plan to execute the warrants and conduct arrests, approximately 115 people resided within the compound. See id. at 710.
\(^\text{21}\). See id. at 715.
\(^\text{22}\). See id. at 710-11. David Koresh died in the fire ignited by the Davidians. See id. at 710.
Davidians knew, and attributed this knowledge to the four defendants without establishing that the defendants were also in a position to have this knowledge.

Similarly, as to the defendants’ claim that the ATF agents engaged in excessive force, the court examined the statements of one of the four defendants, Castillo, and found that as an aggressor, he had no self-defense claim. The court then apparently attributed this aggressor status to the other three defendants as well—without discussing evidence indicating their status as aggressors. Nonetheless, the majority acknowledged that only Castillo could claim any possible benefit from his statements to support a self-defense claim; thus, in this instance they evaluated self-defense individually as to Castillo. Therefore, on one hand, the court attributed Castillo’s role as an aggressor to the other three defendants, yet, on the other hand, denied the other three any possible benefit from Castillo’s statements regarding self-defense.

In contrast, examining again the issue of excessive force, the court discounted the testimony of some Davidians that there was indiscriminate firing by the agents through the walls and windows of the compound. The court stated that this would be relevant only if those Davidians had been convicted, but pointed out that “there was no evidence that any of the defendants either came under indiscriminate, unprovoked fire or knew that such fire was taking place. . . . [T]here are no vicarious defenses.” The majority went on to state that the “knowledge of one resident cannot simply be imputed to all who are at the compound.” Even so, this is precisely what the court did as to the identity of the federal agents. These inconsistencies and logical fallacies leave the reader, and this commentator, perplexed.

The dissenting judge pointed out that since the offense at issue was not a group crime, the court had to evaluate evidence regarding the “culpability of individual defendants.” However, the dissent pointed to evidence which would link only one defendant to such knowledge. As to the other three defendants’ belief that the agents employed excessive force, the dissenting judge relied on statements made by other Davidians and argued that the jury might have reasonably attributed this to the individual defendants. Thus, the

23. See id. at 717-19.
24. See id. at 747-49 (Schwarzer, D.J., dissenting).
25. See id. at 717 n.3.
26. See id. at 719-20.
27. Id. at 719 (emphasis added).
28. Id.
29. Id. at 747 (Schwarzer, D.J., dissenting).
30. See id. at 748 n.5 (Schwarzer, D.J., dissenting). The defendant, Branch, went into a room where Ms. Schroeder experienced indiscriminate gunfire. See id. (Schwarzer, D.J., dissenting).
31. See id. at 749 (Schwarzer, D.J., dissenting).
dissenting opinion contains the same logical inconsistencies as those that plague the majority opinion.

The inconsistencies found in the Branch majority and dissenting opinions raise serious questions about the extent to which a court can effectively evaluate the culpability of individual defendants when nearly two hundred people were involved in the incident, and eleven defendants were ultimately tried together.

II. THE ASSIMILATIVE CRIMES ACT

A little known or employed statute, the Assimilative Crimes Act (ACA), came up in three Fifth Circuit cases during the survey period and, significantly, the Supreme Court granted certiorari in one of these cases, United States v. Lewis. The ACA allows state criminal law to fill gaps where federal law does not cover a particular offense; yet, the conduct in question in Lewis occurred on a "federal enclave" as required by 18 U.S.C. § 7. Thus, the Act serves to incorporate state law in this circumstance.

In Lewis, authorities charged James and Debra Lewis with the beating death of their four-year-old child; the crime occurred at Fort Polk, a United States army base in Louisiana. The issue was whether the prosecutor properly charged the Louisiana first degree murder statute through the ACA when federal law criminalizes the same conduct under 18 U.S.C. § 1111. The difference between the two statutes, however, is that the Louisiana statute includes first degree murder situations where "the offender has specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older," whereas federal law includes a specific definition of first degree murder that does not include the age of the victim as a factor. The federal statute provides that "[a]ny other murder is murder in

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34. See 18 U.S.C. § 13(a) (1994). The relevant section of the Act provides, [quote]
37. See Lewis, 92 F.3d at 1373.
38. See id.
39. Id. (quoting LA. REV. STAT. ANN. § 14:30(A)(5) (West 1997)).
40. The federal statute at issue, 18 U.S.C. § 1111(a) (1994) provides:
the second degree." 41 In rendering its opinion, the court cited only two Supreme Court opinions: United States v. Sharpnack and Williams v. United States. 42 The court looked to Sharpnack for the proposition that "where Congress has enacted legislation criminalizing conduct on the enclaves, the federal statutes preempt the state laws regarding those crimes." 43 The government, therefore, cannot employ the state statute. 44 The court also followed Williams, which in effect held that the ACA "could not enlarge the definition of the federal carnal knowledge crime by incorporating the state statutory rape statute through the ACA." 45 Although the "precise acts" covered by the state and federal statutes were the same, the relevant age of the victim was not. In Williams, the crime was statutory rape which the federal law defines as carnal knowledge of a minor under the age of sixteen, whereas Arizona law sets the age at eighteen. 46 Since the victim was seventeen, there was no federal crime, and the Supreme Court reversed the conviction based on the Arizona statute. 47 The court in Lewis noted that after Williams, a majority of circuit courts, including the Fifth Circuit, followed the "precise acts" test which prohibits application of the ACA when the precise act prohibited by the state statute is defined and prohibited by the federal statute. 48 The Fifth Circuit held that the provision in the Louisiana murder statute did not define a different act of murder, but only "affect[ed] the degree of the crime and the level of punishment." 49 Essentially, the court stated that "murder is murder" and the federal and state statutes do not punish different conduct. Thus, the court held that use of the ACA was error. 50 Nonetheless, the court upheld the convictions finding that the elements required for the Louisiana statute satisfied the elements necessary for second degree murder under the federal statute. 51 In addition, the court held that re-sentencing was not necessary since the life imprisonment sentences received by the two

Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.


41. Id.
42. See Lewis, 92 F.3d at 1375 (citing United States v. Sharpnack, 355 U.S. 286 (1958); Williams v. United States, 327 U.S. 711 (1946)).
43. Id. (citing Sharpnack, 355 U.S. at 291).
44. See id.
45. Id. (citing Williams, 327 U.S. at 718).
46. See Williams, 327 U.S. at 714 n.6.
47. See id. at 725.
48. See Lewis, 92 F.3d at 1374.
49. Id. at 1376.
50. See id. at 1377.
51. See id. at 1378.
defendants did not exceed the maximum sentence under the federal statute.\textsuperscript{52} While the Supreme Court is likely to resolve the issue of whether the "precise act" test is correct, the Court is unlikely to address the other issues of interpretation of the ACA raised in other Fifth Circuit cases during the survey period.

For instance, in \textit{United States v. Teran}, the issue involving the ACA was procedural but equally complicated.\textsuperscript{53} The defendant in \textit{Teran} challenged the subject matter jurisdiction of the federal magistrate because the Texas driving while intoxicated (DWI) statute permitted a punishment of up to two years imprisonment.\textsuperscript{54} Federal law would have classified the permitted punishment as a felony, and therefore, beyond the jurisdiction of a federal magistrate.\textsuperscript{55} Thus, the court faced the question of whether the ACA "requires that the maximum punishment range under state law [also] be assimilated."\textsuperscript{56} The Fifth Circuit noted that there is a presumption against selective assimilation, but emphasized that federal courts should not assimilate state law provisions that "conflict with federal policy."\textsuperscript{57} The court determined that the state maximum punishment conflicted with the federal policy of reliance on federal magistrates to promote the efficiency of the federal criminal process by permitting offenses of \ldots [this] type \ldots to be tried by a Magistrate.\ldots."\textsuperscript{58} Based on this policy exception, the court determined that the jurisdiction of the magistrate was proper over the defendant's conviction.\textsuperscript{59} Similarly, \textit{United States v. Bailey} raised an issue as to which rule, state or federal, should govern where the state criminal provision has been assimilated under the ACA.\textsuperscript{60} The specific question was whether the defendant was entitled to a lesser included offense instruction.\textsuperscript{61} One prong of the federal and state tests for such an instruction differed, while the second prong was substantially the same under both.\textsuperscript{62} Rather than determine which test was to control, the court concluded that the defendant's request for a lesser included instruction failed under both tests.\textsuperscript{63}
III. FIREARMS AND 18 U.S.C. § 924 (c)(1)

A. Independent Offense or Sentence Enhancement?

In United States v. Branch, the court faced the question of whether the trial judge correctly imposed a thirty year sentence where there had been no jury determination that the defendants had used a machine gun. The punishment enhancement provisions of 18 U.S.C. § 924(c)(1) initially provide for a sentence of five years for one who "uses or carries a firearm" in relation to a crime of violence. Subsequent clauses provide for longer sentences depending upon the type of weapon used. In Branch, the district court sentenced four defendants to thirty years and another to ten years on their section 924(c)(1) convictions, finding that "each of the five defendants had used or were criminally responsible for someone who had used a machine gun during the conspiracy." However, the prosecution did not charge, and the jury failed to make factual findings as to the type of firearm used.

Confronted with a question of first impression, the court looked to both the structure of the statute as well as the legislative history. The court found it significant that Congress added the machine gun clause to the statute instead of creating another, separate section. In addition, the House Report stated that the clause was to impose an "[e]nhanced penalty for machine gun use in crime," and there was never any indication that Congress intended to create a new and separate offense. The court discounted as dicta prior indications that section 924(c)(1) "may require the jury to agree on which type of weapon was used." In conclusion, the court held that the clauses in the statute providing for longer sentences based on the type of weapon used did not require the government to charge, nor the jury to make factual findings as to the particular weapon used or carried by the defendant. Nonetheless, the

64. 91 F.3d 699, 751 (5th Cir. Aug. 1996), cert. denied, 117 S. Ct. 1467 (1997).
66. See id. The provision, in relevant part, states as follows:
   Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.
67. Branch, 91 F.3d at 738.
68. See id.
69. See id. at 739-40.
70. See id. at 739.
72. Id. (quoting United States v. Correa-Ventura, 6 F.3d 1070, 1087 n.35 (5th Cir. 1993)).
73. See id. at 740; see also United States v. Gonzales, 121 F.3d 928, 941 (5th Cir. Aug. 1997)
court vacated the sentence and remanded for re-sentencing based on Bailey v. United States. 74

