NOTES

THE ALASKA MISCONDUCT INVOLVING WEAPONS STATUTES: A HISTORY AND ANALYSIS

This Note examines the Alaska Misconduct Involving Weapons statutes, concentrating on their history and on two Alaska Court of Appeals decisions interpreting them. The Note also considers the federal statute upon which the Alaska statutes and their judicial interpretations are based. Finally, the Note invites the Alaska Legislature to respond to the court's decisions by amending and clarifying the statutes.

I. INTRODUCTION

In 2002, the Alaska Court of Appeals decided *Murray v. State*. In *Murray*, the court of appeals interpreted Alaska Statute section 11.61.195, which prohibits the possession of a weapon while committing a number of specified drug offenses. Drawing upon its previous decision in *Collins v. State*, the court laid out a set of factors to assist a trial court in determining whether a nexus between a weapon and an underlying offense has been proven under the statute. These factors were taken from a series of federal appellate cases interpreting 18 U.S.C. § 924(c)(1).

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- 1. 54 P.3d 821 (Alaska Ct. App. 2002).
- 2. ALASKA STAT. § 11.61.195 (Michie 2002).
- 3. 977 P.2d 741, 753 (Alaska Ct. App. 1999) (holding that prosecution must prove a "nexus" between the weapon and the predicate drug offense).
 - 4. Murray, 54 P.3d at 824; see also discussion infra Part V.
 - 5. Murray, 54 P.3d at 824 n.17; see also discussion infra Part V.

This Note asserts that, for better or worse, the *Murray* court implied that the federal and state statutes, while differing slightly, should essentially be interpreted in the same manner. Accordingly, in order for practitioners, judges, and legislators to understand how the case will affect Alaska jurisprudence, a fundamental understanding of the federal statute is needed. This Note sets out the texts, legislative histories, and interpretive jurisprudences of each statute, and compares the substantive points of the statutes. Next, the Note analyzes *Murray* in detail, paying special attention to the federal decisions that spawned the factors cited by the Alaska court. Finally, the Note encourages the legislature to clarify its intent by amending the statute or by announcing that the court of appeals' interpretation is indeed consistent with the legislature's actual intent.

II. ALASKA'S MISCONDUCT INVOLVING WEAPONS STATUTES

A. Statutory Framework

In 1992, the Alaska Legislature enacted the Anti-Violent Crime Act. Section 10 of this Act changed the title of the existing misconduct involving weapons statute to Misconduct Involving Weapons in the Third Degree and inserted the more serious crimes of Misconduct Involving Weapons in the First Degree and Misconduct Involving Weapons in the Second Degree. In pertinent part, the Act provided:

AS 11.61 is amended by adding new sections to article 2 to read: Sec. 11.61.190. MISCONDUCT INVOLVING WEAPONS IN THE FIRST DEGREE.

- (a) A person commits the crime of misconduct involving weapons in the first degree if the person uses or attempts to use a firearm during the commission of an offense under AS 11.71.010 11.71.040.
- (b) Misconduct involving weapons in the first degree is a class A felony.

Sec. 11.61.195. MISCONDUCT INVOLVING WEAPONS IN THE SECOND DEGREE.

- (a) A person commits the crime of misconduct involving weapons in the second degree if the person knowingly
- (1) possesses a firearm during the commission of an offense under AS 11.71.010 11.71.040; or

^{6. 1992} Alaska Sess. Laws 79.

^{7.} Id.; see also State v. McLaughlin, 860 P.2d 1270, 1271 n.1 (Alaska 1993).

- (2) violates AS 11.61.200(a)(1) and is within the grounds of or on a parking lot immediately adjacent to
- (A) a public or private preschool, elementary, junior high, or secondary school without the permission of the chief administrative officer of the school or district or the designee of the chief administrative officer; or
- (B) a center, other than a private residence, licensed under AS 47.35.010 47.35.075 or recognized by the federal government for the care of children.
- (b) Misconduct involving weapons in the second degree is a class B felony.8

These provisions can be classified as the Alaska "use statute" (section 11.61.190(a)) and the Alaska "possession statute" (section 11.61.195(a)(1)). The parts of the statutes with which this Note is concerned—the actual "use" and "possession" components—apply to certain drug-related violations of the Alaska criminal code, including delivery, manufacture, and possession of certain controlled substances. Despite small technical changes to the statutes themselves, the use and possession components have remained identical to their original enactments. 11

B. Judicial Interpretation

1. The Court's Initial Reading: Collins v. State. Judicial interpretation of the Alaska weapons statute has been limited, especially with regard to the use statute. However, the court of appeals has recently been very active in interpreting the possession statute. The court's first chance to consider the possession statute

^{8. 1992} Alaska Sess. Laws 79.

^{9.} By enacting both a use statute and a possession statute, the Alaska Legislature avoided many of the problems that have arisen in the analogous federal provisions. *See infra* Part VI. In addition, for the purposes of this Note, the use and possession statutes are collectively termed the "Alaska weapons statute."

^{10.} See Alaska Stat. §§ 11.71.010-.040 (Michie 2002).

^{11.} See id.

^{12.} As of this writing, no Alaska court has interpreted or considered the provision of the use statute discussed in this Note (use of a firearm during the commission of a drug offense). However, at least one decision has considered the prosecution's obligations under Alaska Stat. § 11.61.190(a), which punishes the discharge of a firearm from a propelled vehicle under certain circumstances. *See* Smith v. State, 28 P.3d 323, 326 (Alaska Ct. App. 2001).

