FIREARMS: SELECTED FEDERAL STATUTES AND GUIDELINE ENHANCEMENTS

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Table of Contents

Table of Authorities

Page

Page

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The purpose of this document is to provide an general overview of key sentencing issues and case law arising from federal firearms statutes and various guideline provisions on firearm enhancements. An exposition of all federal firearm statutes and full discussion of all guideline provisions dealing with firearms offenses and enhancements is beyond the scope of this paper.

I. Statutory Offenses and Applicable Guidelines

A. 18 U.S.C. § 922(g); Prohibited Persons ("Felon-in-Possession")

1. General Provision

Bans specified classes of people from transporting/possessing in interstate or foreign commerce any firearm or ammunition or from receiving any firearm or ammunition that has been transported in interstate or foreign commerce. The banned classes include: convicted felons; fugitives; unlawful users of controlled substances; adjudicated "mental defectives"; illegal aliens; dishonorably discharged service personnel; those who have renounced their U.S. citizenship; misdemeanor domestic violence offenders or those subject to certain restraining orders in domestic violence matters. The maximum penalty is five years imprisonment.

The **guideline** applicable to § 922(g) offenses is **§2K2.1**. A defendant convicted under § 922(g) with three prior convictions for violent felonies or serious drug offenses is subject to enhanced penalties as an Armed Career Criminal under § 924(e). *See* part I.B., *infra*.

2. Multiplicity

Defendants who violate more than one subsection of § 922(g), such as by being a felon in possession of a firearm and by being an unlawful user of controlled substances in possession of a firearm, may be charged with several counts of violating § 922(g). Several circuits have addressed whether this practice constitutes multiplicity, that is, multiple counts of an indictment which cover the same criminal behavior. The threat of multiple sentences for the same offense raises double jeopardy implications.

In *United States v. Peterson*, 867 F.2d 1110 (8th Cir. 1989), the Eighth Circuit rejected the claim of multiplicity where one codefendant was convicted of three counts of unlawful possession of firearms by a convicted felon, in violation of § 922(g)(1), and one count of unlawful possession of

firearms by a user of controlled substances, in violation of § 922(g)(3). The court held multiple firearm violation counts charged under different subsections of § 922(g) but arising out of the same pattern of conduct were not multiplicitous because, under *Blockburger v. United States*, 284 U.S. 299, 304 (1932), the counts each required at least one unique element of proof.

The Eleventh Circuit took a different position in *United States v. Winchester*, 916 F.2d 601 (11th Cir.1990), in which defendant was convicted and sentenced for violations of § 922(g)(1) (felon in possession) and (g)(2) (fugitive from justice in possession), arising out of the possession of a single firearm. The court found the convictions multiplicitous, concluding that, in enacting § 922(g), it was not within Congress's comprehension or intention that a person could be sentenced, for a single incident, under more than one of the subdivisions of § 922(g). The court distinguished *Blockburger* on two grounds: First, the *Blockburger* defendant was convicted and sentenced under two different statutory sections while the *Winchester* defendant was convicted under two different subsections of the same statute. Second, the court concluded that *Blockburger* only provided guidance in determining congressional intent and was therefore inapplicable because legislative history revealed that Congress' intent was to prohibit the possession of firearms by classes of individuals it deemed dangerous, rather than to punish persons solely for having a certain status under the law.

In *United States v. Munoz-Romo*, 989 F.2d 757 (5th Cir.1993), the Fifth Circuit agreed with *Winchester*. Although the Fifth Circuit had originally upheld multiple sentences under various subsections of § 922(g), defendant filed a petition for writ of *certiorari* and, in response, the Solicitor General of the United States changed positions and urged that the case be remanded for dismissal of one of the counts. The Supreme Court granted certiorari, vacated the judgment, and remanded for further consideration in light of the position asserted by the Solicitor General. On remand, the Fifth Circuit concluded that Congress, by rooting all the firearm possession offenses in a single legislative enactment and including all the offenses in subsections of the same statute, signaled that it did not intend multiple punishments for the possession of a single weapon. *Accord*, *United States v. Johnson*, 130 F.3d 1420 (10th Cir. 1997); *United States v. Dunford*, 148 F.3d 385 (4th Cir. 1998) (reversing seven of 14 convictions based on defendant's membership in two prohibited classes while possessing 6 firearms and ammunition).

