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# Who Makes the Call? Sentencing the Firearm User Under 18 U.S.C. § 924(c) inunited States v. Alborola-Rodriguez

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# Who Makes the Call? Sentencing the Firearm User Under 18 U.S.C. § 924(c) in *United States v. Alborola-Rodriguez*

## I. INTRODUCTION

One of the basic rights of criminal defendants in our country is the right to a jury trial.[1] This right "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' "[2] Coupled with the jury trial right is the fact that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[3]

Although the right to a jury trial in the criminal setting is absolute, the question remains whether the legislature can define the elements of a crime as questions of law and thus allow the judge to make findings relevant to those elements.[4] This question arises when the legislature specifically allocates certain factual issues to be found by the judge,[5] or when the statute is silent as to whether the judge or jury should make the findings.[6] It seems obvious, based on the importance of the jury trial right, that when the statute is silent, the default rule should be that the jury is required to make the findings. However, not all courts have interpreted ambiguous statutes in this manner. For example, the federal circuits are split as to whether the judge is allowed to determine, during sentencing, the type of firearm used by the criminal convicted of 18 U.S.C. § 924(c), or whether the jury must make factual findings as to the type of weapon used when committing the violent or drug trafficking offense.[7] Section

1. *See* U.S. CONST. amend. VI.

2. Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) (citation ommitted).

3. *In re* Winship, 397 U.S. 358, 364 (1970).

4. *See generally* Peter J. Henning, *Foreword: Statutory Interpretation and the Federalization of Criminal Law*, 86 J. CRIM. L. & CRIMINOLOGY 1167 (1996) (describing the increased federalization and constitutionalization of criminal law).

5. *See, e.g.*, State v. Lopes, 980 P.2d 191 (Utah 1999).

6. *See, e.g.*, U.S. v. Alborola-Rodriguez, 153 F.3d 1269 (11th Cir. 1998).

7. *See infra* Part II.B.

924(c) affords different penalties depending on the type of firearm used in relation to the crime.[8] The judicial decisions surrounding the statute highlight the difficulty of drawing the thin line between the law and facts in statutory interpretation.[9]

In 1998, the Eleventh Circuit had the opportunity to interpret the statute and decide whether the judge or jury should make the findings relevant to the type of firearm. In *United States v. Alborola-Rodriguez*,[10] the court reviewed the decisions of the other circuits

8. The statute provides in relevant part as follows:

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic as sault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years;

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed. . . .

18 U.S.C. § 924(c) (1994).

9. *See* Henning, *supra* note 4, at 1195.

10. 153 F.3d 1269 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1809 (1999).

and ultimately concluded that, during sentencing, the judge, rather than the jury, is to determine the type of firearm used in the crime.[11] Although the court attempted a well-reasoned decision, it came to the wrong conclusion, because it misinterpreted prior case law regarding the issue and relied too heavily on the Fifth Circuit's faulty and inconsistent ruling in *United States v. Branch*.[12]

Part II of this note gives a short history of 18 U.S.C. § 924(c) and explains the various circuit decisions which have interpreted that statute. Part III gives the facts of *Alborola-Rodriguez* and explains the Eleventh Circuit's reasoning. Part IV points out the error in the Eleventh Circuit's reasoning, attempts a statutory analysis of 18 U.S.C. § 924(c), and explains how the U.S. Supreme Court should rule if this issue were before it. Finally, Part V concludes that it is within the province of the jury to decide the type of firearm used in the crime and suggests specific legislative reforms.

## II. BACKGROUND

### *A. History of 18 U.S.C. § 924(c)*

18 U.S.C. § 924(c) was originally enacted as part of the Gun Control Act of 1968.[13] In its original form, the statute provided a mandatory minimum sentence of between one and ten years for those criminals who used or carried a firearm "unlawfully during the commission of any federal felony."[14] Because of weaknesses that undermined the deterrent force of the statute,[15] Congress amended the

11. *See id*. at 1272.

12. 91 F.3d 699 (5th Cir. 1996) (holding that the type of firearm is a finding for the judge upon sentencing).

13. *See* Thomas A. Clare, Note, Smith v. United States *and the Modern Interpretation of 18 U.S.C. § 924(c): A Proposal to Amend the Federal Armed Offender Statute*, 69 NOTRE DAME L. REV. 815, 823 (1994).

14. *Id*. In relevant part, the statute provided as follows:

> Whoever—
>
> (I) uses a firearm to commit a felony for which he may be prosecuted in a court of the United States or
>
> (II) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years.

18 U.S.C. § 924(c) (1982).

15. *See* Clare, *supra* note 13, at 823 (stating that the weaknesses of the statute were as

statute several times. In 1984, in light of an accelerated crime rate, the Act was amended by the Comprehensive Crime Control Act of 1984 (CCCA).[16] The CCCA, among other things, made it clear that "Congress intended section 924(c) to be a separate offense and punishable in addition to the predicate."[17] In 1986, § 924(c) was amended again by the Firearms Owners' Protection Act.[18] Two of the most important changes from this amendment were to make § 924(c) applicable to drug offenses and distinguish among the types of firearms, "raising the mandatory minimum penalty to ten years if the firearm is a machine gun or equipped with a silencer."[19] "Subsequent amendments in 1988, 1990 and 1994 have redefined a drug trafficking crime, expanded types of firearms covered by the statute and increased penalties up to life imprisonment without release."[20] These amendments represented a shift in Congress's attitude toward sentencing.[21]

> The change was primarily attributable to the bipartisan belief that rehabilitation of criminals was difficult to accomplish and by widespread dissatisfaction with judicial discretion in sentencing, which critics argued actually exacerbated the problems of controlling crime. This dissatisfaction resulted in renewed support for mandatory minimum penalties, especially for crimes involving narcotics offenses.[22]

With each amendment came court decisions attempting to inter-

follows: nothing in the original statute prohibited parole; the sentencing judge could suspend the sentence or substitute parole; and a series of Supreme Court cases interpreted the rule as a sentence enhancement provision rather than as a separate, additional offense).