B. The Aftermath of Bailey v. United States, Continued

More than twenty percent of the cases reviewed, eleven out of fifty-two, 75 involved applications of the United States Supreme Court opinion of Bailey v. United States. 76 In Bailey, the Supreme Court set out a definition of the term “use” for purposes of 18 U.S.C. § 924(c)(1), which imposes a minimum five-year term of imprisonment on anyone who “during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.” 77 The Court rejected the argument that section 924(c)(1) criminalized “simple[e] possession with a floating intent to use,” 78 and instead held that the Government must prove that the defendant “actively employed the firearm during and in relation to the predicate crime.” 79 To illustrate the differences between these standards the Court stated that active employment of a firearm under section 924(c)(1) “certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire a firearm.” 80 In addition, the Court stated that “a reference [by an offender] to a firearm calculated to bring about a change in the circumstances of the predicate offense is a ‘use.’” 81 In contrast, merely storing a weapon in the vicinity of drugs or drug proceeds, without more, is insufficient to satisfy section 924(c)(1). 82 In the two consolidated cases, the Court held that where one defendant had a loaded pistol in the trunk of the car the defendant was driving, and the other had an unloaded firearm in a locked footlocker in the defendant’s residence, neither “actively employed” the weapon. 83

(rejecting a similar argument that the thirty year sentence for machine gun use is a separate offense as opposed to a sentence enhancement).

74. See Branch, 91 F.3d at 740-41 (citing Bailey v. United States, 516 U.S. 137 (1995)).
75. One of these cases, United States v. Garcia, 86 F.3d 394 (5th Cir. June 1996), cert. denied, 117 S. Ct. 752 (1997), was discussed in last year’s survey. Therefore, to avoid repetition here, this author refers the reader to Bubany, supra note 3, at 451-52.
78. Id. at 144 (quoting United States v. Bailey, 36 F.3d 106, 121 (D.C. Cir. 1994) (en banc) (Williams, J., dissenting)).
79. Id. at 150.
80. Id. at 148.
81. id.
82. See id. at 149.
83. See id. at 151.
As to the factual aspect of the crime of "using" a firearm in relation to violent or drug trafficking offenses, the Fifth Circuit found sufficient evidence to support a conviction in United States v. Johnson. In Johnson, the defendant reached for a weapon in a partially zippered pouch located on the transmission hump near the front seat of the car while attempting to hide a bag of cocaine base. In contrast to the defendant in Bailey, who hid the weapon in the trunk of his car, the defendant in Johnson reached for the weapon after police had stopped the car and were approaching. The court held that the jury could have found that the defendant "hoped to evade arrest for the predicate drug offense by arming himself," thus the government had proven that the defendant "used" the gun.

It appears the court's analysis involved an overlap of two elements of the offense. First, the element requiring "use" of a firearm, and second, the element requiring the weapon to be "in relation to" the drug offense. The Supreme Court had previously stated that "in relation to" requires a showing that the firearm "facilitat[ed], or ha[d] the potential of facilitating the drug trafficking offense." The Johnson court's conclusion regarding the jury's possible finding that the defendant hoped to evade arrest by attempting to get the gun, would appear to satisfy the "in relation to" element. From this, the court concluded that reaching for the gun also constituted "use." This logic does not seem consistent with the Bailey opinion and may have been avoided by affirming the conviction based on the "carry" prong. Johnson was charged with "using and carrying" a firearm and the judge instructed the jury that they could convict if Johnson "used or carried" a firearm. Other cases decided during the survey period held that where the weapon was within the defendant's reach, the defendant "carried" the weapon for purposes of section 924(c)(1).

In United States v. Ulloa, the court rejected the argument that Bailey required an approach different from pre-Bailey cases with regard to the bartering of weapons for drugs. In Ulloa, the defendant entered into an
agreement with undercover agents to supply drugs in exchange for weapons.\textsuperscript{94} Although the Supreme Court in \textit{Bailey} expressly affirmed its precedent of \textit{Smith v. United States} by including "bartering" within the definition of "use,"\textsuperscript{95} the defendant in \textit{Smith} had provided the weapons while in \textit{Ulloa} the Bureau of Alcohol, Tobacco, and Firearms supplied the weapons.\textsuperscript{96} The court affirmed the conviction, which was based on Ulloa's guilty plea, and found that \textit{Bailey} did not require the defendant to exercise "dominion and control" over the weapons, and did not alter the Fifth Circuit precedent of \textit{United States v. Zuniga},\textsuperscript{97} where the government agents had also supplied the weapons.\textsuperscript{98}

A case consolidated with \textit{Bailey} had facts similar to those found in \textit{United States v. Payne}.\textsuperscript{99} In \textit{Payne}, the government conceded that where the police found a firearm on the defendant’s bedroom nightstand at the time of arrest and the defendant was outside, the \textit{Bailey} definition of use was not satisfied.\textsuperscript{100} Thus, the court reversed the firearm convictions.\textsuperscript{101}