3. Possession of More Than One Firearm

Most courts have held that possession of more than one firearm and ammunition by a prohibited person supports only one conviction under 18 U.S.C. § 922(g). Courts have noted that the prohibited conduct, possession of any firearm or ammunition, could arguable occur every time a disqualified person picks up a firearm even though it is the same firearm or every time a disqualified person picks up a different firearm. "The statute does not delineate whether possession of two firearms—say two six-shooters in a holster—constitutes one or two violations, whether the possession of a firearm loaded with one bullet constitutes one or two violations, or whether possession of a six-shooter loaded with six bullets constitutes one or two or seven violations." *United States v. Dunford*, 148 F.3d 385, (4th Cir. 1998) (reversing all but one conviction where defendant possessed six firearms and ammunition). *See also United States v. Keen*, 104 F.3d 1111, 1119 (9th Cir. 1997); *United States v. Hutching*, 75 F.3d 1453, 1459 (10th Cir. 1996) (simultaneous possession of multiple firearms generally constitutes only one offense unless there is evidence that the weapons were stored in different places or acquired at different times); *United States v. Berry*, 977 F.2d 915, 917 (5th Cir. 1992); *United States v. Throneburg*, 921 F.2d 654 (6th Cir. 1990); *United States v. Grinkiewicz*, 873 F.2d 253, 255 (11th Cir. 1989).

On the other hand, possession of a single bullet has been held to be sufficient to support a § 922(g) conviction. *See United States v. Cardoza*, 129 F.3d 6 (1st Cir. 1997).

B. 18 U.S.C. § 924(e); Armed Career Criminal Act of 1984 (ACCA)

This sentencing enhancement imposes a mandatory minimum 15-year sentence of imprisonment (and a life maximum) for § 922(g) violators who have three previous convictions for a violent felony or serious drug offense, committed on occasions different from one another. "Violent felony" means any crime punishable by imprisonment for more than one year that has as an element the use, attempted use, or threatened use of force against another or is burglary, arson, or extortion, or involves the use of explosives, or involves other conduct that presents a serious potential risk of physical injury to another. "Serious drug offense" is defined as either certain federal drug offenses with a statutory maximum of 10 years or more imprisonment, or state offenses involving manufacturing, distributing, or possessing with intent to manufacture or distribute, with a statutory maximum of 10 years or more imprisonment. The **guideline** implementing this statutory provision is **§4B1.4**.

1. Because the Armed Career Criminal guideline is statutorily driven, guideline definitions for "violent felony" and "serious drug offense" for

Armed Career Criminal purposes are not the same as the definitions of "crime of violence" and "controlled substance offense" used in §§4B1.1 and 4B1.2 (Career Offender). Neither is the definition of "related cases" at §4A1.2 applicable.

2. The time periods for counting prior sentences under §4A1.2 (Criminal History) or §§4B1.1 and 4B1.2 (Career Offender) are not applicable in determining whether a defendant is subject to the Armed Career Criminal enhancement.

3. Notice

Neither § 924(e) nor §4B1.4 require that any notice be given a defendant subject to an increased sentence as an Armed Career Criminal. Thus, only notice necessary to satisfy constitutional requirements must be given. Due process requires that a defendant receive reasonable notice and an opportunity to be heard regarding a sentence increase for recidivism. *Oyler v. Boles*, 368 U.S. 448, 452 (1962). The notice must be sufficient to allow a defendant to investigate and object to the validity of the prior convictions. *United States v. Wilson*, 7 F.3d 828 (9th Cir. 1993), *cert. denied*, 511 U.S. 1134 (1994); *accord*, *United States v. Tracy*, 36 F.3d 187 (1st Cir. 1994), *cert. denied*, 514 U.S. 1074 (1995); *United States v. Bates*, 77 F.3d 1101 (8th Cir.) (assuming, without deciding, that due process requires notice to defendant that the government intends to enhance, notice of prior convictions prior to sentencing is sufficient), *cert. denied*, 117 S. Ct. 215 (1996); *United States v. Cobia*, 41 F.3d 1473 (11th Cir.) (enhancement is mandatory and should automatically be applied regardless of whether the government seeks it through formal notice, but defendant must receive actual notice of predicate convictions), *cert. denied*, 514 U.S. 1121 (1995). Courts have rejected the idea that due process requires pretrial notice of the government's intent to seek the enhancement, so long as the defendant is notified of the predicate convictions prior to sentencing. *See United States v. Hardy*, 52 F.3d 147 (7th Cir.), *cert. denied*, 516 U.S. 877 (1995)*; United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir.), *cert. denied*, 498 U.S. 1015 (1990).