^{13.} This Note focuses on the judicial interpretation of the possession statute, but it also discusses some options for the legislature and the courts. *See infra* Part VI.

came in *Collins v. State.*¹⁴ In *Collins*, a defendant was arrested when Anchorage police responded to an anonymous tip that drug sales were occurring in a certain apartment.¹⁵ During their search, the police found the defendant and two other people.¹⁶ In the defendant's room, the police also found two handguns, various drug paraphernalia, and a drug-sale record.¹⁷ The defendant was subsequently convicted under section 11.61.195 on the basis that he simultaneously possessed the firearms and the drugs.¹⁸ Indeed, the jury was instructed that, in order to convict the defendant under the possession statute, the State needed only to establish that the event actually occurred and that the defendant "knowingly possessed a firearm during the commission of a felony drug offense..." The jury, however, received no further explanation pertaining to the phrase "during the commission of a felony drug offense."

After his conviction, the defendant filed a motion for judgment of acquittal, arguing that the statute required proof of some connection between the firearm and the drug offense.²¹ The trial judge expressed preliminary agreement with the defendant's interpretation of the statute and asked the parties to submit supplemental briefs on the subject.²² In its brief, the State conceded that the statute required proof of a nexus between, not just simultaneous possession of, drugs and a firearm.²³ However, the State argued that as long as the defendant was "emboldened" by the presence and availability of the firearm, proof of use or threatened use was not required.²⁴ The State also argued that the fact that the drugs and guns were found in the same location effectively proved a nexus between them.²⁵ The trial judge denied the defendant's motion.²⁶

^{14. 977} P.2d 741 (Alaska Ct. App. 1999).

^{15.} Id. at 744.

^{16.} Id.

^{17.} Id.

^{18.} *Id.* at 751 (Mannheimer, J., concurring).

^{19.} Id.

^{20.} Id.

^{21.} Id.

^{22.} Id. at 752.

^{23.} *Id*.

^{24.} Id.

^{25.} Id.

^{26.} Id.

The court of appeals reversed the trial judge's ruling.²⁷ Specifically, the court found that because the State conceded that the statute required proof of an additional element (or nexus), the indictment lacked a necessary element.²⁸ In addition, the court held that if a nexus were an element, the jury should have been instructed as to the nexus requirement and should have made a finding as to that element.29 Since neither event occurred at Collins' trial, the conviction was flawed, regardless of whether the State adequately proved a nexus.³⁰ Furthermore, the court of appeals rejected the State's contention that a crime under section 11.61.195 is committed whenever someone "simultaneously commits a drug felony and possesses or exercises control over a firearm—even a firearm located in another place."³¹ In doing so, the court noted that the State's interpretation would drastically increase sentences whenever a drug user happened to be a gun Accordingly, the court concluded that section 11.61.195(a)(1) required proof of a "nexus between a defendant's possession of the firearm and the defendant's commission of the felony drug offense." However, the court specifically declined to define the contours of the nexus.3

2. The Court's Latest Opinion: Murray v. State. The court of appeals received its opportunity to define the nexus in Murray v. State.³⁵ In Murray, officers responded to a defendant's hotel room in search of a dead body.³⁶ Instead of a dead body, however, the officers found the defendant, who claimed that his girlfriend was currently in possession of cocaine and was driving around town in his car.³⁷ When the officers stopped the car, they contacted the defendant, who consented to a search of the car.³⁸ During the

^{27.} Id. at 752-53.

^{28.} Id.

^{29.} Id. at 752.

^{30.} Id.

^{31.} *Id.* at 753 (noting that the state had claimed that "the only nexus required by the statute is one [of] time: possession [of the firearm] must coincide at some point in time with the commission of a felony drug offense[]") (internal quotation marks omitted).

^{32.} *Id*.

^{33.} Id.

^{34.} Id.

^{35. 54} P.3d 821 (Alaska Ct. App. 2002).

^{36.} Id. at 822.

^{37.} Id.

^{38.} Id.

search, the officers uncovered marijuana and a crack pipe.³⁹ The defendant subsequently arrived at the traffic stop and volunteered that he had given his girlfriend the marijuana.⁴⁰ In addition, he claimed that he had about a quarter-pound of marijuana and a handgun located at his residence.⁴¹

After obtaining a warrant, the officers searched the defendant's residence.⁴² They found marijuana in a living room closet, marijuana measuring and sorting materials in the kitchen, marijuana residue in a bedroom drawer, and a loaded .44 magnum handgun in the bedside table drawer.⁴³ In addition, they found a gun cleaning kit and boxes of ammunition in a bucket in the bedroom and a marijuana "bud" in the weapon's case.⁴⁴ The defendant was tried and convicted of multiple offenses, including one count of Misconduct Involving Weapons in the Second Degree under section 11.61.195(a)(1).⁴⁵ Originally, the trial judge made no specific findings as to the nexus between the drugs and the weapon.⁴⁶ However, the court of appeals remanded the case to the trial court to enter specific findings on the nexus issue.⁴⁷

On remand, the trial court stated that its original findings encompassed the nexus issue. The court emphasized these facts: that the marijuana had been found in the same bedroom as the firearm and that the defendant had bought the firearm to protect his marijuana "stash." Furthermore, the trial court claimed that the presence of the firearm "emboldened" the defendant to maintain his marijuana stash by making his home more secure. Finally, the court noted that the "substantial amount of drugs" involved in the case, as well as "the defendant's status as a felon," led to the conclusion that the nexus requirement was satisfied.