The Fifth Circuit also reversed a conviction for a section 924(c)(1) offense in \textit{United States v. Blount}.\textsuperscript{102} In \textit{Blount}, one firearm was found on the television set in the residence where the defendant was arrested, and drugs and other weapons were found in a locked closet of the residence.\textsuperscript{103} The court concluded that the mere fact of finding such weapons in the residence, without more, did not satisfy the government's burden to show that these weapons were "used... for some end or purpose related to drug trafficking."\textsuperscript{104}

Similarly, in \textit{United States v. Dickey}, the court reversed a conviction under 18 U.S.C. § 924(c)(1) despite the fact that Drug Enforcement Administration (DEA) agents found and seized seven weapons in the defendant’s house and trailer.\textsuperscript{105} The government failed to produce any evidence that the defendant had "carried" any firearms, and as to "use," the government failed to produce evidence other than the fact of the agent’s discovery of the seven firearms.\textsuperscript{106} The court held that the government failed to demonstrate that the defendant even "displayed" a firearm, an offense listed

\textsuperscript{94} See id. at 950.
\textsuperscript{96} See \textit{Ulloa}, 94 F.3d at 950.
\textsuperscript{97} 18 F.3d 1254 (5th Cir. 1994).
\textsuperscript{98} See \textit{Ulloa}, 94 F.3d at 955-56.
\textsuperscript{99} 99 F.3d 1273 (5th Cir. Nov. 1996).
\textsuperscript{100} See id. at 1279.
\textsuperscript{101} See id.
\textsuperscript{103} See id. at 1493.
\textsuperscript{104} Id. at 1494.
\textsuperscript{105} 102 F.3d 157, 165 (5th Cir. Dec. 1996). The agents also found other evidence relating to the drug trafficking offense. See id.
\textsuperscript{106} See id.
as an example by the United States Supreme Court, because the government offered no evidence indicating the firearms were displayed to anyone.\footnote{See id.}

"[D]isplaying necessarily implies that there is someone to whom the firearm is displayed, [and] . . . displaying requires a displayor and a displayee."\footnote{Id.} The government failed to support a finding that the guns were displayed in relation to the drug trafficking activity because the government failed to show that anyone actually saw the firearms.\footnote{See id.}

The court went on to state that even if the mere presence of the firearms in an open and obvious location was sufficient to constitute "use," the evidence nonetheless failed to show that such "use" was in relation to the offense of manufacturing methamphetamine; that is, the firearms were not "‘an operative factor in relation to the predicate offense.’\footnote{Id. (quoting Bailey v. United States, 516 U.S. 137, 143 (1995)).}

In contrast, the defendant in United States v. Morris faces a new trial despite the fact that there was insufficient evidence under Bailey to establish "use" of a firearm.\footnote{Id.} In Morris, police found a weapon on the table next to where the defendant was sitting.\footnote{See id.}

After the Supreme Court handed down the Bailey decision, Morris filed a habeas corpus petition pursuant to 28 U.S.C. § 2255.\footnote{See id. at *2.} The court held that while Bailey required vacating the conviction to the extent it was based on the "use" prong, a new trial was proper since a jury might find that the defendant had "carried" the firearm within the meaning of section 924(c)(1).\footnote{See id at *5.} The conviction in Morris was for "using and carrying" a firearm.\footnote{See id. at *2.}

Thus, it seems that where both carrying and using are charged, the defendant will face a new trial where the evidence is insufficient to support a finding of "use" or "carrying" of a firearm. However, if the court found that the evidence was sufficient to support a finding that the defendant "carried" the weapon, it is unclear why the court did not deny the habeas corpus petition. Nonetheless, the court took the opportunity to define "carry" to require that the prosecution prove "the defendant transported the firearm or had it within his reach during and in relation to the commission of the underlying offense."\footnote{Id. at *5 (citing United States v. Hall, 110 F.3d 1155, 1156 (5th Cir. Apr. 1997)).}

Since the weapon was on a table next to the defendant, and thus within his reach, it is unlikely that the government will have any difficulty convicting Morris at a new trial.