A defendant who enters a guilty plea must be advised of any mandatory minimum penalty and of the maximum penalty to which he is exposed. *See* Fed. R. Crim. P. 11(c). If the court fails to so advise the defendant, the defendant must be sentenced without the enhancement or, alternatively, permitted to withdraw the guilty plea.

4. Validity of Previous Convictions

A defendant may challenge whether previous convictions are in fact predicate convictions under the ACCA definitions. However, with the sole exception of convictions obtained in violation of right to counsel, a defendant in a federal sentencing proceeding has no right to collaterally attack the validity of previous state convictions used to enhance his sentence under ACCA. *Custis v. United States*, 511 U.S. 485 (1994).

5. Burglary as a Violent Felony

Taylor v. United States, 495 U.S. 575 (1990): An offense constitutes "burglary" under § 924(e) if, regardless of its exact definition or label, it has the basic elements of a "generic" burglary—*i.e.*, an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime—or if the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant.

6. Occasions Different From One Another

Several courts have held that a defendant is subject to the ACCA enhancement if each of the three previous convictions arose out of a separate and distinct "criminal episode." *United States v. Green*, 810 F.2d 999, 1000 (11th Cir. 1986); *United States v. Towne*, 870 F.2d 880, 889 (2d Cir. 1989), *cert. denied*, 490 U.S. 1101 (1989); *United States v. Schoolcraft*, 879 F.2d 64, 74 (3d Cir. 1989), *cert. denied*, 493 U.S. 995 (1989). Where two or more of the predicate crimes occurred in close temporal and physical proximity to one another, so long as some temporal "break" occurs between the two crimes, they will be held to constitute distinct criminal episodes; completion of the first crime before commencement of the second indicates they are distinct criminal episodes; the perpetrator has a meaningful opportunity to desist before committing the second offense. *See United States v. Pope*, 132 F.3d 684 (11th Cir. 1998) (1975 burglary convictions were for breaking into and robbing two different doctors' offices, 200 yards apart, in immediate succession; enhancement proper); *United States v. Brady*, 988 F.2d 664, 666 (6th Cir.) (*en banc*) (two robberies committed within 30 minutes of each other treated as separate criminal episodes under ACCA), *cert. denied*, 510 U.S. 857 (1993); *United States v. Schieman*, 894 F.2d 909, 913 (7th Cir. 1990) (after burglarizing store, defendant was approached and pursued by a police officer, whom he assaulted. Court found the burglary and assault were separate criminal episodes, although committed ten minutes apart and closely connected), *cert. denied*, 498 U.S. 856 (1990); *United States v. Tisdale*, 921 F.2d 1095, 1099 (10th Cir. 1990) (burglaries of three separate stores in same shopping mall on same evening constituted three separate crimes), *cert. denied*, 502 U.S. 986 (1991).

Several circuits have also held that multiple drug offenses, committed close in time, constitute multiple convictions under the ACCA. *United States v. Johnson*, 130 F.3d 1420 (10th Cir. 1997) (Three $20 crack sales to undercover officers were similar in nature, but distinct in time and separate criminal episodes); *United States v. Maxey*, 989 F.2d 303, 306 (9th Cir. 1993) (drug offenses committed at distinct times are separate predicate offenses, even if committed within hours of each other, similar in nature, and consolidated for trial or sentencing); *United States v. Kelley*, 981 F.2d 1464, 1473-74 (5th Cir. 1993) (two deliveries of cocaine two weeks apart in different counties were separate offenses), *cert. denied*, 508 U.S. 944 (1993); *United States v. Samuels*, 970 F.2d 1312, 1315 (4th Cir. 1992) (two drug offenses one day apart were separate), *cert. denied*, 506 U.S. 845 (1992); *United States v. Roach*, 958 F.2d 679, 683-84 (6th Cir. 1992) (three drug sales on March 11, 12, and 26, were separate); *United States v. McDile*, 914 F.2d 1059, 1061-62 (8th Cir. 1990) (sales of drugs on September 15, November 15, 17, and 23, 1983, were separate offenses), *cert. denied*, 498 U.S. 1100 (1991).

