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United States v. Dalton: Forcing Prosecutors to Draw Their Weapons from a Different Holster

I. INTRODUCTION

On the surface, United States v. Dalton\(^1\) appears to be just another double jeopardy case. Underlying the decision, however, tremendous practical ramifications affect prosecutors and the tack they take in trying cases involving possession and transfer of machine guns. If prosecutors choose to proceed under 26 U.S.C. § 5861 (Section 5861),\(^2\) it is quite possible that they will wind up reprosecuting under 18 U.S.C. § 922(o) (Section 922 (o)).\(^3\) This double prosecution unduly burdens prosecu-

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1 United States v. Dalton, 990 F.2d 1166 (10th Cir. 1993).
2 26 U.S.C. § 5861 (1988). This section is part of what is known as the National Firearms Act, which includes §§ 5801-72. Section 5861 reads:
   It shall be unlawful for any person—
   (a) to engage in business as a manufacturer or importer of, or dealer in, firearms without having paid the special (occupational) tax required by section 5801 for his business or having registered as required by section 5802; or
   (b) to receive or possess a firearm transferred to him in violation of the provisions of this chapter; or
   (c) to receive or possess a firearm made in violation of the provisions of this chapter; or
   (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or
   (e) to transfer a firearm in violation of the provisions of this chapter; or
   (f) to make a firearm in violation of the provisions of this chapter; or
   (g) to obliterate, remove, change, or alter the serial number or other identification of a firearm required by this chapter; or
   (h) to receive or possess a firearm having the serial number or other identification required by this chapter obliterated, removed, changed or altered; or
   (i) to receive or possess a firearm which is not identified by a serial number as required by this chapter; or
   (j) to transport, deliver, or receive any firearm in interstate commerce which has not been registered as required by this chapter; or
   (k) to receive or possess a firearm which has been imported or brought into the United States in violation of section 5844; or
   (l) to make, or cause the making of, a false entry on any application, return, or record required by this chapter, knowing such entry to be false.

3 18 U.S.C. § 922(o) (1988). This section was added to what is known as the Gun Control Act, containing §§ 921-30, in 1986 in an amending act known as the Firearms Owner's Protection Act, which reads:
torial resources, which may be further taxed by the possibility of past Section 5861 convictions reappearing in writs of habeas corpus.

This Note thoroughly examines *Dalton* in both its reasoning and practical application. The split in circuits over the constitutionality of Section 5861 will be discussed, followed by an analysis of the relative advantages of Section 5861 and Section 922(o) and suggestions on how prosecutors can decide under which statute to proceed. There will also be some discussion of potential policy rationale behind the *Dalton* decision.

II. FACTS AND BACKGROUND—TRACING *DALTON* THROUGH THE SYSTEM

John Dalton, an attorney, had a client who was a registered gun dealer. As payment for his services, he accepted a firearm which had been converted into a machine gun in 1989. The United States District Court for the District of Colorado convicted Dalton of violating Sections 5861(d) and (e) of the National Firearms Act: Subsection (d) prohibits receipt or possession of an unregistered firearm; Subsection (e) prohibits the transfer of a firearm without compliance with the transfer provision in Section 5812 (which requires the transferor to see that the firearm is registered to the transferee and the transfer tax is paid).

Dalton appealed his conviction, claiming he had been asked to perform an impossible act. In 1986, Section 922(o) was added to the Gun Control Act of 1968, making it illegal to possess any machine gun made after 1986. The government does not allow registration of machine guns falling under Section 922(o) and does not accept the tax which would be required under the National Firearms Act. In fact, Section 5812 states specifically that an application for registration will be denied if

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(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
(2) This subsection does not apply with respect to—
(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

4 United States v. Dalton, 960 F.2d 121, 122 (10th Cir. 1993).
5 Id.
transfer, receipt, or possession of the firearm would violate the law. Dalton argued that requiring him to perform an act which was precluded by law violated both due process and fundamental fairness. The United States Court of Appeals for the Tenth Circuit agreed with Dalton and reversed the decision of the district court, holding that Section 5861 violated Dalton’s due process rights.