16. Pub. L. No. 98-473, 98 Stat. 1837 (codified in various sections of 18 U.S.C. and 28 U.S.C.).

17. Clare, *supra* note 13, at 824; s*ee also* 18 U.S.C. 924(c) (1994) (amending the statute to include language that the punishment is to be "in addition" to the punishment for the predicate offense).

18. Pub. L. No. 99-308, § 104(a)(2)(A)-(E), 100 Stat. 449, 456 (1986).

19. Clare, *supra* note 13, at 824-25.

20. Kristin Whiting, Note & Comment, *The Aftermath of* Bailey v. United States*: Should Possession Replace Carry and Use Under 18 U.S.C. § 924(c)(1)?,* 5 J.L. & POL'Y 679, 688 (1997) (citing Crime Contol Act of 1990, Pub. L. No. 101-647, § 1101, 104 Stat. 4789, 4892 (1990); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (1988); *id.* § 6460, 102 Stat. 4181, 4374).

21. *See* Michael J. Riordan, *Using a Firearm During and in Relation to a Drug Trafficking Crime: Defining the Elements of the Mandatory Sentencing Provision of 18 U.S.C. § 924(c)(1)*, 30 DUQ. L. REV. 39, 40 (1991).

22. *Id.* (footnotes omitted).

pret the new language that Congress had added to the statute. For example, courts struggled to interpret the words "during and in relation to" in the statute.[23] Similarly, until the Supreme Court resolved the issue, the federal circuits were split as to what Congress meant by the term "use" in the statute.[24] Currently, the statutory question that has caused circuit conflict is whether the type of firearm used in connection with the crime is a question for the jury or whether the judge can make the finding upon sentencing the criminal convicted of violating § 924(c).

### *B. Federal Circuit Court Split*

#### *1. Circuits holding that type of firearm is a jury question*

*a. Sixth Circuit (*United States v. Sims*)*.[25] The Sixth Circuit was one of the first courts to address this issue, and the court ultimately held that the jury must make the determination as to which type of firearm was used in the crime.[26] In *Sims*, five defendants were arrested during a sting operation involving the sale of narcotics.[27] When the officers searched the defendant's automobiles, they found two 12-gauge shotguns, a 9-millimeter pistol, and two AR-15 semi-automatic rifles that had been converted to fire automatically.[28] The defendants were charged and convicted of several offenses, including one count of use and carrying of machine guns, and one count of use and carrying a firearm during and in relation to a drug trafficking offense.[29] At a post-trial, pre-sentencing hearing, the district court vacated the convictions on the machine gun count and held that " 'where a defendant is charged with separate offenses under 18 U.S.C. § 924(c)(1) because of the use of different firearms, and only one predicate drug offense is charged, a conviction on both firearm

23. *See, e.g.*, United States v. Correa-Ventura, 6 F.3d 1070 (5th Cir. 1993); United States v. Stewart, 779 F.2d 538 (9th Cir. 1985); s*ee also* Riordan, *supra* note 21; Clare, *supra* note 13.

24. *See* Bailey v. United States, 516 U.S. 137 (1995); s*ee also* Whiting, *supra* note 20, at 890-91.

25. 975 F.2d 1225 (6th Cir. 1992).

26. *See id*. at 1235.

27. *See id*. at 1230.

28. *See id*.

29. *See id*. at 1231.

counts cannot stand; one of them must be vacated.' "[30] The question before the appellate court was whether the district court had acted appropriately.[31]

The appellate court held that the district court indeed had handled the case appropriately, stating:

> In situations such as this one, where the indictment contains only one substantive drug trafficking offense and separate counts under section 924(c) for weapons which fall into more than one weapons category as defined by that section, the court must consolidate those section 924(c) counts, either pre- or post-trial so that no defendant will be convicted on more than one gun count relative to the one drug trafficking offense.[32]

In explaining the two ways to accomplish this consolidation, the court indicated that the type of firearm used in the offense was a question for the jury.

> This may be accomplished . . . by . . . submitting special interrogatories or a special verdict form to the *jury*, requiring that if the *jury* returns a guilty verdict on the gun charge, it must specify which category or categories of weapons it unanimously has found the defendant was using or carrying. Or, it may be accomplished by submitting the separate gun counts to the *jury* and, should there be more than one conviction, merging those convictions after the trial.[33]

The court finally held that if the jury found that a single defendant had used two separate firearms, each requiring different sentencing, "the sentence imposed . . . should reflect the highest of the sentences which Congress has provided."[34]

*b. First Circuit (*United States v. Melvin*).*[35] The First Circuit reached a similar conclusion. In *Melvin*, six defendants were arrested after attempting to rob an armored truck. When the defendants were apprehended, six guns were found, including a pistol, a machine

30. *Id.* at 1232 (quoting United States v. Sims, 767 F. Supp. 840, 842 (E.D. Mich. 1991)).

31. *See id.* at 1232-33.

32. *Id.* at 1235.

33. *Id.* (emphasis added).

34. *Id.* at 1236.