C. 18 U.S.C. § 924(c); Using or Carrying a Firearm During Crime of Violence or Drug Trafficking

Provides for a fixed mandatory prison term of five years for anyone who uses or carries a firearm during and in relation to any crime of violence or drug trafficking crime (in addition to the punishment provided for the crime of violence or drug trafficking crime). A 20-year consecutive sentence is imposed in the case of a second or subsequent conviction under this subsection. A heightened penalty also applies for certain weapons. The penalties must run consecutively to any other term of imprisonment imposed on the offender. The **guideline** applicable to this statutory provision is **§2K2.4**.

1. "Use"

Bailey v. United States, 116 S. Ct. 501 (1995): The "use" prong of this statute requires "active employment" of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense. Examples given by the Court include brandishing, displaying, bartering, striking with, firing, attempting to fire, or referring to the firearm with intent to intimidate. More than mere storage of the firearm near the offense behavior is required. The facts before the Court in *Bailey* and its companion case involved a firearm in a bag in a locked trunk and a firearm in a footlocker in a defendant's closet.

Smith v. United States, 508 U.S. 223 (1993): The bartered exchange of a gun for narcotics constitutes "use" of firearm during and "in relation to" drug trafficking crime.

2. "Carry"

Muscarello v. United States, 118 S. Ct. 1911 (1998): The phrase "carries a firearm" 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. Second or Subsequent Conviction

Deal v. United States, 508 U.S. 129 (1993): Convictions for a second, third, *etc*., count of a crime of violence (or drug trafficking offense) in a single proceeding constituted second or subsequent convictions under § 924(c). Thus, defendant Deal received the 20-year enhanced penalties for each of his second through sixth convictions under § 924(c) even though he was convicted of the six bank robberies/§ 924(c) offenses (committed on different dates) in a single proceeding and was not arrested, tried or convicted on the first robbery/§ 924(c) offense before committing the second through sixth.

4. Consecutive Sentences

United States v. Gonzales, 520 U.S. 1 (1997): Requirement that federal sentence on § 924(c) count may not be imposed concurrently to "any other term of imprisonment" applies to prior state, as well as federal, sentences.

5. Type of Weapon

United States v. Alerta, 96 F.3d 1230 (9th Cir. 1996): For purposes of § 924(c) offense of using or carrying firearm during and in relation to crime of violence or drug trafficking offense, type of firearm used is element of the offense on which a jury instruction and finding is required. The omission of an instruction to the jury on type of firearm is harmless only if review of the facts found by the jury established that the jury necessarily found the omitted element. *See also United States v. Perez*, 129 F.3d 1340 (9th Cir. 1997). *United States v. Sims*, 975 F.2d 1225, 1235 (6th Cir.1992), *cert. denied*, 507 U.S. 932 (1993): "[T]he difference between the applicable sentences for handguns and machine guns mandates" that the jury "specify which category or categories of weapons it unanimously has found the defendant was using or carrying."

The **guideline** applicable to § 922(g) offenses is **§2K2.1**. A defendant convicted under § 922(g) with three prior convictions for violent felonies or serious drug offenses is subject to enhanced penalties as an Armed Career Criminal under § 924(e), in which case the applicable **guideline** is **§4B1.4**. *See* part I.B., *infra*.

II. Guideline Enhancements for Firearms

The guidelines provide for increased offense levels through specific offense characteristics that penalize a range of firearm-related conduct.

A. In §2D1.1, the drug trafficking guideline, 2 offense levels are added if a firearm was possessed during a drug trafficking offense. These levels are added if a firearm was present unless it is clearly improbable the weapon was connected with the offense. *See* §2D1.1, comment. (n.3).

United States v. Belitz, 141 F.3d 815 (8th Cir. 1998): Defendant argued he was not the owner of the gun used to increase his offense level in drug offense; his friend had asked him to repair the gun and he had it in the room for the friend to pick up. The court found ownership and innocent reason for possession were irrelevant; gun was loaded and accessible and defendant knew there were drugs in house. Defendant had not shown that it was clearly improbable that the gun was connected to the drug activity.