\footnotesize

107. See id.

108. Id.

109. See id.

110. Id. (quoting Bailey v. United States, 516 U.S. 137, 143 (1995)).


112. See id.

113. See id. at *2.

114. See id at *5.

115. See id. at *2.

116. Id. at *5 (citing United States v. Hall, 110 F.3d 1155, 1156 (5th Cir. Apr. 1997)).
United States v. Hall was also decided during the survey period and involved facts similar to those in Morris.\textsuperscript{117} In Hall, the defendant pled guilty to the section 924(c)(1) offense.\textsuperscript{118} The police found and seized one firearm located on the floor near a coffee table in the living room where Hall and other defendants were located at the time of the search.\textsuperscript{119} A second firearm was found in the bedroom where another defendant was located.\textsuperscript{120} Applying Bailey, the court determined that the evidence was insufficient to support a finding that the defendant had "used" a firearm.\textsuperscript{121} The mere fact that "Hall was in the same room as the weapon when the officers entered, and the weapon was on the floor a few feet from the table upon which drugs and paraphernalia were sitting," was not enough to show that Hall had "used" the gun by displaying it, mentioning it, or otherwise actively employing it.\textsuperscript{122} In addition, the court held that the government produced insufficient evidence to support a finding that Hall "carried" the weapon.\textsuperscript{123} Employing an analysis similar to that used by the Supreme Court in Bailey to define the "use" prong, the court looked to the dictionary definition of the term "carry."\textsuperscript{124} This definition included, "[t]o transport," "to wear or have on one's person," and "to bear, bear about, sustain, transport, remove, or convey."\textsuperscript{125} Rather than limit the "carry" prong to these situations, the court determined that this prong is satisfied when the defendant either transports the weapon or it is "within his reach—during and in relation to the predicate crime."\textsuperscript{127} Although this definition is not necessarily new, it is significant in that it is the first post-Bailey formulation by the Fifth Circuit that attempts to track the Bailey analysis and apply it to the "carry" prong.\textsuperscript{128} It is also interesting that this analysis did not lead to a different result than that reached in pre-Bailey cases examining the carry prong. However, other circuits adhere to broader

\textsuperscript{117} See id. at 1155 (5th Cir. Apr. 1997).
\textsuperscript{118} See id. at 1156.
\textsuperscript{119} See id. at 1158.
\textsuperscript{120} See id.
\textsuperscript{121} See id. at 1160.
\textsuperscript{122} Id.
\textsuperscript{123} See id. at 1161.
\textsuperscript{124} See id.
\textsuperscript{125} Id. (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 343 (1961)).
\textsuperscript{126} Id. (quoting BLACK'S LAW DICTIONARY 214 (6th ed. 1990)).
\textsuperscript{127} Id.
\textsuperscript{128} See id. at 1162; see also United States v. Blankenship, 923 F.2d 1110, 1116 (5th Cir. 1991) (holding that to be determined as carrying, the firearm must have been within the reach during the commission of the offense); United States v. Feliz-Cordero, 859 F.2d 250, 253 (2d Cir. 1988) (holding that evidence that a weapon was within reach was sufficient to prove that the defendant "carried" the weapon for purposes of § 924(c)(1)); United States v. Joseph, 892 F.2d 118, 126 (D.C. Cir. 1989) (holding that evidence that the defendant had a "present ability to exercise dominion and control over a firearm and that the firearm [was] within easy reach" supported a finding that the defendant carried the weapon).
definition of "carry" that does not require a showing that the weapon was within the defendant's reach. 129

Another aspect of the "carrying" prong involves situations where the police find a weapon in the car driven by the defendant. Under Bailey, the "use" prong is not satisfied when the police find the weapon in the trunk of a car. 130 During the survey period, the Fifth Circuit recognized that "[w]hen a vehicle is used, 'carrying' takes on a different meaning from carrying on the person because the means of carrying is the vehicle itself," and thus requires actual transportation of the weapon. 131 In United States v. McPhail, the defendant was convicted of "using or carrying" a weapon under section 924(c)(1). 132 The court reversed the conviction because there was insufficient evidence that the appellant transported a gun during or in relation to drug trafficking. 133 First, relying on Bailey, the court determined that there was no evidence to show that the defendant had "actively employed" or used a weapon. 134 Second, as to the "carry" prong, the mere presence of the weapon in the car did not establish that the defendant actually transported the weapon in relation to the drug transaction. 135 Without additional evidence to show that the defendant was in the car, that the defendant drove the car, or even that the defendant's car was operable, the government failed to prove the "carry" prong. 136 The court also expressly stated that the holding in Bailey applies retroactively because that case defined the conduct "criminalized by the statute." 137

In United States v. Muscarello, the Fifth Circuit reversed the district court's dismissal and reinstated the conviction based on the defendant's guilty

129. See, e.g., United States v. Cleveland, 106 F.3d 1056, 1066-1068 (1st Cir. 1997), cert. granted, 118 S. Ct. 621 (1997) (holding that "the ordinary meaning of the term 'carry' . . . affords no basis for imposing an accessibility requirement"); United States v. Mitchell, 104 F.3d 649, 653-54 (4th Cir. 1997) ("[W]e conclude that the plain meaning of the term 'carry' . . . requires knowing possession and bearing, movement, conveyance, or transportation of the firearm in some manner."); United States v. Molina, 102 F.3d 928, 932 (7th Cir. 1996) ("[W]e need not concern ourselves with the question of whether the gun was within immediate reach . . . [because] it was surely carried in relation to the crime when it was transported in a car in the same compartment that contains drugs possessed with the intent to distribute."). But see United States v. Mauldin, 109 F.3d 1159, 1161 (6th Cir. 1997) (stating that "carrying" requires "more than mere possession or storage"); United States v. Giraldo, 80 F.3d 667, 676 (2nd Cir. 1996), cert. denied, 117 S. Ct. 135 (1996) ("[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.").