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39. Id.
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^{40.} *Id*.

^{41.} *Id*.

^{42.} *Id*.

^{43.} *Id*.

^{44.} Id.

^{45.} *Id*.

^{46.} *Id.* The trial judge based his decision on the fact that some "logical correlation" existed between the drugs and the weapon. *Id.* Specifically, the judge noted that "the place where the drugs were located was also the place where the firearm was located." *Id.*

^{47.} Id. at 822-23.

^{48.} Id. at 823.

^{49.} Id.

^{50.} Id.

^{51.} *Id*.

On appeal of the trial court's order, the court of appeals vacated the trial court's decision.⁵² The court found that the trial court's factual findings were erroneous because the trial judge had based his ruling in part on the fact that the drugs and the firearm were found in the same room of the house.⁵³ In actuality, however, the drugs were found in the living room and the firearm was found in the bedroom.⁵⁴ Because the proximity of the firearm was relevant to the nexus determination, the court of appeals remanded the case for reconsideration of the nexus issue.⁵⁵

In the second part of its opinion, the court of appeals analyzed the legal standard used by the trial court.⁵⁶ At trial and on remand, the trial judge found that a nexus was established because the drugs and the firearm were in close physical proximity and because the firearm "emboldened" the defendant to continue his drug possession. Further, in its brief to the court of appeals, the State argued that there is always a sufficient nexus under the possession statute whenever someone possesses drugs and a firearm in close physical proximity.⁵⁸ The court of appeals dismissed this argument, noting that a test based only on physical proximity would trigger liability under the possession statute any time a party commits a drug offense in their residence and also possesses a firearm in their residence, regardless of the reason for gun possession.⁵⁹ The court also stated that the State's argument would be contrary to the court's notion of the legislature's intent in enacting the statute. Accordingly, the court of appeals held that, to establish a sufficient nexus to trigger liability under the possession statute, the State is required to prove that the defendant's possession of a firearm "aided, advanced, or furthered the commission of the drug offense."61

^{52.} Id. at 825.

^{53.} Id. at 823.

^{54.} *Id.* The State conceded this fact on appeal. *Id.*

^{55.} *Id*.

^{56.} Id. at 823-24.

^{57.} Id.

^{58.} *Id.* at 824. This is a very similar argument to the one advanced by the State in *Collins*. *See* Collins v. State, 977 P.2d 741, 752 (Alaska Ct. App. 1999). Instead of arguing that simultaneous possession always proves a nexus, the State in *Murray* argued that close physical proximity always proves a nexus. 54 P.3d at 824.

^{59.} Murray, 54 P.3d at 824.

^{60.} Id.

^{61.} *Id.* (rejecting the "close physical proximity" test as a sufficient condition for liability under the possession statute).

To assist trial courts in determining whether a nexus exists, the court of appeals proposed a multi-factor test based upon certain federal circuit court decisions. In doing so, the court of appeals inextricably linked its interpretation of section 11.61.195 to relevant federal case law. These factors and their origins will be discussed more thoroughly in Part V. However, to better understand the framework that produced the factors, a discussion of the pertinent federal law is required. The meandering road that Congress and the federal courts have followed in interpreting the federal statute also shows the difficulties that can arise when legislative intent is not clear. Finally, the federal law provides a framework for analyzing the Alaska use statute, which to date has not been interpreted by Alaska courts.

III. THE FEDERAL FRAMEWORK: 18 U.S.C. § 924(C)

A. The Original Enactment

In 1968, Congress enacted the Gun Control Act. The Act contained a provision, later codified at 18 U.S.C § 924(c), which stated that "[w]hoever uses a firearm to commit any felony... or carries a firearm unlawfully during the commission of any felony... shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years." As a general matter, the statute was intended "to persuade the man who is tempted to commit a Federal felony to leave his gun at home." The statute, however, did not apply to many criminal acts because it was inapplicable to situations where the defendant had a permit for the weapon or refrained from using the weapon to commit the crime. In addition, the Supreme Court initially held that the statute functioned only as an "enhancement provision" rather than as a separate offense.

Congress responded to these attacks with a series of amendments over a ten-year period. The first amendment (and the

^{62.} Id. at 823-24.

^{63.} Angela LaBuda Collins, Note, *The Latest Amendment to 18 U.S.C. §* 924(c): Congressional Reaction to the Supreme Court's Interpretation of the Statute, 48 CATH. U. L. REV. 1319, 1325 (1999) (internal citation omitted).

^{64.} Danielle D. Giroux, Note, My Dictionary or Yours? The Supreme Court's Interpretation of "Carrying" Under 18 U.S.C. § 924(C)(1) in Muscarello v. United States, 8 GEO. MASON L. REV. 355, 356 (2000) (internal citation omitted).

^{65.} Muscarello v. United States, 524 U.S. 125, 132 (1998) (quoting 114 CONG. REC. 22,231 (1968) (statement of Rep. Poff) (internal quotation marks omitted)).

^{66.} Giroux, *supra* note 64, at 356-57.