35. 27 F.3d 710 (1st Cir. 1994).

gun, and a sawed-off rifle.[36] The defendants were charged and convicted under § 924(c), but the jury was never told that it must agree on the firearm or firearms used by each defendant.[37] After the jury returned its general verdict, the trial court

> concluded that it had erred in not asking the jury to find specifically which of the firearms the defendants had possessed, or whether one or more of the weapons in the van was, in fact, a machine gun. It therefore refused to impose more than the lowest possibly applicable sentence—the five-year term prescribed for handguns.[38]

Like the appellate court in *Sims*, the *Melvin* court was asked to determine if the trial court had handled the matter appropriately.

After reviewing the record and applicable case law, the *Melvin* court stated that the district court had "acted properly and that the five-year terms must be affirmed."[39] The court agreed with the government's proposition that "a finding that defendants used machine guns is 'implicit and inescapable' from the jury's general verdict."[40] Referring to *Sims*, the court said that "[w]here, as here, a statute proscribes more than one type of conduct, with penalties that vary depending upon the acts committed, some method of ascertaining the *jury's* specific finding is necessary."[41]

*c. Ninth Circuit (*United States v. Alerta*)*.[42] In 1996, the Ninth Circuit also decided that the type of firearm used in the commission of a crime is a question for the jury.[43] In *Alerta*, the defendant was arrested for a drug trafficking crime.[44] In connection with the crime, police found several weapons, including a machine gun, each requiring differing sentences under § 924(c).[45] During trial, the defendant

> requested a jury instruction that would have asked the jury to find that he used or carried particular weapons. He also proposed that

36. *See id*. at 713. Under 18 U.S.C. § 924(c)(1) (1994), each of these weapons carries a different sentence. *See supra* note 8 for the full text of the statute.

37. *See Melvin*, 27 F.3d at 714.

38. *Id*.

39. *Id*. at 713.

40. *Id*. at 714.

41. *Id*. at 716 (emphasis added).

42. 96 F.3d 1230 (9th Cir. 1996).

43. *See id*. at 1236.

44. *See id*. at 1232.

45. *See id*. at 1233.

> the jury be furnished a special verdict form, which required the jury to find him "guilty" or "not guilty" of the use during a drug transaction of the various weapons, by name and type, to which the testimony had related.[46]

The trial court did not submit the defendant's instruction but instead instructed the jury that he could be convicted if he knowingly used "any" of the firearms.[47] "Thus, the jury did not find specifically what type of weapons Alerta used or carried."[48] Alerta was sentenced to an additional thirty years for using a machine gun.[49]

On appeal, the Ninth Circuit held that it was "possible that the jury [could have] found only that Alerta used one or more of the weapons that were not machine guns, in which case the requisite consecutive sentence for Count 5 would be 5 years, not the 30-year sentence that Alerta received."[50] Further, the court stated that "[b]ecause of the immense consequences that follow a determination whether a firearm used in violation of section 924(c)(1) is an ordinary firearm or, at the other extreme, a machine gun, we have stated that a jury finding on that issue is required."[51] Ultimately, the court held that, although there was very strong evidence that Alerta had used the machine gun, " '[t]he question is not whether guilt may be spelt out of a record, but whether guilt *has been found by a jury* according to the procedure and standards appropriate for criminal trials.' "[52]

### *2. Circuits holding that type of firearm is a question for the judge upon sentencing*

With the exception of the Eleventh Circuit's decision in *Alborola-Rodriguez*, the only decision holding that the type of firearm is a finding for the judge upon sentencing is the Fifth Circuit's deci-

46. *Id.* at 1234.

47. *See id.*

48. *Id.*

49. *See id.* at 1235.

50. *Id.* at 1234-35 (footnote omitted).

51. *Id.* at 1235 (citing United States v. Martinez, 7 F.3d 146, 148 & n.1 (9th Cir. 1993)).

52. *Id.* at 1236 (quoting Roy v. Gomez, 81 F.3d 863, 867 (9th Cir. 1996) (en banc), *vacated sub nom.*, California v. Roy, 519 U.S. 2 (1996), *and withdrawn*, Roy v. Gomez, 108 F.3d 242 (9th Cir. 1997) (quoting Carella v. California, 491 U.S. 263, 269 (1989) (Scalia, J., concurring))).

sion in *United States v. Branch*.[53]

*Branch* dealt with the much-publicized conflict between the Branch-Davidians, under the leadership of David Koresh, and U.S. government officials, including the F.B.I. and A.T.F.[54] At the conclusion of the conflict, several individuals were arrested and charged with various offenses. Seven defendants were charged and found guilty of using or carrying a firearm during a crime of violence.[55] The district court found that five of the defendants "had used or were criminally responsible for someone who had used a machinegun during the conspiracy" and sentenced four of the defendants to thirty years imprisonment despite the fact that the defendants were not charged with using, nor did the jury find that they used, a machine gun.[56] The appellate court was asked to review the validity of the district court's action.

The court stated that "[t]he validity of the district court's action turns upon whether § 924(c)(1)'s machinegun [sic] provision creates a separate, independent offense or is a sentence-enhancement provision."[57] The court then used the "traditional tools" of statutory interpretation to examine the statute, "namely the statute's text and legislative history."[58]

The court first found that the text supported competing readings of the statute and therefore turned to the legislative history.[59] Looking at the amendment that added the machine gun clause to the Act, the court found that the legislative history indicated that the clause was meant to be a sentence-enhancement provision rather than a separate offense.[60] The court said that "[n]oticeably absent from both the House Report and the floor debates was any discussion suggesting the creation of a new offense."[61] The court went on to analyze the holdings in *Sims* and *Melvin* and found neither dispositive.[62] Finally, the court concluded that "[t]he Government need not