131. See United States v. McPhail, 112 F.3d 197, 200-01 (5th Cir. May 1997) (quoting United States v. Pineda-Ortuno, 952 F.2d 98, 104 (5th Cir. 1992)), reh'g en banc denied, 119 F.3d 326 (5th Cir. 1997)).

132. Id. at 198.

133. See id. (citing United States v. Fike, 82 F.3d 1315, 1328 (5th Cir. 1996)).

134. See id. at 199 (stating that the government conceded that the "use" prong had not been satisfied.)

135. See id.

136. See id. at 199-200.

137. See id.
plea to a section 924(c)(1) offense. The plea established that the loaded firearm found in the glove compartment of the defendant’s truck was “carried for protection in relation to” the drug trafficking offense. The district court, relying on Bailey, dismissed the conviction and found that the evidence was insufficient to establish that the defendant had “used” the firearm. In reversing, the court stated that the Bailey analysis did not affect the “carry” prong of section 924(c)(1). Furthermore, the court recognized that a factual basis for “carrying” was present because the defendant admitted he used the truck during the commission of the underlying crime. The Supreme Court has granted certiorari in this case, which calls into doubt the Fifth Circuit’s analysis. The Court is likely to focus on the factual basis for satisfying both the “carry” and “in relation” prongs of the section 924(c)(1) offense. At the time of his arrest, the defendant was employed in the sheriff’s office as a bailiff, thus calling into question whether the “in relation” prong was satisfied. Additionally, the admission in the plea agreement does not indicate that the defendant “carried” the weapon, but rather that he was in possession of it, which according to Bailey is insufficient. The Fifth Circuit did not rely on evidence independent of the plea agreement to support the finding that the defendant “carried” the weapon “in relation” to a drug-trafficking crime.

In United States v. Branch, the court remanded section 924(c)(1) convictions where the district court found that the defendants “each either had actual or constructive possession of the numerous fully automatic weapons and hand grenades present in the Compound.” The court stated that the district court’s finding did not satisfy the statutory requirement, defined in Bailey, requiring the government to prove that the defendant “actively employed” the firearm. Therefore, the Branch court concluded that a finding of mere possession was not enough.

Finally, it is worth noting that, during the survey period, the Fifth Circuit was not confronted with the question of whether other charges dismissed

139. Id. at 637 (emphasis added).
140. See id.
141. See id.
142. See id. at 639.
143. See Muscarello v. United States, 118 S. Ct. 621 (Dec. 12, 1997).
144. See Muscarello, 106 F.3d at 638.
145. See id. at 638-39.
146. See id. (stating that the court was relying solely on the contents of the plea agreement).
148. See id.
149. See id. at 740.
pursuant to a plea agreement might be reinstated when the section 924(c)(1)
conviction is vacated.150

C. The Predicate Offense

In United States v. Branch, the jury convicted five of the eleven
defendants under 18 U.S.C. § 924(c)(1).151 The predicate crime of violence
charged involved involved conspiracy to murder federal agents.152 However, the jury
acquitted all defendants of the conspiracy charge.153 Thus, the question was
whether the court could uphold the section 924(c)(1) offense even though the
jury had not convicted the defendants on the predicate violent crime.154 Prior
Fifth Circuit opinions established that a conviction on the predicate offense
was not necessary to establish the fact of the compound offense for purposes
of section 924(c)(1).155 On appeal, dissenting Judge Schwarzer stated that the
Branch court had to determine "whether there was sufficient evidence that
each of the defendants joined the conspiracy with the requisite intent."156
Again, the majority and dissent parted company.157 The panel agreed as to the
definition of conspiracy—1) two or more people agreed to pursue an unlawful
objective; 2) the individual defendant voluntarily agreed to join the
conspiracy; and 3) one or more of the members of the conspiracy performed

150. See Bubany, supra note 3, at 453 (predicting that this issue, left unanswered by Bailey, would
eventually need to be addressed); see also, e.g., United States v. Bunner, 134 F.3d 1000, 1005 (10th Cir.
1998) (allowing prosecution "to reinstate previously dismissed charges"); United States v. Barron, 127 F.3d
890, 896-97 (9th Cir. 1997) (permitting government to reinstate dismissed charges). But see, e.g., United
States v. Sandoval, 122 F.3d 797, 800 (9th Cir. 1997) (concluding government cannot reinstate charges
because defendant did not breach plea agreement by attacking conviction based on conduct no longer
deemed criminal). See generally Ty Apler, The Danger of Winning: Contract Law Ramifications of
Successful Bailey Challenges for Plea-Convicted Defendants, 72 N.Y.U. L. REV. 841 (1997) (arguing that
"a successful collateral attack is neither a breach of defendant's plea agreement with the government nor
an act that requires rescission of the agreement due to impracticability"); Henry D. Gabriel & Katherine A.
Barski, Appellate Review of Sentences Under the Federal Sentencing Guidelines in the Fifth Circuit, 57
Challenged Sentences); Recent Cases: Plea Agreements-Ninth Circuit Allows Post-Plea Agreement
Collateral Attack Based on Charge in Underlying Law, United States v. Sandoval-Lopez, 122 F.3d 797
(9th Cir. 1997), 111 HARY. L. REV. 603 (1997) (examining judiciary's reliance on contract law in
analyzing plea agreements).