^{67.} Collins, *supra* note 63, at 1326.

most direct response) was enacted as a component of the Comprehensive Crime Control Act of 1984.⁶⁸ This enactment instituted a mandatory five-year sentence without parole under § 924(c) for any defendant who "carried firearms during, and in relation to," a crime of violence.⁶⁹ The amendment also removed the "unlawful" carrying requirement, thus bringing within the grasp of § 924(c) those cases in which a defendant lawfully possessed a firearm but carried it in the commission of a crime.⁷⁰ Accordingly, under the 1984 amendment, a defendant could "carry" a firearm if he "had a gun in his pocket, but did not display it, or refer to it."⁷¹

Subsequent amendments broadened § 924(c) to include drug trafficking crimes. Congress enacted another amendment to § 924(c) in 1986 as part of the Firearms Owners' Protection Act. This amendment made § 924(c) applicable to drug trafficking crimes as well as crimes of violence. The amendment also reflected the overarching and now universally-recognized purpose of § 924(c): "to combat the 'dangerous combination' of 'drugs and guns." Congress modified the definition of "drug trafficking crime" in 1988, defining the term as "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801), the Controlled Substances Import and Export Act (21 U.S.C. § 951), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901)." Finally, in 1990 and 1994, Congress expanded the list of weapons covered under the statute.

- B. Judicial Interpretation of the "Uses or Carries" Standard and the Congressional Response
- 1. Smith v. United States *and the "Use" Prong*. In 1993, the Supreme Court made its first attempt to probe the depths of the "use" prong of § 924(c).⁷⁷ In *Smith*, ⁷⁸ a defendant was charged and

^{68.} Id.

^{69.} Id. at 1327.

^{70.} Giroux, *supra* note 66, at 357.

^{71.} *Id.* (quoting S. REP. No. 98-225, at 314 (1983) (internal quotation marks omitted)).

^{72.} Collins, supra note 67, at 1328.

^{73.} See Giroux, supra note 66, at 357.

^{74.} Muscarello v. United States, 524 U.S. 125, 132 (1998) (quoting Smith v. United States, 508 U.S. 223, 240 (1993)).

^{75.} H. REP. No. 105-344, at 3 n.2 (1997).

^{76.} Collins, *supra* note 63, at 1328. For a complete list of covered weapons, see $18 \text{ U.S.C.} \S 924(c)(1)(B) (2000)$.

^{77.} Smith v. United States, 508 U.S. 223 (1993).

convicted under § 924(c) for exchanging a MAC-10 automatic firearm for a quantity of cocaine. On appeal, the defendant argued that § 924(c)'s proscription against using a firearm "during and in relation to" a drug trafficking offense was only applicable when the firearm was used as a weapon, not as a medium of exchange. The Eleventh Circuit rejected the defendant's argument, holding that "any use of 'the weapon to facilitate *in any manner* the commission of the offense" was sufficient to trigger liability under § 924(c).

The Supreme Court began its analysis of the defendant's claim by noting that § 924(c) requires the prosecution to show both that the defendant "use[d] or carrie[d] a firearm" and that he or she did so "during and in relation to" a "crime of violence or drug trafficking crime." The Court then held that the language contained in § 924(c)(1) was broad enough to punish any use of a firearm, provided that such use was "during and in relation to" a drug trafficking offense or crime of violence. Accordingly, the manner in which the defendant used the Mac-10 is immaterial if he used it "during and in relation to" his cocaine-related offenses.

Turning to the "during and in relation to" element, the Court held that an act cannot support punishment under § 924(c)(1) unless, at a minimum, "it facilitates or furthers the drug crime." This construction is aligned with the purpose of the "in relation to" language, which was designed to allay concerns that a person could be charged under § 924(c)(1) even though their possession of a firearm was "coincidental or entirely unrelated" to a drug offense. In the specific case, the fact that the defendant's use of the MAC-10 was "integral" to the transaction clearly indicated that the weapon's presence facilitated the drug offense. Accordingly, the defendant's conviction under § 924(c) was proper.

2. Bailey v. United States: *The Turning Point*. After *Smith*, confusion developed among the circuit courts as to how "use"

^{78.} Id.

^{79.} Id. at 225-27.

^{80.} Id. at 227.

^{81.} *Id* (emphasis in original).

^{82.} Id. at 227-28.

^{83.} Id. at 229.

^{84.} Id. at 232.

^{85.} Id. at 238.

^{86.} Id.

^{87.} Id. at 241.

should be defined in situations other than a guns-for-drugs trade. Specifically, although *Smith* had defined "use" under § 924(c) as "employment," some circuit courts differed as to whether mere "possession" of a weapon was sufficient to trigger criminal liability. In order to rectify this inconsistency and to resolve the circuit split, the Supreme Court granted certiorari in *Bailey v. United States*. "

Bailey consisted of two cases that were consolidated by the District of Columbia Circuit in a rehearing en banc. In the first case, United States v. Bailey, a defendant was charged and convicted under § 924(c)(1) when officers executing a traffic stop found cocaine and a round of ammunition in the defendant's car and a loaded pistol in his trunk. In the second case, United States v. Robinson, a defendant was arrested and convicted when officers found an unloaded weapon and some drug paraphernalia in her bedroom closet.

Prior to these consolidated cases, two theories existed among the federal circuits for defining the "use" prong of § 924(c)(1). The first theory (the "drug fortress" theory) held that the presence of a firearm for the maintenance or protection of a "drug fortress" was sufficient to trigger criminal liability under the "use" prong of § 924(c)(1). The theory extended to "mere possession" cases in which the firearm had a future possibility of aggressive use. In addition, the theory was extended in the Fifth Circuit to include cases in which firearms and drugs were possessed on the same premises at the same time.

The second theory was the "ready access" theory. Under this theory, a defendant could be convicted of "using" a firearm under § 924(c)(1) if he or she intended to have the firearm available for

^{88.} Collins, supra note 63, at 1334.

^{89.} Id.

^{90. 516} U.S. 137 (1995).