53. 91 F.3d 699 (5th Cir. 1996).
54. *See id*. at 709-11.
55. *See id*. at 711.
56. *Id*. at 738.
57. *Id*.
58. *Id*.
59. *See id*. at 739.
60. *See id*.
61. *Id*.
62. *See id*. at 740.

charge in the indictment nor must the jury find as part of its verdict the particular type of firearm used or carried by the defendant."[63]

## III. *UNITED STATES V. ALBOROLA-RODRIGUEZ*[64]

### *A. The Facts*

*Alborola-Rodriguez* involved two defendants who were convicted of using or carrying a firearm during or in relation to a drug trafficking offense.[65] The weapons that were found and at issue at trial were a pistol, a short-barreled shotgun, and an M-1 rifle.[66] One of the defendants, Alborola, received a ten year enhanced statutory sentence for using or carrying a short-barreled shotgun during the drug trafficking crime in violation of 18 U.S.C § 924(c).[67]

On appeal, Alborola requested that the Eleventh Circuit vacate the enhanced sentence "because the jury rendered only a general guilty verdict without specifying which weapon or weapons they unanimously found him to have used or carried."[68] The court held, however, "that the type of firearm involved in a § 924(c) offense is not an element of the offense and is thus not a question for the jury; instead, it is a sentencing question to be resolved by the sentencing court by a preponderance of the evidence."[69]

### *B. The Court's Reasoning*

Alborola argued that "where the jury verdict does not establish beyond a reasonable doubt that the defendant used or carried a firearm that subjects him to a term greater than five years under 18 U.S.C. § 924(c)(1), the enhanced sentence may not be affirmed."[70] This argument implied that the firearm type was a statutory element. The government responded that the type of firearm was not an element of the statute, and therefore was a question for the sentencing

63. *Id.*
64. 153 F.3d 1269 (11th Cir. 1998).
65. *See id.* at 1270.
66. *See id.* at 1271.
67. *See id.*
68. *Id.*
69. *Id.* at 1272.
70. *Id.* at 1271 (citing United States v. Melvin, 27 F.3d 710 (1st Cir. 1994)).

court rather than the jury.[71] To resolve the conflict, the court stated: "we must interpret § 924(c)(1) and determine whether specific jury findings are required before a defendant may be sentenced to an enhanced term for carrying or using certain firearms."[72]

The court then proceeded to examine *United States v. Melvin*,[73] and determined that the *Melvin* court had "expressly declined to reach the issue of whether firearm type is an element of 924(c)(1)."[74] Therefore, the court gave *Melvin* no weight. Next, the court examined the other circuit decisions on the issue, noting that a split existed between them. The court relied heavily on the Fifth Circuit's analysis in *United States v. Branch*.[75] In fact, after reviewing each of the precedents of the "sister circuits,"[76] *Alborola-Rodriguez* provided little of its own reasoning and simply concluded, without explanation, that the Fifth Circuit had "the better side of the argument."[77]

## IV. ANALYSIS

### *A. Faulty Reasoning in* Alborola-Rodriguez

The Eleventh Circuit made two errors in arriving at its conclusion in *Alborola-Rodriguez*. First, it misinterpreted a footnote in *Melvin* to mean that the First Circuit did not resolve the question of whether the type of firearm is an element of § 924(c). Second, the *Alborola-Rodriguez* court relied too heavily on the Fifth Circuit's decision in *Branch*, which was not reasoned carefully and was inconsistent with its own prior statements.

#### *1. The* Melvin *footnote*

In analyzing the First Circuit's decision in *Melvin*, the *Alborola-Rodriguez* court found that the *Melvin* court "expressly declined to

71. *See id*.

72. *Id*.

73. 27 F.3d 710 (1st Cir. 1994).

74. *Alborola-Rodriguez*, 153 F.3d at 1272 (citing *Melvin*, 27 F.3d at 715 n.9).

75. 91 F.3d 699 (5th Cir. 1996).

76. *Alborola-Rodriguez*, 153 F.3d at 1272. In addition to the First Circuit's approach in *Melvin*, the court reviewed the Ninth Circuit's reasoning in *United States v. Alerta*, 96 F.3d 1230 (9th Cir. 1996), and the Sixth Circuit's decision in *United States v. Sims*, 975 F.2d 1225 (6th Cir. 1992).

77. *Alborola-Rodriguez*, 153 F.3d at 1272.

reach the issue of whether firearm type is an element of § 924(c)(1)."[78] The *Alborola-Rodriguez* court made this determination by seizing upon the language of a footnote in *Melvin*. That footnote stated:

> The defendants argued that, even if we found that the jury's verdict unambiguously reflected a finding that all of the weapons found in the van were used by all the defendants, the 30-year sentence could not be imposed because the jury had not been asked to decide whether those firearms were, in fact, automatic weapons and whether the defendants knew the nature of the weapons. The government contended that it was the court's role to determine the appropriate label for the firearms, and that it was unnecessary to prove knowing use of automatic weapons. Our conclusion that the jury's verdict was ambiguous makes it unnecessary to consider these other questions.[79]

The conclusion that, through this footnote, the *Melvin* court declined to reach the issue of whether the jury must make findings on the type of firearm is erroneous. The footnote explains the defendant's contention that *had* the jury made a specific finding that each defendant used a machine gun, the thirty-year statutory enhancement would still not be valid because the jury had not found that the machine gun is in fact an "automatic weapon." This argument is distinct from one that contends that the jury must simply decide which weapon, among many, the defendants had used. This distinction is subtle and somewhat difficult to make. It is analogous to the situation in which a person using a single firearm (a machine gun) is arrested for a drug trafficking offense. The *Melvin* defendants would argue that even though a single firearm was used, a thirty-year enhancement could not be imposed unless the jury found that the machine gun was indeed an "automatic weapon." Because the *Melvin* court found that the jury had not first made findings as to which firearm, out of many, the defendants had used, it declined to make a decision on this collateral issue.[80] It is likely that the *Alborola-*