Dalton was reindicted under Section 922(o). He made a motion to dismiss the indictment. Dalton argued that the new indictment violated the Double Jeopardy Clause of the Fifth Amendment because his previous conviction under Section 5861 had stemmed from the identical act. The United States District Court for the District of Colorado granted Dalton’s motion to dismiss, agreeing with his double jeopardy argument.

The government appealed the dismissal. This time the court of appeals reversed the district court in favor of the government. The court declared that Dalton’s reprosecution under Section 922(o) was not barred by the Double Jeopardy Clause. The case was remanded with instructions that the indictment be reinstated.

III. THE TENTH CIRCUIT’S REASONING IN DALTON

Dalton’s double jeopardy argument, which was accepted by the district court, was based on the standard double jeopardy tests outlined by the U.S. Supreme Court in Blockburger v. United States and Grady v. Corbin. The court of appeals,

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6 United States v. Kurt, 988 F.2d 73 (9th Cir. 1993).
7 Dalton, 960 F.2d at 126.
8 U.S. Const. amend. V.
12 495 U.S. 508 (1990). The double jeopardy test in Blockburger is known as the “same elements” test. In order to pass this test, each of the two offenses in question must require proof of an essential element which is not required to prove the other offense. If this test is passed, then the “same conduct” test in Grady is applied. This test provides a double jeopardy bar to prosecution “if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.” Grady, 495 U.S. at 510.

In Dalton, the district court found that the two offenses failed the Blockburger test, and thus an analysis under the more inclusive Grady test was not undertak-
however, entertained very little of the district court's analysis. Instead, the court skirted these cases and demonstrated that judicially crafted exceptions to general double jeopardy principles applied to the facts in *Dalton*. The court stated:

It has long been settled, however, that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to the conviction.  

The court then analogized *Dalton* to *Montana v. Hall*, a case where the statute under which the defendant had been prosecuted did not take effect until three months after he committed his illegal act. In *Hall*, the United States Supreme Court said that the state had "simply relied on the wrong statute," and "[i]t is clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument." The court of appeals found that "*[Dalton]* is virtually indistinguishable from *Hall*," pointing out that the charging instrument, Section 5861, had been implicitly repealed after the conviction and was thus defective. Therefore, under the rule set forth in *Hall*, Dalton's reprosecution under Section 922(o) did not violate the Double Jeopardy Clause.

IV. ANALYSIS

A. Is the Double Jeopardy Analysis in *Dalton* Valid?

Given the district court's analysis under the mainstream double jeopardy cases of *Blockburger* and *Grady*, it follows that the court of appeals needed substantial grounds to overturn its ruling. The court met this burden by relying on Supreme Court cases such as *Hall*, which carve out exceptions to the general double jeopardy rules. The strength of their argument is best

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15 *Dalton*, 990 F.2d at 1168 (quoting *Hall*, 481 U.S. at 404).
16 *Id.*
17 *Id.*
demonstrated, however, by exposing the weaknesses of the arguments put forth by the district court.

Since the government's case in Dalton was based on specific exceptions to the double jeopardy rules, in order to effectively discount the government's claims and rely on mainstream double jeopardy analysis the district court needed to show that the exceptions did not apply to the facts in Dalton. The district court failed to do this. The court correctly pointed out that if a conviction is reversed for insufficiency of evidence, reprosecution is not proper. The court then reasoned, however, that since Dalton "was convicted of a crime he could not perform," that "the evidence was necessarily insufficient." This is logically unsound. The evidence presented was more than sufficient to prove that Dalton was indeed in possession of an unregistered machine gun, which is unarguably a crime under Section 5861. The problem is with the statute itself, not the evidence. The court of appeals effectively refuted this argument by the district court.