^{91.} Id. at 141.

^{92.} Id. at 139.

^{93.} Id. at 140.

^{94.} Julie D. Bettenhausen, Note, *The Implications of Bailey v. United States on the Rise of Convicted Criminal Claims and the Fall of 18 U.S.C. § 924(c)(1)*, 46 DRAKE L. REV. 677, 682 (1998).

^{95.} Bailey, 516 U.S. at 141.

^{96.} *Id.*; see also United States v. McFadden, 13 F.3d 463, 465 (1st Cir. 1994).

^{97.} Bettenhausen, *supra* note 94, at 683; *see also* United States v. Blake, 941 F.2d 334 (5th Cir. 1991); United States v. Molinar-Apodaca, 889 F.2d 1417 (5th Cir. 1989). Recall that this was very similar to the state's contention in *Collins v. State.* 977 P.2d 741, 752 (Alaska Ct. App. 1999).

use during a drug transaction or if the firearm was strategically located so as to be quickly and readily accessible during a drug transaction. 98

The District of Columbia Circuit produced a third theory. In its *en banc* rehearing of the cases, a majority of the court adopted a "proximity and accessibility" test.⁹⁹ This test was effectively defined as a "proximity plus" test, under which defendants were subject to liability for "use" of a weapon during and in relation to a drug trafficking offense when they put or kept the gun in a particular place from which the defendant (or his or her agent) could gain access to it to facilitate a drug crime.¹⁰⁰ Thus, mere possession of a weapon was not enough to convict a defendant under § 924(c)(1).¹⁰¹

In a unanimous decision, the Supreme Court agreed that "use" meant more than mere possession of a firearm by a drug offender, holding that if Congress had intended to punish mere possession, it would have done so. 102 However, the Court struck down the "proximity and accessibility" test, holding that under that test almost any type of possession of a firearm by a person engaged in drug trafficking would be sufficient to convict a defendant. The Court concluded that the "language, context, and history" of § 924(c) indicated that "active employment" of a weapon was required to violate the "use" prong. The Court also rejected the Government's contention that "use" encompassed the actions of a defendant who places a gun in a position to protect drugs or to "embolden" himself. 105 Under that theory, the meaning of the word "carry" in the statute would be rendered superfluous or redundant.¹⁰⁶ The Court was unable to accept that outcome, and instead proposed a construction of "use" that would not undermine the definition of "carry." Finally, and perhaps most importantly,

^{98.} Bettenhausen, *supra* note 94, at 683-84; *see also* United States v. Theodoropoulos, 866 F.2d 587 (3d Cir. 1989); United States v. Feliz-Cordero, 859 F.2d 250 (2d Cir. 1988).

^{99.} Bailey, 516 U.S. at 141.

^{100.} Id. at 142.

^{101.} Id. at 143.

^{102.} Id.

^{103.} Id. at 143-44.

^{104.} Id. at 144.

^{105.} *Id.* at 145. Recall that this was essentially the trial judge's rationale for determining that the defendant "possessed" a weapon during the commission of a drug crime in *Murray v. State.* 54 P.3d 821, 823 (Alaska Ct. App. 2002).

^{106.} Bailey, 516 U.S. at 145.

^{107.} Id. at 146. Under the Court's interpretation, a firearm would fit the

the Court again observed that if Congress had intended to strip "use" of its "active connotations" or to render "carry" redundant, it could have done so by instituting a possession standard. 108

3. Congress responds to Bailey. Bailey had a profound effect on federal criminal law. Prosecutions under § 924(c) were decreased by one-half in the first month following the decision. Additionally, between 1,500 and 2,250 § 924(c) prosecutions were disqualified per year by Bailey, leading to approximately a seventeen percent decline in prosecutions under the statute. The decision also led to a rash of litigation in lower courts due to the Court's retroactive application of its decision.

Rather than accept *Bailey* as a valid exercise of the Court's constitutional power, Congress reacted relatively quickly and condemned the Court's "limited interpretation" of the use prong. Congress viewed *Bailey* as a fetter to prosecutors and as a weapon that "drug dealers and other bad actors" could use to get out of jail. As a result, both houses of Congress introduced bills designed to rectify the "*Bailey* problem" and clarify the congressional intent behind § 924(c). The proposals, however, were not identical. The House approach (the first to be introduced) entirely deleted the "uses or carries" language of the statute and instead punished those defendants who brandished or discharged firearms, as well as those who possessed firearms in furtherance of a crime of violence or drug trafficking offense. This bill was therefore designed to defeat the "restrictive effect" of

definition of "use," but not that of "carry," when a defendant displays the gun during a transaction (for instance, when a defendant barters with a firearm without handling it) or carries the firearm without being used (for example when an offender conceals a weapon during a transaction). *Id.*

108. Id. at 146-48.

109. Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1672-73 (2002).

110. 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, 60-61 (2000); see also H.R. REP. No. 105-344, at 5 (1997).

111. Beale, *supra* note 109, at 1673. More than ten-thousand people were in prison for § 924(c) violations at the time *Bailey* was handed down. *Id*.

112. H.R. REP. No. 105-344, at 4.

113. 144 CONG. REC. H10330 (daily ed. Oct. 9, 1998) (statement of Rep. McCollum).

114. H.R. REP. No. 105-344, at 6.

115. Id. at 3.

Bailey. The Senate bill, while similar to the House version, retained the "uses or carries" language and added a possession standard. The Senate was deeply committed to rectifying the conflict between the branches, and Senator Jesse Helms, the sponsor of the bill, went so far as to claim that Congress was "morally obliged" to fix the *Bailey* "blunder." Helms and other senators referred to their version as the "*Bailey* Fix Act."