152. See id.
153. See id.
154. See id. at 721.
155. See id. (citing United States v. Munoz-Fabela, 896 F.2d 908, 911 (5th Cir. 1990); United States
v. Ruiz, 986 F.2d 905, 911 (5th Cir. 1993)).
156. Id. at 751 (Schwarzer, D.J., dissenting) (citing United States v. Powell, 469 U.S. 57, 67-69
(1984)).
157. See id. at 721 (arguing that participation in the gunfire was enough to sustain the charge of
aiding and abetting); id. at 952-53 (Schwarzer, D.J., dissenting) (asserting that the factual findings of
the court did not support a conspiracy charge); supra note 10 (discussing disagreement as to the correct
standard to use and apply in determining whether the district court should have given a self-defense
instruction).
an overt act to further the objectives of the conspiracy." Since the predicate offense alleged was conspiracy to murder federal agents, the requisite intent which the government had to prove was malice aforethought. However, in applying this standard to the evidence, the majority and dissent came to different conclusions. The majority relied on the fact that Koresh held "Bible studies" during which he taught that the "enemy" was the ATF and the FBI, and must be killed. However, the court pointed to evidence that only one of the five defendants convicted ever attended these classes. The dissent criticized other evidence relied on by the court as merely showing that each defendant participated in the gun battle, but not that "any of them entered into an agreement to kill federal officers, much less that any did so with malice aforethought." As to the existence of an agreement, the majority appears to have answered the question correctly since this may be "inferred from the facts and circumstances" and does not require an express "meeting of the minds." As to the mental state, again, given the rather broad reliance on inferences and circumstantial evidence, the evidence as to each defendant's involvement in the gun battle would seem to support such intent.

IV. APPLYING UNITED STATES V. LOPEZ AND THE COMMERCE CLAUSE

The Fifth Circuit continues to grapple with issues raised after the Supreme Court's decision in United States v. Lopez, which found the Gun Free Zones Act of 1990 unconstitutional under the Commerce Clause. During the survey period, all but one of the cases raising this issue challenged statutes prohibiting the possession of firearms. In the first of these cases, United States v. Knutson, the court found that 18 U.S.C. § 922(o) was not unconstitutional. Although a panel had previously reached a similar conclusion in United States v. Kirk, it has no precedential value since the en banc affirmance was by an equally divided court. The statute makes it

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158. Branch, 91 F.3d at 732 (citing United States v. Baker, 61 F.3d 317, 325 (5th Cir. 1995)).
159. See id.
160. See id. at 732-35 (asserting that the "actions of each defendant ... signal[ed] membership in this conspiracy"); id. at 751-52 (Schwarz, J., dissenting) (arguing that the district court's record does not support a finding that each defendant conspired to murder federal agents).
161. See id. at 733.
162. See id.
163. Id. at 751-52 (Schwarz, D.J., dissenting).
165. See id.
167. See United States v. Knutson, 113 F.3d 27, 28 (5th Cir. May 1997) (concluding that § 922(o) is constitutional under the commerce clause).
168. Id.
169. 70 F.3d 791 (5th Cir. 1995), vacated, 78 F.3d 160 (5th Cir. Mar. 1996), and aff'd en banc by
"unlawful for any person to transfer or possess a machine gun." In evaluating the statute, the court examined the three categories of activity which Congress may regulate according to Lopez: "(1) the use of the channels of interstate commerce; (2) 'the instrumentalities of interstate commerce, even though the threat may come only from intrastate activities'; and (3) activities which have 'a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce.' The court found that section 922(o) fell within the second category and concluded that Congress could have rationally decided that "the availability of machine guns, violent crime, and narcotics trafficking" are part of a larger problem, and thus have seen that controlling or "freezing" the number of legally possessed machine guns was intertwined with interstate commerce. In addition, the court cited the fact that a majority of circuit courts considering the issue have upheld section 922(o).

The court also affirmed the constitutionality of 18 U.S.C. § 922(g), which makes it unlawful for a convicted felon "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." In United States v. Rawls, the court concluded that Lopez did not affect prior precedent upholding this statute. The reason for this is that the statute contains a jurisdictional element, unlike section 922(q), the statute involved in Lopez. Given the jurisdictional element set out in the statute, the court also held that "as applied

an equally divided court, 105 F.3d 997 (5th Cir. Feb. 1997); see also Bubany, supra note 3, at 462-63 (discussing the panel opinion in Kirk).

170. 18 U.S.C. § 922(o)(1) (1994). The statute includes an exception for the lawful transfer or possession of a machine gun that was lawfully possessed before the effective date of the statute. See id. § 922(o)(2)(B).