After presenting this faulty reasoning, the district court then decided that it really was not necessary because, it subsequently claimed, Dalton "raises double jeopardy issues independent of those which arise after a conviction is reversed on appeal." The court compared Brown v. Ohio, claiming it was a similar case which raised the same issues. This analysis, however, is also flawed. The comparison was based on the statement: "courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." The district court relied on footnote five to this statement, which reads in part, "[w]e are not concerned here with the double jeopardy questions that may arise . . . after a conviction is reversed on appeal." In Brown v. Ohio, Brown was convicted on one charge, actually served his sentence, and then

19 Dalton, 990 F.2d at 1168.
21 432 U.S. 161, 165 (1977) (holding that the Double Jeopardy Clause barred Brown's prosecution for auto theft after he had already been prosecuted and punished for the lesser included offense of operating the vehicle without the owner's consent).
22 Dalton, 795 F. Supp at 356.
23 Brown, 432 U.S. at 165 (emphasis added).
24 Id. at 165 n.5.
was being reprosecuted for another crime of which his previous conviction was a lesser included offense. The reason the Supreme Court did not look at the question addressed in the footnote is because it was inapplicable to the facts of Brown since his conviction was not reversed on appeal. The double jeopardy question mentioned in the footnote applies to Dalton, however, since Dalton's first conviction under Section 5861 was reversed on appeal. Looking at the Court's textual statement, it is evident that it was indicating, through the use of the word "ordinarily" and the subsequent footnote, that there are possible exceptions to the general rule, particularly in the circumstances outlined in the footnote. The district court misinterpreted these exceptions. Although the appellate court never addressed this particular flaw in the district court's opinion, viewed correctly it actually strengthens the court of appeals' position on reversal.

Finally, the district court claimed that Hall recognizes "that where Blockburger double jeopardy issues are implicated the rule allowing reprosecutions after a reversal on grounds other than insufficiency of the evidence is inapplicable." This language in Hall appears in a footnote to the statement: "but the Brown analysis is not apposite in this Hall case," and the footnote reads "[w]e explicitly noted in Brown that the case did not raise 'the double jeopardy questions that may arise . . . after a conviction is reversed on appeal.'"

In context, the district court's final argument in Dalton was merely an extension of its previous misinterpretation of Brown, lending further consistency to the appellate court's analysis in Dalton. So although the Court of Appeals did not extensively dismantle the district court's opinion, it is clear that the interplay of double jeopardy rules and Supreme Court-created exceptions supported the reversal of the district court.

B. Is Section 5861 Really Unconstitutional?

1. The Tenth Circuit says yes

In Dalton's original appeal of his conviction under Section 5861, the Tenth Circuit Court of Appeals referred to United

27 Id. at 404.
28 Id. at 404 n.2 (quoting Brown, 432 U.S. at 165 n.5).
States v. Rock Island Armory, 29 Sonzinsky v. United States, 30 and the legislative history of the National Firearms Act in order to demonstrate the unconstitutionality of this section. Central to the court’s reasoning was the taxing purpose behind the statute. When Congress passed the National Firearms Act, it chose to go about regulating the making, sale, possession, and transfer of machine guns through the taxing power granted it by the Constitution. The primary reason for this was to avoid improper use of congressional power to regulate what could be considered a local activity and thus within the power of the states to regulate.

In Sonzinsky, the regulatory purpose of the National Firearms Act was challenged on these basic grounds, claiming that the tax was unconstitutional since it was, in reality, a penalty imposed to aid regulation of machine gun trafficking. The Supreme Court rejected this challenge, claiming that the registration provisions were supportable as a means of generating revenue and stating that, “[o]n its face, it is only a taxing measure.”31

In Rock Island Armory:

[T]he court pointed out that this Act was passed and has been consistently upheld under the power of Congress to raise revenue. The court reasoned that because the possession of machineguns made after 1986 is illegal under section 922(o) and the government will therefore no longer register and tax them, and because the registration requirements are solely in aid of collecting the tax, the constitutional base for those requirements—i.e., the power to tax—has disappeared. Accordingly, the court held the registration requirements constitutionally invalid as to firearms that the government no longer taxes. 32

The Tenth Circuit adopted this position in Dalton’s first appeal, declaring that Section 922(o), as added to the Gun Control Act, does indeed render Section 5861 of the National Firearms Act constitutionally invalid for the reasons stated in Rock Island Armory. “To put the proposition as plainly as we are able: a provision which is passed as an exercise of the taxing power no

