

NLWJC - Kagan

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Crime - Guns Mandatory Minimum

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Subject: Bailey fix

Update on Bailey:

The federal law has a 5-year mandatory penalty for anyone who "uses or carries a firearm" during or in relation to a drug or violent crime. Two years ago, the Supreme Court ruled in the Bailey case that to "use" a firearm under the statute, it must be actively deployed-- a much narrower construction than we wanted.

Legislative Action. Our juvie bill proposed to fix the limiting effect of the Bailey decision by adding "possession" to get the 5-year mandatory sentence. Neither the Senate nor the House added anything on Bailey to their juvie bills; however, the full Senate passed a separate bill similar to our Bailey proposal. The House Judiciary Committee passed a bill to broaden what would be covered under the statute (e.g., possessing, brandishing) and would dramatically increase the mandatory penalties.

Supreme Court. The Court has now agreed to review what it means to "carry" a firearm under the statute. The Justice Department has taken the position in the lower court litigation (we are litigants in the case) to view the term broadly to include transporting firearms.

The early Justice read is that no matter how the Court ultimately decides, we should continue to pursue our legislative fix to add possession to the statute.