78. *Id.*

79. United States v. Melvin, 27 F.3d 710, 715 n.9 (1st Cir. 1994).

80. Like the *Melvin* court, I will not discuss this issue in detail. Suffice it to say that where only one weapon is used, the sentencing judge may well be able to determine the type of firearm *as a matter of law* and not as a finding of fact. *See* Gwinn v. Deane, 613 F.2d 1, 3 (1st Cir. 1989) (holding that where characteristics of a weapon are not in dispute, the question whether the weapon falls within a statutory classification is a question of law and not of fact,

*Rodriguez* court's misinterpretation of the *Melvin* footnote affected the outcome of their decision, causing them to rule incorrectly.

*2. Reliance on* Branch

The *Alborola-Rodriguez* court also ruled incorrectly because it relied too much on the *Branch* court's reasoning while disregarding the reasoning of all the other circuits that have weighed in on this issue. In order to understand how the *Alborola-Rodriguez* court erred, it is necessary to analyze the errors in *Branch.*

First, *Branch* also interpreted the *Melvin* footnote to mean that the *Melvin* court had declined to reach a decision on the issue.[81] As mentioned above, this interpretation is erroneous.

Second, the *Branch* court erred in its analysis of the legislative history of § 924(c).[82] The court cited several House Reports accompanying the 1986 amendment of § 924(c).[83] These documents referred to an "[e]nhanced penalty" and "mandatory prison" terms or sentences but never mentioned that the amendment created a separate offense.[84] The *Branch* court stated that "[a]t no point did Congress indicate that it intended to create a new, separate offense for those weapons."[85] Thus, the court's reasoning is that because Congress was silent on the issue of whether it intended to create a separate offense, Congress did not intend to create a separate offense.

However, the United States Supreme Court has construed legislative silence exactly the opposite.[86] In *United States v. Wells*, the respondents urged the Court to find that "materiality" was an element of 18 U.S.C. § 1014, contending that "Congress has ratified holdings of some of the Courts of Appeals that materiality is an element of § 1014 by repeatedly amending the statute without rejecting

and so is for the court to decide). *But see* United States v. Yannott, 42 F.3d 999, 1007 (6th Cir. 1994) (holding that while determination of what constitutes a firearm under relevant statute is a question of law, determination of whether a particular weapon fits within the legal definition of firearm under that statue is a question of fact within the province of the jury).

81. *See* United States v. Branch, 91 F.3d 699, 740 (5th Cir. 1996).

82. For a more in-depth analysis of the legislative history of U.S.C. § 924(c), see *infra* Part IV.B.2.

83. *See Branch*, 91 F.3d at 739.

84. *Id.* (citations omitted).

85. *Id.* (citing H.R. REP. NO. 681, 101st Cong., 2d Sess. 107 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6511).

86. *See* United States v. Wells, 519 U.S. 482, 496 (1997).

those decisions."[87] The Court did not agree, stating: "We thus have at most legislative silence on the crucial statutory language, and we have 'frequently cautioned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." ' "[88] Thus, simply because the legislative history of § 924(c) failed to mention whether Congress was creating a sentence enhancement or a separate offense does not indicate that Congress intended the amendment to be a sentence enhancement. In fact, one could argue exactly the opposite: that because Congress was silent to the issue, they intended to create a separate offense.

Also, even if Congress had expressly mandated that it intended to create an enhancement provision, that provision may not pass constitutional muster. This was precisely the problem that the Utah legislature confronted in *State v. Lopes*.[89] In that case, the Utah Supreme Court was asked to review the Utah "gang-enhancement statute."[90] Section 76-3-203.1(5)(c) of that statute provides:

> The sentencing judge rather than the jury shall decide whether to impose the enhanced penalty under this section. The imposition of the penalty is contingent upon a finding by the sentencing judge that this section is applicable. In conjunction with sentencing the court shall enter written findings of fact concerning the applicability of this section.[91]

It was clear from the plain language of the statute that the state legislature intended the judge to make relevant findings of fact regarding sentencing. However, the Utah Supreme Court struck the statute down, stating:

> This section of the enhancement statute directs the judge to become the fact finder, expressly taking that power away from the jury. . . . This clearly violates article I, section 12 of the Utah Constitution[92] because, absent waiver, only a jury has the ability to de-

87. *Id.* at 495.

88. *Id.* at 496 (quoting NLRB v. Plasterers, 404 U.S. 116, 129-30 (1971) (quoting Girouard v. United States, 328 U.S. 61, 69 (1946))); *see also* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 749 (1988) (stating that "[o]rdinarily, 'Congress' silence is just that—silence' " (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987))).

89. 980 P.2d 191 (Utah 1999).

90. *Id.* at 192 (citation omitted).

91. *Id.* at 195-96.

92. Article 1, section 12 of the Utah State Constitution mirrors the Sixth Amendment of the United States Constitution, which provides that "the accused shall enjoy the right to a

> termine when elements of a crime are established beyond a reasonable doubt. Therefore, we find subsection (5)(c) of § 76-3-203.1 of the Code unconstitutional.[93]

Therefore, even if Congress had been clear that it intended to create a sentence enhancement when it amended § 924(c), the statute would still be unconstitutional, because it would violate the jury trial right of the accused.