30 300 U.S. 506 (1937).
32 Id.
longer has that constitutional basis when Congress decrees that the subject of that provision can no longer be taxed.\textsuperscript{33}

2. The Fourth and Seventh Circuits say no

The Fourth Circuit rejected the \textit{Dalton} reasoning in \textit{United States v. Jones}.
\textsuperscript{34} Jones was convicted of possessing, transferring, and transporting in interstate commerce two shotguns which he had modified into automatic weapons and sold to undercover government agents. He was convicted under the National Firearms Act. Part of his appeal relied on \textit{Dalton} and the assertion that the government should have tried him under the Gun Control Act instead. In rejecting Jones' argument, the Fourth Circuit Court of Appeals reasoned: "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for repeal by implication is when the earlier and later statutes are \textit{irreconcilable}."\textsuperscript{35} The court pointed out that no affirmative showing of an intent to repeal the National Firearms Act appears in either the statutory text or the legislative history of the 1986 amendment to the Gun Control Act. Absent such showing, the two statutes must be examined for irreconcilability. The court reasoned that the two statutes are not irreconcilable because "neither act requires him to deal in such guns. Simply put, Jones can comply with both acts by refusing to deal in newly-made machine guns."\textsuperscript{36}

The Fourth Circuit also rejected the reasoning in \textit{Dalton} concerning the inapplicability of the taxing provision. It pointed out that the government still taxes the making of illegal machine guns even though possession and transfer are not taxed.\textsuperscript{37} While the \textit{Dalton} court claimed that taxing the making of machine guns is irrelevant to prosecution of possessing and transferring, the court maintained that knowing the chain of possession and transfer helps to determine the maker of the firearm and is thus "supportable as in aid of a revenue purpose."\textsuperscript{38} In addition, the court pointed to \textit{Minor v. United States}\textsuperscript{39} to support its claim that, even if the power to tax

\begin{itemize}
\item \textsuperscript{33} \textit{Id.} at 125.
\item \textsuperscript{34} 976 F.2d 176 (4th Cir. 1992).
\item \textsuperscript{35} \textit{Id.} at 183 (quoting Morton v. Mancari, 417 U.S. 535, 550 (1974)).
\item \textsuperscript{36} Jones, 976 F.2d at 183.
\item \textsuperscript{37} \textit{Id.}; see also \textit{Dalton}, 960 F.2d at 125.
\item \textsuperscript{38} Jones, 976 F.2d at 184 (quoting Sonzinsky v. United States, 300 U.S. 506, 513 (1937)).
\item \textsuperscript{39} 396 U.S. 87, 98 (1969).
\end{itemize}
were no longer sufficient to support the statute, Congress' power under the Commerce Clause would certainly be sufficient to support it in Jones' case.40

The Seventh Circuit, in *United States v. Ross*,41 rejected *Dalton* and adopted the analysis set forth in *Jones*. Since *Rock Island Armory* was decided by the Central District Court of Illinois, which is contained within the Seventh Circuit, its holding appears to be overruled by *Ross*. While the Seventh Circuit never expressed this intention, it did mention that *Jones* rejects both *Rock Island Armory* and *Dalton*.

3. *The Ninth Circuit is unclear*

The Ninth Circuit, in *United States v. Kurt*,42 noted with favor the reasoning in *Dalton*.43 In *Kurt*, the Ninth Circuit quoted heavily from *Dalton* but then stated that it "need not resolve the question of whether Kurt could have been convicted under [Section] 5861 if he was in possession of a gun which had been purchased or converted after May 19, 1986, since he has failed to show that [Section] 5861 is unconstitutional in its application to him."44 The court then said that since Kurt had not presented evidence demonstrating when the gun was either purchased or converted, he had not carried the burden necessary to establish the unconstitutionality of the statute.45 While the Ninth Circuit did not expressly find Section 5861 unconstitutional, the court's extensive reliance on the analysis in *Dalton* seems to indicate that, given the right case, it would follow *Dalton*.