In the past, members of Congress had tried to introduce "possession" language into § 924(c), but had been met with limited success. 120 However, Bailey served as the proverbial last straw, and the Senate's version of the amendment to § 924(c) passed both houses in 1998. 121 Under the amendment, designed to "throttle criminal use of guns," the statute was extended to reach conduct occurring outside of the "uses or carries" standard by punishing "possession in furtherance of" a violent crime or drug trafficking crime.¹²² While instituting a change in the underlying law, Congress also made it clear that the possession standard had limits. Specifically, the House Committee on the Judiciary noted that to convict under the "possession in furtherance of" standard, the government must show that the firearm was possessed to "advance or promote" the commission of the offense. Accordingly, the statute was limited to criminal activity and was not intended to reach self-defense actions or situations where a weapon was possessed in the general vicinity of a criminal act. 124

4. The Wild Card: Muscarello v. United States. While Congress was debating the 1998 amendment to § 924(c), the Supreme Court decided Muscarello v. United States. In Muscarello, the Court considered the extent of the "carry" prong of § 924(c). The defendants in Muscarello (two consolidated cases) claimed that, because the weapons at issue in their cases were

^{116.} Collins, *supra* note 63, at 1348.

^{117.} Id. at 1348.

^{118.} Id. at 1349.

^{119.} Id.

^{120.} See Giroux, supra note 64, at 358 (noting that, as early as 1990, the Senate had attempted to replace the "uses or carries" language with "possession" language).

^{121.} Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469 (codified at 18 U.S.C. § 924(c)).

^{122.} Id.

^{123.} H.R. REP. No. 105-344, at 12 (1997).

^{124.} Id.

^{125. 524} U.S. 125 (1998).

^{126.} *Id.* at 126.

found in the glove compartment and trunk of the defendants' vehicles, respectively, § 924(c) did not apply to their conduct.¹²⁷ The Supreme Court disagreed, holding that § 924(c) was not limited to situations where a defendant "carries" a firearm on their person. 128 Rather, the Court held that § 924(c) applied to situations in which a person "knowingly possesses and conveys firearms in a vehicle," regardless of where in the vehicle the weapon actually is located. On its face, it would seem that this language effectively extended § 924(c) to include the types of conduct that Congress was trying to reach when it enacted the 1998 amendment. 130 However, Congress paid no attention to Muscarello when enacting the amendment. 131 This may have occurred because Congress wished to reach situations such as the one at issue in *Murray*: those cases where the defendant has a weapon on the premises where he or she conducts drug operations. Since no "carrying" actually occurs in that case, a "possession" standard would be needed to reach that conduct.

IV. A BRIEF ASIDE: WHY REQUIRE A NEXUS?

Because of the relatively interrelated nature of drug crimes and firearms, a statute that punishes the use or possession of a firearm while committing a drug offense sweeps a great deal of conduct within its ambit. This is effectively demonstrated by § 924(c), which is the most frequently prosecuted federal firearms statute. The federal statute also imposes enhanced penalties or institutes separate offenses for conduct that normally would be punished under only one offense. As a result, prosecutors have an incentive to apply § 924(c) tenaciously and to try, whenever possible, to expand its reach by broadly interpreting its requirements. A nexus, then, is required to provide a check on prosecutorial overreaching.

^{127.} Id. at 127.

^{128.} Id. at 126.

^{129.} Id. at 127 (emphasis added).

^{130.} Collins, *supra* note 63, at 1349-50.

^{131.} Id. at 1350.

^{132.} Beale, *supra* note 109, at 1665-66.

^{133.} Id. at 1667.

^{134.} Id. at 1675.

V. ALASKA'S FRAMEWORK FOR ESTABLISHING A NEXUS UNDER SECTION 11.61.195

In *Murray*, the Alaska Court of Appeals reiterated that a nexus between a defendant's possession of a firearm and his commission of a drug offense is required for conviction under section 11.61.195. To aid fact-finders in determining whether a nexus exists, the court set out a list of factors that federal circuit courts have found "relevant" in determining whether a firearm was possessed in furtherance of a drug offense under § 924(c). These factors are:

(1) the type of drug activity conducted; (2) the accessibility of the firearm; (3) the type of firearm; (4) whether the firearm was stolen; (5) the status of the defendant's possession (legitimate or illegal); (6) whether the firearm was loaded; (7) the proximity of the firearm to the drugs or drug profits; and (8) the time and circumstances under which the gun was found.¹³⁷

While the court cautioned that these factors were not exhaustive, it also specifically stated that the factors were relevant to whether "the defendant's possession of [a] firearm aided, advanced, or furthered the commission of the drug offense."¹³⁸

While many states do require some sort of nexus between a weapon and a drug crime to convict, Alaska was one of the first to use a factor-based analysis.¹³⁹ At the time of *Murray*, Louisiana was the only other state utilizing such a factor-based approach, and even then only used the factors in cases where actual possession of a firearm was not present.¹⁴⁰ Additionally, while Kentucky adhered to the rule that a nexus between the weapon and the drug offense was required to convict, the standard only applied to cases of actual

^{135.} Murray v. State, 54 P.3d 821, 824 (Alaska Ct. App. 2002).

^{136.} Id.

^{137.} Id.

^{138.} Id.