B. In §2B3.1, the robbery guideline, the specific offense characteristic provides for increases of 5 to 7 offense levels depending on the type of firearm behavior.

C. Section 2K2.1(b)(5) of the firearms guideline provides an increase of 2 levels (with a floor offense level of 18) for gun possession "in connection with" another felony. Most circuits have construed the "in connection with" language of §2K2.1(b)(5) as equivalent to the "in relation to" language of § 924(c) (discussed above at section I.C.). *See United States v. Regans*, 125 F.3d 685 (8th Cir. 1997); *United States v. Spurgeon*, 117 F.3d 641 (2d Cir. 1997) (the firearm must serve some purpose with respect to the felonious conduct, not be merely coincidental)*; United States v. Wyatt*, 102 F.3d 241, 247 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1325 (1997); *United States v. Nale*, 101 F.3d 1000, 1003-04 (4th Cir. 1996); *United States v. Thompson*, 32 F.3d 1 (1st Cir. 1994); *United States v. Routon*, 25 F.3d 815 (9th Cir. 1994); *United States v. Gomez-Arrellano*, 5 F.3d 464 (10th Cir. 1993). *But see United States v. Condren*, 18 F.3d 1190, 1195-98 (5th Cir.) (analogizing language to §2D1.1(b)(1)) (discussed above at section II.A.), which imposes a looser nexus than § 924(c), *cert. denied*, 513 U.S. 856 (1994).

III. Penalties

A. Statutory

1. For violations of § 922(g), the "felony-in-possession" statute, the maximum statutory penalty is ten years. *See* 18 U.S.C. § 924(a). Firearms involved in a knowing violation of § 922(g) are subject to seizure. *See* 18 U.S.C. § 924(d)(1).

2. For violations of § 924(c), the mandatory penalty for the basic offense is 5 years; if the firearm is a short-barreled rifle or shotgun or semiautomatic assault weapon, 10 years; if a machine gun, destructive device, or firearm equipped with a silencer, 30 years. For second or subsequent convictions under § 924(c), the penalty is 20 years, and if the firearm is a machine gun, etc., life imprisonment without release. These penalties are consecutive to any other sentence, such as for the underlying offense. *See* 18 U.S.C. § 924(c). Firearms involved are subject to seizure. *See* 18 U.S.C. § 924(d)(1).

B. Guideline Enhancements

For guideline purposes, the specific offense characteristics result in a 25-100 percent increase in the range. (The current average increase over all crimes is 20 months).

1. No defendant receives both a guideline enhancement for firearms and the mandatory consecutive sentence for § 924(c) based on the same firearm, as the guideline specifically directs that the specific offense characteristics for firearms not be applied when the defendant is convicted of a § 924(c) violation. *See* §2K2.4, comment. (n.2).

   United States v. Knobloch, 131 F.3d 366 (3d Cir. 1997): The Third Circuit reversed a §2D1.1(b)(1) gun increase because defendant had a conviction for § 924(c). Note 2 plainly prohibits an enhancement for possession of any firearm—whether it be the one directly involved in the underlying offense or another firearm, even one in a different location. "If the court imposes a sentence for a drug offense along with a consecutive sentence under 18 U.S.C. § 924(c) based on that drug offense, it simply cannot enhance the sentence for the drug offense for possession of any firearm."

2. Some courts have added the enhancement on top of the § 924(c) sentence where defendant had multiple firearms or when a codefendant also possessed a firearm. *See, e.g., United States v. Willett*, 90 F.3d 404, 408 (9th Cir. 1996) (2-level enhancement on top of the § 924(c)(1) conviction proper where defendant committed drug trafficking offense with multiple weapons); *United States v. Washington*, 44 F.3d 1271, 1280-81 (5th Cir.) (enhancement on top of § 924(c) conviction proper where accomplice in the crime had another gun) *cert. denied*, 514 U.S. 1132 (1995); *accord, United States v. Kimmons*, 965 F.2d 1001, 1011 (11th Cir. 1992), *cert. denied*, 506 U.S. 1086 (1993), and *cert. granted, judgment vacated on other grounds*, 508 U.S. 902 (1993).