This apparent leaning by the court of appeals did not sway the district court for the Central District of California in *United States v. O'Mara*.46 In this case O'Mara was convicted under Section 5861(d) of possession of an unregistered machine gun. Subsequently, he filed a writ of habeas corpus in which he moved to have his sentence vacated. The district court in *O'Mara* seized upon the fact that *Kurt* did not expressly decide the constitutionality of Section 5861 convictions because Kurt

40 *Jones*, 976 F.2d at 183-84.
41 9 F.3d 1182, 1192-94 (7th Cir. 1993).
42 988 F.2d 73 (9th Cir. 1993).
43 *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1993).
44 *Kurt*, 988 F.2d at 75-76.
45 *Id.* at 76.
was not clearly subject to Section 922(o). It pointed out that O'Mara was subject to Section 922(o) and then proceeded to demonstrate the flaws in the Dalton analysis.\footnote{Id. at 1470-72.}

The district court argued persuasively that, due to the 1968 amendment of the National Firearms Act, the transferee is exempt from the statute's registration requirement. Because of this, the court stated: "the NFA creates a single mandate for the transferee of the firearm. It prohibits him from accepting possession of a firearm that has not been properly registered by the transferor."\footnote{Id. at 1471.} This reading supports the Jones analysis by demonstrating that both statutes can be complied with if the transferee merely refuses to take possession of the unregistered machine gun.\footnote{Id. at 1471 n.12.}

The district court also attacked the assumption in Dalton that the sole constitutional basis of Section 5861 was the taxing power, pointing out that in United States v. Evans,\footnote{928 F.2d 858, 862 (9th Cir. 1991).} "[t]he Ninth Circuit holds that section 5861(d) is a valid exercise of the authority vested in Congress by the commerce clause."\footnote{O'Mara, 827 F. Supp. at 1472.} This reasoning demonstrated that, even if the taxing provision is of no purpose after the enactment of Section 922(o), there is still a valid constitutional underpinning for Section 5861.

The juxtaposition of the dicta in the Kurt case against the well-reasoned O'Mara district court opinion makes it unclear which path the Ninth Circuit will choose to follow on this issue. Thus the circuits are split concerning the constitutionality of the National Firearms Act, with the Fourth and Seventh Circuit going one direction, the Tenth Circuit the other direction, and the Ninth Circuit in a state of flux. While a thorough analysis of the viability of these divergent opinions is beyond the scope of this Note, it should be evident that the unstable state of the NFA provides federal prosecutors quite a tightrope to walk, especially in the jurisdictions which have yet to address the issue.

\footnote{Nevertheless, the district court in O'Mara notes that this analysis would not apply to a transferee of firearms, since they are required to register the firearms under the amended NFA. Id. at 1471 n.12. They point out that the defendant in Jones was a maker of firearms, and thus the Jones analysis was erroneously applied in that case.}
C. How Can Prosecutors Decide Which Statute to Use?

In helping prosecutors decide under which statute to indict, the question which must logically be asked now is: What are the advantages to indictment under Section 5861 as opposed to Section 922(o)? In addressing this question, we will put aside the issue of taxation, assuming that the primary purpose of both statutes is to regulate the trafficking of firearms. To begin with, sentencing does not appear to be an issue. There is no distinction within the Sentencing Guidelines which would result in differing sentences according to the statute under which the charge came. 52

Looking at the statutory language, Section 5861 is applicable to "firearms," 53 whereas Section 922(o) is applicable only to "machineguns." 54 The definition of a machine gun is the same in Section 922 as it is in Section 5845 of the National Firearms Act, 55 but the definition of firearm under Section 5845 is much broader. 56 This obviously makes Section 5861

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The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

56 26 U.S.C. § 5845(a) reads:
The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although redesigned as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.
broader in its reach, but the types of firearms listed other than machine guns can still be validly controlled under Section 586—even if it is considered unconstitutional with respect to machine guns—because it was Section 922(o) which rendered Section 5861 unconstitutional. In other words, since Section 922(o) is only applicable to possession and transfer of machine guns, it can only invalidate Section 5861 with respect to possession and transfer of machine guns.