^{139.} See, e.g., Commonwealth v. Montague, 23 S.W.3d 629, 632-33 (Ky. 2000); State v. Peete, 517 N.W.2d 149 (Wis. 1994). States with statutes that specifically include a standard have not found a need for any judicial nexus analysis. See, e.g., Manning v. State, 956 S.W.2d 184 (Ark. 1997) (holding that, in order to convict under the Arkansas statute, the firearm must be "in close approximation to the defendant or within defendant's easy reach").

^{140.} State v. Blanchard, 776 So. 2d 1165, 1173 (La. 2001). The Louisiana court also instituted a slightly different set of factors: "(1) the type of firearm involved; (2) the type of controlled dangerous substance involved; (3) the quantity of drugs involved; (4) the proximity of the firearm to the drugs; (5) whether the firearm is loaded; and (6) any other relevant evidence." *Id.* The "any other relevant evidence" factor would seem to eliminate the concerns that the *Murray* court had about the exhaustiveness of a factor-based test.

possession. ¹⁴¹ In contrast, Alaska's factor-based framework seems to apply to both cases of actual possession and cases of constructive possession.

A. The Murray Factors

The Murray factors originated with United States v. Ceballos-Torres. 142 Ceballos-Torres appears to be the first federal appeals case dealing with the 1998 amendment to § 924(c), and in it the Fifth Circuit struggled with the true meaning of "in furtherance." ¹⁴³ Much like the Murray court did two years later, the Ceballos-Torres court adopted the dictionary definition of "in furtherance": "[the] act of furthering, advancing, or helping forward." The court then listed five ways in which a gun could "further, advance, or help a drug trafficking." First, the court noted that a gun provides a defense for drug traffickers against those who might attempt to steal the dealer's drug stash or profits. 46 Second, a gun would serve a significant deterrent purpose because the knowledge that one carries a gun will substantially lessen the chances that anyone would wish to attempt to rob that person. 147 Third, having a gun at the ready during any deal can protect the dealer in case the deal fails.¹⁴⁸ Fourth, in accord with the deterrence interest in carrying a gun, the availability of a gun during a transaction may lessen the chance that the deal will fail. Finally, the gun may allow a drug trafficker to defend his or her "turf" against other dealers.150

Recognizing that the dictionary definition was correct and that Congress did not intend the "in furtherance of" standard to reach purely incidental possession, the Fifth Circuit held that proof of a nexus required evidence that was "more specific to the particular defendant" and that "show[ed] that his or her possession actually furthered the drug trafficking offense." The court then introduced the factors subsequently adopted by the *Murray* court and noted that the factors helped to "distinguish different types of

^{141.} Montague, 23 S.W.3d at 632.

^{142. 218} F.3d 409 (5th Cir. 2000).

^{143.} Id. at 412.

^{144.} Id.

^{145.} Id.

^{146.} *Id*.

^{147.} Id.

^{148.} *Id*.

^{149.} Id.

^{150.} Id.

^{151.} Id. at 414-15.

firearm possession."¹⁵² Accordingly, the factors would probably counsel that neither a drug dealer who collects and displays unloaded antique firearms nor one who possesses firearms for target shooting or for hunting game possesses firearms "in furtherance" of drug trafficking.¹⁵³ After detailing the factors and their optimal result, the Fifth Circuit claimed that its dictionary definition was the best way to resolve the ambiguity created by Congress.¹⁵⁴

The Ceballos-Torres court's formulation of the "in furtherance standard" was soon almost universally adopted among the circuit courts. However, the adoption of this standard has not produced unanimity in analysis, as some courts have provided different slants on the overarching rule. For example, the Tenth Circuit has claimed that its standard for determining whether a firearm was possessed "in furtherance of" a drug offense is some "direct connection" between the firearm and the offense. This standard created some conflict between itself and the factors set out in Ceballos-Torres. The Tenth Circuit helped rectify this tension to a certain degree by holding that the Ceballos-Torres factors are, at the very least, "relevant and helpful." In contrast, the Sixth Circuit held that under Ceballos-Torres a firearm must be "strategically located so that it is quickly and easily available for use" in order to be subject to the "possession" prong of § 924(c). 159

B. Case-by-case Application of the *Murray/Ceballos-Torres*Factors

The *Murray/Ceballos-Torres* factors offer limited guidance regarding the outcome of future cases. At the outset, it should be noted that, under the House Judiciary Committee's conception of the "in furtherance" standard, the evidence presented by the government in *Bailey* would probably not have been sufficient to convict. Further, in *Ceballos-Torres*, the defendant was found

^{152.} Id.

^{153.} Id. at 415.

^{154.} Id.

^{155.} See, e.g., United States v. Lomax, 293 F.3d 701, 705 (4th Cir. 2002); United States v. Timmons, 283 F.3d 1246, 1252 (11th Cir. 2002); United States v. Wahl, 290 F.3d 370, 376 (D.C. Cir. 2002); United States v. Mackey, 265 F.3d 457, 462 (6th Cir. 2001); United States v. Basham, 268 F.3d 1199, 1208 (10th Cir. 2001).

^{156.} United States v. Iiland, 254 F.3d 1264, 1274 (10th Cir. 2001).

^{157.} Basham, 268 F.3d at 1207.

^{158.} Id. at 1208.

^{159.} Mackey, 265 F.3d at 462 (citation omitted).