Moreover, it is important to note that the *Branch* court's analysis of the legislative history focused on the amendment that added the machine gun provision to § 924(c). The court in *Alborola-Rodriguez* relied on that legislative history analysis to reach its conclusion as well.[94] However, the type of firearm at issue in *Alborola-Rodriguez* was a short-barreled shotgun.[95] Therefore, the legislative history analysis from *Branch* is arguably entirely inapplicable to the *Alborola-Rodriguez* case.

Finally, the Fifth Circuit's decision in *Branch* is entirely inconsistent with its own language in a prior ruling. In *United States v. Correa-Ventura*,[96] the court remarked,

> For example, if a firearm violation is asserted, and evidence is introduced as to both shotguns and rifles (with a mandatory 5-year imprisonment penalty) and revolvers with silencing equipment (resulting in a 30-year imprisonment), the jury may well be required to agree on which type of weapon was used in order for the court to assess the appropriate penalty. In that instance, a unanimity instruction as to the class of weapon may be necessary, since the legislature, in amending Section 924(c) to provide varying penalties for certain classified firearms, appears to have indicated its intent that a unanimous verdict be reached with respect to the given class of firearms.[97]

Thus, the court indicated that the determination of the type of firearm used is within the province of the jury. As mentioned, this language is inconsistent with the *Branch* ruling. However, the *Branch* court gave the *Correa-Ventura* language no weight, dismiss-

speedy and public trial, by an impartial jury." U.S. CONST. amend. VI.

93. *Lopes*, 980 P.2d at 196 (footnote added).

94. *See* United States v. Alborola-Rodriguez, 153 F.3d 1269, 1272 (11th Cir. 1998).

95. *See id*. at 1271.

96. 6 F.3d 1070 (5th Cir. 1993).

97. *Id*. at 1087 n.35 (citations omitted).

ing it as mere dicta.[98]

Thus, the Fifth Circuit's reasoning in *Branch* did not provide reliable support for the Eleventh Circuit's *Alborola-Rodriguez* decision because it (1) incorrectly interpreted the *Melvin* footnote; (2) erroneously analyzed the statute's legislative history; (3) was inapplicable in terms of subject matter to *Alborola-Rodriguez*; and (4) was inconsistent with the Fifth Circuit's previous decision in *Correa-Ventura*. In short, the *Branch* court erred and the *Alborola-Rodriguez* court inherited these errors in its incorrect holding.

### *B. Statutory Analysis*

Key to resolving whether the judge or jury should make the relevant findings under the statute is deciding whether § 924(c) is simply a sentence-enhancing provision or a separate offense. If the statute is construed as a separate offense, then the type of firearm will likely be an element of that offense, meaning that the jury must determine the weapon used. However, if *Branch* is correct and the statute provides merely enhancement provisions, then the judge can make the requisite findings.

#### *1. Judicial interpretation of the plain language of § 924(c)*

The plain language of the statute is always the starting point in statutory analysis because if the language proves unambiguous, it is conclusive.[99] Key language of § 924(c) supporting the view that the statute is indeed a separate offense states that the statute will be applied "in addition to the punishment provided for such crime of violence or drug trafficking crime."[100] This language was added to the statute in 1986 to cure the statute's weaknesses,[101] one of which may have been the Supreme Court's characterization of the statute as an enhancement provision rather than a separate offense.[102]

The Tenth Circuit read the amended statute as a separate offense, specifically relying on "the statutory language which provides that the underlying offense need only be one for which the defendant '*may* be prosecuted in a court of the United States,' and pro-

98. *See* United States v. Branch, 91 F.3d 699, 739 (5th Cir. 1996).
99. *See* United States v. Turkette, 452 U.S. 576, 580 (1981).
100. 18 U.S.C. § 924(c)(1) (1994).
101. *See* Clare, *supra* note 13, at 824-25.
102. *See* Busic v. United States, 446 U.S. 398, 405 (1980).

vides for a greater sentence for a 'second or subsequent *conviction under this subsection*.' "[103] The *Hill* court stated that this language was significant in its determination that § 924(c) is a separate offense because, after the amendment, "[w]hile proof of the underlying crime is necessary to convict under § 924(c), a defendant need not be convicted of the underlying crime in order to be convicted of § 924(c)."[104] The *Hill* court went on to state that "[a] defendant need not even be charged with the underlying crime to be convicted under § 924(c)."[105] The fact that the defendant need not be convicted nor charged of the underlying crime in order to be convicted of § 924(c) shows that the statute is more than a sentence-enhancing provision and is indeed a separate offense. Thus, the type of firearm is an element of that offense and a question of fact that should be reserved to the jury unless the jury trial right is waived.[106]

Further, the *Hill* court stated that "[b]ecause § 924(c) is a separate offense, 'a conviction and sentence under § 924(c) requires the full panoply of constitutional safeguards ordinarily granted criminal defendants.' "[107] One of these constitutional safeguards is the Sixth Amendment right to a jury trial, which should apply when convicting and sentencing a defendant under the statute. Thus, because § 924(c) is a separate offense, and § 924(c) mandates full protection of the defendant's constitutional rights, the type of firearm, as an element of the offense, should be a decision reserved to the jury.

In contrast, the *Branch* court would most likely argue that type of firearm is not an element of any offense because § 924(c) is an enhancement provision rather than a separate offense.[108] However, the *Hill* court's reasoning is more persuasive than the reasoning in *Branch*, as *Hill* dealt more specifically with the plain language of the statute and analyzed more fully what that language implied.