It is not apparent anywhere that Section 922(o) is in any way inferior to Section 5861 with regard to the regulatory effect it has on possession and transfer of machine guns. Thus, prosecutors have the same statutory weapons they had originally under Section 5861, but some of them are now drawn from a different statutory holster. After determining there is no advantage to indictment under either statute, how does a prosecutor decide under which statute to indict? The answer is obviously dependent on the jurisdiction. Prosecutors in the Fourth and Seventh Circuits appear to be safe to use either statute in a possession and transfer case considering the holdings in *Jones* and *Ross*. Prosecutors in the Tenth Circuit should certainly use Section 922(o) for such cases, and, given the uncertainty in the Ninth Circuit, Section 922(o) seems the safer route for prosecutors there as well.

As far as the open jurisdictions are concerned, it is a judgment call. Prosecutors would obviously prefer that the rationale of the *Jones* court be adopted, thus giving them license to indict under either statute according to any preference they may have. Given the right fact situation, if a prosecutor saw indicators that their circuit preferred the *Jones* analysis, they might want to test the court. The risks probably outnumber the potential benefits, however. If the court in a particular jurisdiction adopts the *Dalton* analysis, the prosecutor must go back and reindict under Section 922(o), taking the case through the system again. There are no guarantees that the court will allow this. The court may instead adopt the double jeopardy analysis of the District of Colorado District Court (although it was overruled), barring reprosecution completely. The Ninth Circuit, albeit prior to the second *Dalton* ruling by the Tenth Circuit Court of Appeals, indicated in dicta at the end of *Kurt* that such reindictment would be barred by the Double Jeopardy
Clause.\textsuperscript{57} Even if the court allows reindictment and reprosecution, the attempt under Section 5861 has resulted in a waste of time and resources which could have been avoided had the original indictment been under Section 922(o). Since there are no evident benefits of Section 5861 over Section 922(o), it is apparent that initial indictment under Section 922(o) is both the safe and efficient choice for virtually all circuits.

\textbf{D. Potential Policy Reasons for the Dalton Decision}

While the \textit{Dalton} analysis is grounded on sound double jeopardy principles, some practical effects of the decision may have played a part in the court's decision.

\textbf{1. Judicial economy}

Had the \textit{Dalton} court decided differently, the decision could have opened for prosecutors a whole new Pandora's box. With post-1986 convictions under Section 5861 for possession and transfer considered constitutionally infirm in the Tenth Circuit, writs of habeas corpus could become an option for inmates serving time under such convictions. With no way to reindict these individuals, it could become an increasingly exercised option, causing a caseload increase for already overburdened prosecutors. However, with the likelihood that a successful writ of habeas corpus will be followed by a valid reindictment under Section 922(o), this option will probably not be nearly as attractive to inmates.

\textbf{2. Public policy requires punishment of the guilty}

A second very practical consideration is that of punishment for the guilty. Many people, especially outside of the legal community, express continual frustration at seeing convicted criminals turned loose on technicalities. The \textit{Dalton} decision insures that prosecutors still have a weapon to use against guilty parties whose convictions are invalid due to the unconstitutionality of the statute under which they were convicted. Thus, the public policy requiring that those individuals guilty of a crime be punished is furthered in the Tenth Circuit by \textit{Dalton}.

\textsuperscript{57} United States v. Kurt, 988 F.2d 73, 76 (9th Cir. 1993).
V. Conclusion

The double jeopardy analysis in *Dalton* has significant ramifications for prosecutors. It affords them the ability to reprosecute individuals under a valid statute if the statute under which the prior conviction was obtained is found to be unconstitutional. This decision also raises practical issues for prosecutors which must be considered, the greatest of which is whether to pursue prosecution of an individual accused of possession and transfer of a machine gun under Section 5861 or Section 922(o). Since both statutes serve the same regulatory function, without any perceived advantages to either, Section 922(o) affords prosecutors the path of least resistance and greatest efficiency, and should be used accordingly.

*Benton Larsen*