172. Id. at 31 (citing United States v. Beuckelaere, 91 F.3d 781, 785 (6th Cir. 1996)).

173. See id. at 28. See generally United States v. Wright, 117 F.3d 1265, 1267 (11th Cir. 1997) (determining that Congress has ample authority to prohibit the possession or transfer of machine guns under § 922(o)); United States v. Rybar, 103 F.3d 273, 274-94 (3rd Cir. 1996) (concluding that the enactment of § 922(o) was a proper exercise of Congress’s authority to regulate under the Commerce Clause); United States v. Beuckelaere, 91 F.3d 781, 782-88 (6th Cir. 1996) (holding that § 922(o) was constitutional based on all three Lopez categories); United States v. Kenney, 91 F.3d 884, 885-91 (7th Cir. 1996) (upholding § 922(o) as a regulation of activities substantially affecting interstate commerce); United States v. Ramirez, 74 F.3d 948, 951-55 (9th Cir. 1996), cert. denied, 117 S. Ct. 72 (1996) (determining that § 922(o) is constitutionally proper under the Commerce Clause); United States v. Brown, 72 F.3d 96, 96-97 (8th Cir. 1995) (rejecting appellant’s Lopez challenge on the basis that § 924(c)(1) is a permissible exercise of the legislature’s power under the Commerce Clause); United States v. Wilks, 58 F.3d 1518, 1522 (10th Cir. 1995) (finding that § 922(o) represents a permissible exercise of the authority granted to Congress under the Commerce Clause).


175. Id.; see also United States v. Wallace, 889 F.2d 580, 583 (5th Cir. 1989) (creating Fifth Circuit precedent upholding the statute).

176. See Rawls, 85 F.3d at 242.
to Rawls," the statute was constitutional because the statute required only a showing that the firearm "had previously traveled in interstate commerce." The court relied on a pre-Lopez Supreme Court decision that held that section 922(g) only required that a minimal nexus need be shown. The government had presented expert evidence that the weapon had been manufactured in Massachusetts, indicating that the firearm's presence in Texas had resulted from interstate commerce. Therefore, the court affirmed the conviction.

In United States v. Corona, the court engaged in a bit more thoughtful analysis as to the effect of Lopez on statutes that include a jurisdictional element. Corona involved an as applied challenge to a federal statute prohibiting one from maliciously burning buildings used in, or affecting, interstate commerce. In Corona, the defendants burned a building they had hoped to use as a bed and breakfast, and the fire spread to the United Cab warehouse. The court stated that Lopez called into question cases that evaluated the effect on interstate commerce for a "minimal effect" such as when the defendant is prosecuted for burning a private home connected to natural gas lines. This question arises due to the following language used in Lopez: "'[T]he proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.'" The court stated that if only the burning of the private house were involved, the government may not have presented enough evidence of a "substantial nexus" to interstate commerce. However, since the fire spread to the Union Cab warehouse, even the stronger showing which Lopez arguably requires, would be satisfied since the burning of a cab company building "can have a substantial effect on interstate commerce." Thus, while other circuits have continued to apply pre-Lopez authority to statutes containing a jurisdictional element, the Fifth Circuit in Corona has indicated that this application might not be

177. Id. (quoting United States v. Fitzhugh, 984 F.2d 143, 146 (5th Cir. 1993)).
178. See id. at 243 (citing Scarborough v. United States, 431 U.S. 563, 575 (1977)).
179. See id.
180. See id. The court also relied on this decision in other challenges to § 922(g) during the survey period. See United States v. Dickey, 102 F.3d 157, 163 (5th Cir. Dec. 1996); United States v. Harkrider, 88 F.3d 1408, 1409 (5th Cir. July 1996), cert. denied, 117 S. Ct. 446 (1996); see also United States v. Wells, 98 F.3d 808, 811 (4th Cir. 1996); United States v. McAllister, 77 F.3d 387, 389 (11th Cir. 1996), cert. denied, 117 S. Ct. 262 (1996); United States v. Bennett, 75 F.3d 40, 49 (1st Cir. 1996), cert. denied, 117 S. Ct. 130 (1996).
183. See id. at 567-68.
184. See id. (citing United States v. Hicks, 106 F.3d 187, 188 (7th Cir. 1997), cert. denied, 117 S. Ct. 2425 (1997)).
185. Id. at 569 (quoting United State v. Lopez, 514 U.S. 549, 559-60 (1995)).
186. See id. at 570.
187. Id. at 571.
appropriate.\textsuperscript{188} However, in subsequent opinions the court has retreated from such musings.\textsuperscript{189}

V. CONCLUSION

There is no single theme emerging from the variety of cases decided by the Fifth Circuit during this survey period. Nonetheless, the interpretational issues following both the \textit{Bailey} and \textit{Lopez} Supreme Court cases illustrate the extent to which some confusion still remains. In addition, it will be interesting to observe whether the inconsistencies in the \textit{Branch} opinion, discussed in Part I of this article, impact future cases involving more than one defendant.

\textsuperscript{188} See \textit{id.} at 570-71.

\textsuperscript{189} See \textit{United States v. Miles}, 122 F.3d 235, 240-41 (5th Cir. Sept. 1997) (holding that a de minimis nexus was sufficient as long as a substantial effect resulted from repetition); \textit{United States v. Robinson}, 119 F.3d 1205, 1211-12 (5th Cir. Aug. 1997) (holding that the particular conduct at issue need not have a substantial effect upon interstate commerce and cumulative effects must be considered).