3. Another punitive consequence potentially arising from the guideline firearm enhancements is that Bureau of Prisons policy prevents prisoners who received a firearm enhancement from qualifying for early release in connection with the intensive drug treatment program under 18 U.S.C. § 3621(e). *See* Program Statement No. 5162.02 (July 24, 1995). This policy has been successfully

challenged, however. *See Roussos v. Menifee*, 122 F.3d 159 (3d Cir. 1997); *Downey v. Crabtree*, 100 F.3d 662, 669 (9th Cir. 1996).

IV. Standard of Proof

A. Statutes

Guilt on the statutory offenses must be established by guilty plea or by a verdict "beyond a reasonable doubt." Section 924(e) is a mandatory sentencing enhancement that does not have to be charged. In contrast, § 924(c) describes an offense that must be charged, not a mere sentencing enhancement.

B. Guidelines

The particular showing that must be made with respect to each specific offense characteristic varies, but like all sentencing factors, the standard of proof is a preponderance of the evidence.

C. Codefendant or Coconspirator Liability

In practice, defendants are not usually held accountable under § 924(c) for firearms that they did not personally use or carry, although there is no legal impediment to holding them criminally liable under the law of conspiracy for an accomplice's foreseeable use or possession of a firearm during the conspiracy to commit the crime of violence or drug trafficking crime. *See, e.g.*, *United States v. Shea*, 150 F.3d 44 (1st Cir. 1998); *United States v. Wilson*, 135 F.3d 291 (4th Cir. 1998); *United States v. Washington*, 106 F.3d 983 (D.C. Cir. 1997); *United States v. Masotto*, 73 F.3d 1233 (2d Cir. 1996); *United States v. Myers*, 102 F.3d 227 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1720 (1997); *United States v. Wacker*, 72 F.3d 1453 (10th Cir. 1995); *United States v. Washington*, 106 F.3d 1488 (9th Cir. 1997) (silent but obvious and forceful presence of a gun can be a "use," and that is true whether the gun is on a table, or in the hands of a confederate). By contrast, under the guidelines, courts are required to apply the specific offense characteristics based on a defendant's relevant conduct, which generally includes all reasonably foreseeable acts and omissions of others in furtherance of jointly undertaken criminal activity.

V. Special § 924(c) Issues: *Bailey*'s Effects on § 924(c) Convictions Already Adjudicated

A. *Bousley v. United States*, 118 S. Ct. 1604 (1998)

The Supreme Court addressed aspects of the retroactive application of the *Bailey* decision in *Bousley*. Bousley pleaded guilty to drug charges and a § 924(c) count of using a weapon in connection with a drug trafficking offense. He appealed his sentence, but not his conviction, and his habeas appeal was pending when the Supreme Court decided *Bailey*. The Eighth Circuit rejected his argument that *Bailey* should be

applied retroactively, that his guilty plea was not knowing and intelligent because he was misinformed about the elements of a § 924(c) offense, that this claim was not waived by his guilty plea, and that his conviction should therefore be vacated. The Supreme Court held that Bousley may be entitled to a hearing on the merits of his claim if he could overcome the procedural default of not having appealed his conviction.

The Court reasoned that only a voluntary and intelligent guilty plea is constitutionally valid, and a plea is not intelligent unless a defendant first receives real notice of the nature of the charge against him. Bousley's plea would be constitutionally invalid if he proved that the district court misinformed him as to the elements of a § 924(c)(1) offense. The rule of *Teague v. Lane*, 489 U.S. 288 (1989)—that new constitutional rules of criminal procedure are generally not applicable to cases that became final before the new rules were announced—does not bar Bousley's claim. There is nothing new about the principle that a plea must be knowing and intelligent; and because *Teague* by its terms applies only to procedural rules, it is inapplicable to situations where the Supreme Court decides the meaning of a criminal statute enacted by Congress.