^{160.} Id. (citation omitted).

guilty when his weapon was loaded, possessed illegally, and easily accessible in his apartment along with a substantial amount of money. Similarly, two other courts have upheld convictions where the defendants possessed illegal and easily accessible firearms in close proximity to drugs, drug paraphernalia, or large amounts of cash in their dwelling place. This analysis, however, is not limited to the home. In one case, a defendant's conviction under the factors as applied to § 924(c) was upheld when the defendant was found with a "heavy duty 9 millimeter firearm" and nineteen hits of crack on his person while he ran down the street. In that case, the Fourth Circuit also stated that physically carrying a firearm during a drug trafficking crime will always warrant a conviction under the "possession" prong of § 924(c) because "carrying a firearm always serves to protect the holder."

Despite these general observations, conviction is by no means a certainty under the *Murray/Ceballos-Torres* factor test. This is reflected in the facts of *Murray*, as the court of appeals noted that conviction under section 11.61.195 was unlikely for Murray because he had stated that he purchased the gun for his girlfriend's protection and that he looked in a number of places before determining where the gun was located. In the court's eyes, these facts tended to indicate that Murray did not possess the firearm in furtherance of his drug felony.

VI. THE FUTURE OF SECTION 11.61.195

For better or worse, the court of appeals has tied the fate of section 11.61.195 to the fate of the *Ceballos-Torres* interpretation of the "in furtherance" standard of § 924(c). As it currently stands, this outcome seems to be the most beneficial for Alaska law. The court of appeals saw the similarities in the federal and state statutes and adopted a test that provides a reasonable amount of guidance to any trial court judge considering a violation of section 11.61.195. Effectively, this eliminates most of the ambiguities that may have resulted from previous interpretations of Alaska law. On the federal side, however, a latent ambiguity exists that may serve to change the nature of the *Ceballos-Torres* test altogether.

^{161.} United States v. Ceballos-Torres, 218 F.3d 409, 415 (5th Cir. 2000).

^{162.} United States v. Wahl, 290 F.3d 370, 376-77 (D.C. Cir. 2002); *Mackey*, 265 F.3d at 462-63.

^{163.} United States v. Lomax, 293 F.3d 701, 706 (4th Cir. 2002).

^{164.} Id. at 706.

^{165.} Murray v. State, 54 P.3d 821, 825 (Alaska Ct. App. 2002).

^{166.} Id.

As the *Ceballos-Torres* court was formulating its factors, it openly worried about the effect that its interpretation of "in furtherance" would have on the rest of § 924(c). ¹⁶⁷ Specifically, the Fifth Circuit recognized that its interpretation of the "possession in furtherance" prong appeared to render other parts of the statute superfluous. ¹⁶⁸ This conflict is centered on two parts of § 924(c): the "during and in relation to" clause and the "uses or carries" clause.

On its face, it would appear that the "possession in furtherance of" standard under § 924(c) completely envelops every instance of using or carrying a weapon during and in relation to a drug offense. 169 The Ceballos-Torres court expressed uncertainty as to whether Congress intended to go that far, but found no evidence to the contrary. This ambiguity may lead to future action by the Supreme Court if the Court determines that the difference is sufficiently problematic.¹⁷¹ Obviously, this would have implications for the *Murray* court's framework. Furthermore, it would implicate the structure of Alaska law, which seems to exhibit the same ambiguity as the federal law: Specifically, in Murray, the court of appeals' construction of the possession statute (section 11.61.195) seems to bring all cases that might arise under the use statute (section 11.61.190) under its ambit. This problem is exacerbated by the relative dearth of case law interpreting the use statute. Accordingly, under the current framework, Alaska courts will have to be especially aware of new developments in the jurisprudence of § 924(c).

To prevent this problem, the legislature should strongly consider repealing section 11.61.190 and amending section 11.61.195 to cover both active employment or use and "regular" possession of the weapon. Eliminating section 11.61.190 would minimize any negative effects of a future Supreme Court decision construing the differences between the "use or carry" and "possession" standards contained in § 924(c). Accordingly, Alaska could adhere to its test without having to deal with changes in federal law. An amended statute would also lessen the burden of carefully tracking developments in § 924(c) jurisprudence that the Alaska judiciary would otherwise have to undertake. Additionally, any legislative intent to impose higher penalties could be dealt with within the framework of a single statute. This unified statute would recognize the reality that almost every use of a weapon

^{167.} United States v. Ceballos-Torres, 218 F.3d 409, 413 (5th Cir. 2000).

^{168.} Id.

^{169.} Id.

^{170.} Id. at 415.

^{171.} United States v. Loney, 219 F.3d 281, 287 (3d Cir. 2000).

under the statute also constitutes a possession of the weapon in furtherance of a drug offense.

This analysis may become moot, however, if the interpretation of section 11.61.195 in *Murray* was not what the legislature envisioned when it enacted the statute. When deciding *Murray*, the court of appeals noted that it believed the legislature intended to punish those who possessed a firearm in furtherance of a drug offense.¹⁷² If this was indeed the legislature's intent, the legislature may want to consider amending the language of section 11.61.195 to explicitly include the "in furtherance" standard. If this was not the legislature's intent, it should consider amending the statute as soon as possible in order to reflect its true intent.

VII. CONCLUSION

In *Murray*, the Court of Appeals of Alaska effectively incorporated by reference the entire history of § 924(c) by tying its own possession test to that of the federal courts. This action may or may not have future implications for Alaska law, but it is clear that, for now, trial courts have a more complete indication of the tests they should use and the factors they should consider when determining whether a nexus exists between a weapon and a drug charge. Alaska courts, as well as the legislature, should build upon this foundation in order to guarantee that this test remains stable and reliable.

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