103. United States v. Hill, 971 F.2d 1461, 1464 (10th Cir. 1992) (citation omitted) (emphasis added).

104. *Id.* (citing United States v. Wilkins, 911 F.2d 337, 338 n.1 (9th Cir. 1990); United States v. Robertson, 901 F.2d 733, 734 (9th Cir.), *cert. denied*, 498 U.S. 962 (1990); United States v. Munoz-Fabela, 896 F.2d 908, 911 (5th Cir.), *cert. denied*, 498 U.S. 824 (1990); United States v. Hunter, 887 F.2d 1001, 1003 (9th Cir. 1989)).

105. *Id.* (citing United States v. Wilson, 884 F.2d 174, 176 (5th Cir. 1989)).

106. If only one gun is in question, then the judge may be able to make the finding as a question of law. *See supra* note 80.

107. *Hill*, 971 F.2d at 1464 (quoting United States v. Martinez, 924 F.2d 209, 211 (11th Cir. 1991) (citation omitted)).

108. For a detailed analysis of the *Branch* court's reasoning, *see supra* Part IV.A.2.

*2. Judicial interpretation of Congressional intent for amending § 924(c)*

Assuming, for argument's sake, that the statutory language is unclear, the next step in statutory analysis is to determine congressional intent through the examination of legislative history.[109] The outcome is the same under this step; the jury should decide which type of firearm is used as an element of the statutory offense.

The *Hill* court found that the legislative history unequivocally showed that Congress did indeed intend to create a separate offense. As mentioned, the 1984 amendment was enacted in response to the Supreme Court's characterization of the statute as an enhancement provision. "In doing so, Congress clearly stated that '[s]ection 924(c) sets out an offense distinct from the underlying felony and is not simply a penalty provision.' "[110] The court went on to say that

> in 1986, when Congress again amended § 924(c) to include drug trafficking crimes in addition to crimes of violence as a predicate to a § 924(c) conviction, it recognized that "[a]lthough . . . section 924(c) . . . is frequently referred to as a penalty enhancement it is in reality a separate offense from crimes of violence. . . ."[111]

In its final point regarding the legislative history, the *Hill* court stated that "nothing in any of the subsequent amendments of § 924(c) indicates that Congress intended to change § 924(c) from a 'distinct' and 'separate' offense to a penalty enhancement statute."[112]

However, as mentioned, the *Branch* court would argue that the type of firearm is not an element of an offense because § 924(c) is not an offense but an enhancement provision. While it is true that Congress never explicitly mandates that the type of firearm is an element of an offense, it is important to note that Congress amended § 924(c) to ensure that the statute as a whole was not characterized as a sentence enhancement. Because Congress took such measures to amend the statute, it seems unlikely that Congress would subsequently create several sentence enhancements that depended on the type of firearm used. This type of Congressional action would be

109. *See* Blum v. Stenson, 465 U.S. 886, 896 (1984).

110. *Hill*, 971 F.2d at 1466 (quoting S. REP. NO. 98-225, at 312 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3490).

111. *Id.* (citation omitted) (quoting H.R. REP. NO. 99-495, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1336).

112. *Id.*

entirely inconsistent with Congress's motives.

*3. The rule of lenity*

Even assuming that the legislative history provides no direction and is ambiguous, the rule of lenity requires that the jury determine the type of firearm used in the commission of the crime. The rule of lenity is a "construction maxim"[113] and holds that "penal statutes are 'strictly construed against the Government or parties seeking to exact criminal penalties in favor of the persons on whom such penalties are sought to be imposed.' "[114] This rule is the last resort in statutory interpretation, to be used only after analyzing the language of the statute and congressional intent . However, the rule must be used with care. As the court in *United States v. Rodriguez* stated:

> The mere fact that a defendant can articulate a construction of a statute more narrow than that urged by the government is not enough to render that statute ambiguous and require application of the rule of lenity. The rule is not, after all, intended to beget ambiguities not really present in statutes when they are given " 'their fair meaning in accord with the manifest intent of the lawmakers.' "
>
> . . . Indeed, it is "not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of the Act,' . . . such that even after a court has 'seize[d] everything from which aid can be derived,' it is still 'left with an ambiguous statute.' "[115]

Thus, in light of the ambiguities that are left after the discussion of the plain language and the legislative intent, § 924(c) is a prime candidate for the rule of lenity.

As mentioned, in cases involving the determination of type of firearm used under § 924(c), the courts have had to infer congressional intent regarding whether § 924(c) is a separate offense thus making the type of firearm an element of the offense, or whether § 924(c) is merely an enhancement provision. Therefore, the rule of lenity should apply and the statute should be interpreted in favor of the defendants. Accordingly, in the case of *Alborola-Rodriguez*, the

113. *See* United States v. Casey, 776 F. Supp 272, 275 (E.D. Va. 1999).

114. *Id.* (quoting United States v. Cambell, 704 F. Supp. 661, 664 (E.D. Va. 1989)).

115. United States v. Rodriguez, 841 F. Supp. 79, 82 (E.D.N.Y. 1994) (quoting United States v. Turkette, 452 U.S. 576, 587 n.10 (1981); Chapman v. United States, 500 U.S. 453, 463 (1991)).

rule of lenity requires the court to hold that the jury rather than the judge should make the requisite findings regarding the type of firearm.

### *C. How the Supreme Court Should Rule*

Although the Supreme Court denied certiorari in *Alborola-Rodriguez*,[116] it has granted certiorari in one of the cases arising from the Branch-Davidian conflict.[117] In *United States v. Castillo*,[118] the Fifth Circuit refused to reverse its *Branch* ruling that the type of firearm is an enhancement rather than an element of the offense. However, the Supreme Court should reverse the Fifth Circuit's conclusion and rule that the type of firearm is an element and thus a question for the jury. The Supreme Court should do this for two central reasons based on its prior rulings in addition to the reasons already cited.