The Court then outlined the procedural problems facing Bousley's claim. Because he appealed his sentence, but not his plea, he had procedurally defaulted the attack on his plea. To pursue a defaulted claim in a habeas proceeding, he must first demonstrate either "cause and actual prejudice," or that he is "actually innocent." *Murray v. Carrier*, 477 U.S. 478 (1986). The Court held that his arguments that the legal basis for his claim was not reasonably available to counsel at the time of his plea and that it would have been futile to attack the plea before *Bailey* did not establish cause for the default. However, Bousley may attempt to make an actual innocence showing. Actual innocence means factual innocence, not mere legal insufficiency. Accordingly, on remand, the Government would not be limited to the existing record but could present any admissible evidence of petitioner's guilt. The Court held that Bousley's actual innocence showing must also extend to charges that the Government had forgone in the course of plea bargaining. The court noted, however, that Bousley need not prove actual innocence of both "using" and "carrying" a firearm in violation of § 924(c)(1); the indictment charged him only with "using" firearms, and there was no record evidence that the Government elected not to charge him with "carrying" a firearm in exchange for his guilty plea.

Note: Additional obstacles face successive § 2255 motions. *See* part V.D., *infra*.

B. Generally

In the absence of procedural default issues, if a defendant's § 924(c) conviction, based on an incorrect interpretation of the "use" provision of the statute, was sustained before *Bailey*, the defendant may seek collateral relief under 28 U.S.C. § 2255. Even

if the claim is procedurally defaulted, a defendant may overcome the default by showing actual innocence of the § 924(c) charge, as outlined in *Bousley*.

If the defendant had only a § 924(c) conviction, the court may vacate the conviction. If the defendant has another conviction with which the § 924(c) conviction was intertwined (the predicate crime of violence or drug trafficking offense), the court may resentence.

C. Resentencing Issues

1. Applying Specific Offense Characteristic Increases to Drug Trafficking Offense or Crime of Violence at Resentencing After Successful Collateral Attack on § 924(c) Conviction

United States v. Rodriguez, 112 F.3d 26 (1st Cir. 1997): Specific language of § 2255 allows court to correct a sentence as may be appropriate.

United States v. Gordils, 117 F.3d 99, 102 (2d Cir. 1997): District court has jurisdiction to resentence. *United States v. Mata*, 133 F.3d 200 (2d Cir. 1998): Such resentencing does not violate either the double jeopardy nor the due process clause of the Fifth Amendment.

United States v. Davis, 112 F.3d 118 (3d Cir. 1997): Section 924(c) and the underlying offense are interdependent and result in an aggregate sentence, not sentences which may be treated discretely; in addition there was no due process violation as the defendant did not have a reasonable expectation in the finality of his sentence.

United States v. Rodriguez, 114 F.3d 46 (5th Cir. 1997): Does not violate double jeopardy to resentence. The defendant did not have an expectation of finality if he challenged two of four interrelated convictions, placing the validity of his entire sentence at issue.

United States v. Pasquarille, 130 F.3d 1220 (6th Cir. 1997): Court of appeals upheld the district court's authority to resentence on the unchallenged drug conviction after vacating the § 924(c) count; even though he had already served the portion of his sentence allocated to the drug charge, he lost any expectation of finality when he challenged one of two interrelated convictions and placed the validity of his entire sentence at issue.

United States v. Walker, 118 F.3d 559 (7th Cir. 1997): Resentencing on drug conviction with 2-level increase after successful § 2255 challenge on *Bailey* grounds did not violate due process or double jeopardy.

United States v. Gardiner, 114 F.3d 734 (8th Cir.), *cert. denied*, 118 S. Ct 318 (1997): When defendant files § 2255 motion, he puts in issue all components of total sentence.

United States v. Handa, 122 F.3d 690 (9th Cir. 1997): Removal of gun conviction and sentence put defendant back in legal position he was in at time of arrest respecting sentencing enhancement for gun possession, and resentencing with enhancement thus was neither unfair nor double jeopardy.

United States v. Mendoza, 118 F.3d 707 (10th Cir. 1997): Resentencing with increase was proper in light of interdependence of drug and firearm sentences.

United States v. Mixon, 115 F.3d 900 (11th Cir. 1997): The district court had jurisdiction to resentence with enhancements on the remaining unchallenged counts.

2. When Defendant Has Already Served Sentence for Underlying Offense

United States v. Smith, 115 F.3d 241 (4th Cir. 1997); *United States v. Benbrook*, 119 F.3d 338 (5th Cir. 1997); *United States v. Pasquarille*, 130 F.3d 1220 (6th Cir. 1997); *United States v. Smith*, 103 F.3d 531, 535 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1861 (1997): No double jeopardy violation exists in resentencing, even when defendant has completed the portion of his sentence related to the underlying drug offense.

United States v. Alton, 120 F.3d 114 (8th Cir. 1997): The resentencing does not violate double jeopardy; even when defendant argued he had an expectation of finality because he had completed his sentence on the drug count and was serving the firearm sentence that had been imposed consecutively. The court of appeals said the drug sentence had not actually expired because the defendant was still in custody subject to supervised release on that charge at the end of his imprisonment on the firearm count. Also, the two interdependent sentences constituted one package.

United States v. McClain, 133 F.3d 1191 (9th Cir. 1998): Where defendant had already served the 37-month sentence related to the drug trafficking conviction when he petitioned the court to vacate his conviction and sentence related to the § 924(c) charge, resentencing so as to add the firearm enhancement to the drug trafficking offense does not violate double jeopardy. Defendant was sentenced to a single, unified sentence. Although the total sentence was created by assessing separately the appropriate sentence for each conviction, the ultimate sentence was a package. A defendant's expectations of finality can relate only to his entire sentence, not the discrete parts.

D. Credit for Time Served on Vacated Conviction

If defendant has served more than the time necessary for the remaining conviction, a court may not credit the time served on the invalid conviction against the required term of supervised release. The statute on supervised release states that the term begins on the date of release from imprisonment.[*] (However, the Bureau of Prisons may credit the defendant with the extra time served when/if the defendant is ever returned to custody.) A court could reduce the term of supervised release to one year after satisfactory service under 18 U.S.C. § 3583(e).

E. *Bailey* and Successive § 2255 Motions

A special problem arises when a prisoner could be successful in seeking *vacatur* of his § 924(c) conviction under *Bailey*, but cannot from filing a § 2255 motion because the Antiterrorism and Effective Death Penalty Act's (AEDPA) amendments to § 2255 bar successive § 2255 motions.

Under the AEDPA, a prisoner's successive motion for post-conviction relief is justiciable only if based on newly discovered evidence or on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. As *Bousley* made clear, *Bailey* did not represent a new rule of constitutional law, but does raise the possibility of a claim of actual innocence of the § 924(c) conviction.

The Second Circuit has held that *Bailey* did not involve a new rule of constitutional law but an intervening change in non-constitutional law which is not sufficient to overcome the new statutory bar to successive § 2255 motions. *United States v. Triestman*, 124 F.3d 361 (2d Cir. 1997). In *Triestman*, the Second Circuit considered that there may be constitutional problems with the new § 2255 as amended by the AEDPA when a prisoner who is actually innocent (*i.e.*, his actions are not a crime, Eighth Amendment problem) is precluded from all collateral review. The court noted the principle of avoiding a decision on constitutionality when possible. Thus, instead of holding that the statute improperly bars the relief sought by Triestman and others, the court stated that such prisoners may seek the *vacatur* via a writ of habeas corpus under 28 U.S.C. § 2241 (such motions are directed to the federal court in the district in which the prisoner is held). The court stated that the writ of habeas corpus may be sought whenever a prisoner's inability to obtain collateral relief would raise questions about § 2255's constitutionality.

The Sixth Circuit in *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997), permitted a second § 2255 motion for relief from § 924(c) convictions based on *Bailey*. The court held that the petition made a sufficient showing of either cause and prejudice or actual innocence. The court stated that even if the AEDPA barred Hanserd's second § 2255

[*]18 U.S.C. § 3624(e) provides that supervised release does not run during incarceration and that it commences upon release from custody.

motion, he could still raise his *Bailey* claim in a petition for writ of habeas corpus. The court also held that, if the AEDPA applied to bar Hanserd's second § 2255 motion, it would be impermissibly retroactive because Hanserd's first petition was filed before the AEDPA was enacted.

The Third Circuit has also indicated that, should a § 2255 motion be unavailable to litigate a *Bailey* claim due to the procedural restitutions of the AEDPA, a prisoner could seek relief under the federal habeas corpus statute, 28 U.S.C. § 2241. *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997).

Other courts have yet to consider the issue. However, the Supreme Court recently held that it has jurisdiction to review a denial of an application for a certificate of appealability under the AEDPA by a circuit judge or panel of the Court of Appeals. *United States v. Hohn*, 118 S. Ct. 1969 (1998).