First, the court handed down what might be considered a "defendant-friendly" interpretation of § 924(c) in *Bailey v. United States*.[119] In that case, the Court was called on to decide the meaning of the term "use" in the context of the statute.[120] The defendant, Bailey, was convicted for violating § 924(c) based on a loaded pistol police found inside a locked car trunk after they arrested him for possession of cocaine.[121] Bailey argued that because the gun was locked in the trunk during his arrest, he did not "use" the firearm as the term was employed in the statute.[122] He contended that the statute implied "active employment" of the firearm in order to constitute "use."[123] After examining the circuit split on this issue, the plain language of the statute, and the legislative history of the Act, the Court sided with the defendant, holding that "use" "denotes active employment."[124] As suggested above, this is a "defendant-friendly" in-

116. 119 S. Ct. 1809 (1999).

117. Castillo v. United States, 120 S. Ct. 865 (2000).

118. 179 F.3d 321 (5th Cir. 1999), *cert. granted*, 120 S. Ct. 865 (2000).

119. 516 U.S. 137 (1995).

120. Section 924(c)(1) requires the imposition of specified penalties if the defendant, "during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm." *See Bailey*, 516 U.S. at 142-43.

121. *See id.* at 139.

122. *See id.* at 143.

123. *Id.*

124. *Id.* at 150.

terpretation of § 924(c) and comports with the rule of lenity.[125]

A second, more persuasive reason why the Supreme Court should rule that the type of firearm is a decision for the jury is the Court's decision and language in *McMillan v. Pennsylvania*.[126] In that case, the Court was asked to scrutinize Pennsylvania's Mandatory Minimum Sentencing Act.[127] The petitioners in *McMillan* contested the constitutionality of the statute, averring that "visible possession of a firearm is an element of the crimes for which they were being sentenced and thus must be proved beyond a reasonable doubt."[128] In referring to the Pennsylvania statute, the Court stated:

> [A]nyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. At the sentencing hearing, the judge is directed to consider the evidence introduced at trial and any additional evidence offered by either the defendant or the Commonwealth. The Act operates to divest the judge of discretion to impose any sentence of less than five years for the underlying felony; it does not authorize a sentence in excess of that otherwise allowed for that offense.[129]

The Court further held that the Pennsylvania statute "merely requires a minimum sentence of five years, which may be more or less than the minimum sentence that might otherwise have been imposed."[130]

In upholding the statute's constitutionality, the Court used language that indicated how it would rule if it were to hear the issue at hand in *Alborola-Rodriguez*. The *McMillan* Court stated:

> Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. Section 9712 "ups the ante" for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory

125. See *supra* Part IV.B.3 for a discussion of the "rule of lenity."

126. 477 U.S. 79 (1986).

127. 42 PA. CONS. STAT. § 9712 (1982).

128. *McMillan*, 477 U.S. at 83.

129. *Id.* at 81-82 (citation omitted).

130. *Id.* at 83.

> plan. The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense. Petitioners' claim that visible possession under the Pennsylvania statute is "really" an element of the offenses for which they are being punished—that Pennsylvania has in effect defined a new set of upgraded felonies—*would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment*, cf. 18 U.S.C. § 2113(d) (providing separate and greater punishment for bank robberies accomplished through the "use of a dangerous weapon or device"), but it does not.[131]

Thus, the Court indicated that a statute which exposed a criminal defendant to a greater or additional punishment (such as 18 U.S.C. § 924 (c)) would require proof beyond a reasonable doubt. Although this holding says nothing about the jury trial right, the Court's holding in *Sullivan v. Louisiana*[132] indicates that proof beyond a reasonable doubt and the jury trial right go hand in hand. The Court stated: "It is self evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated."[133] Admittedly, interrelation is not causation and simply because the Court requires proof beyond a reasonable doubt does not necessarily mean that they will require a jury trial. However, the point in *Sullivan* was "that a violation of the Due Process protection[,] afforded a defendant under *Winship*[,] necessarily violated the defendant's Jury Trial Right because the jury, not the judge must determine the essential facts beyond a reasonable doubt."[134]

Thus because of the Court's "defendant friendly" interpretation of § 924(c) and, more importantly, its discussion in *McMillan*, it should rule that the type of firearm used in relation to a violent or drug trafficking crime is a finding reserved to the jury and not the judge.

131. *Id.* at 87-88 (emphasis added).

132. 508 U.S. 275 (1993).

133. *Id.* at 278.

134. Henning, *supra* note 4, at 1184.

## V. CONCLUSION

In short, the court in *Alborola-Rodriguez* came to the wrong conclusion. Although the circuits have struggled to determine "who should make the call" as to the type of firearm used in violation of § 924(c), the jury trial right is too important to disregard. The circuits that have held that the jury should determine the type of firearm are more in agreement with the Constitution and congressional mandate than the circuits that hold that it is a decision for the judge upon sentencing.

In order to resolve this issue, either the Supreme Court or Congress must act. The Supreme Court's decision in *U.S. v. Castillo* may resolve the problem. However, in the event the Supreme Court does not address whether the type of firearm is an enhancement or element of the offense, perhaps it is better to find resolution within the legislative branch. Simply put, Congress should exercise its legislative power and amend the statute. An amendment indicating that § 924(c)(1) is a "separate offense," and that the type of firearm is an "element" of the offense, would make the statute sufficiently clearer. Until Congress or the Supreme Court acts, courts may continue to withhold from defendants their constitutionally mandated jury trial rights.

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