Appendix D

April 26, 2016

To: Clerk of Court

⇔12207-051⇔
Elizabeth Shumaker
1823 Stout ST
Tenth Circuit
Denver, CO 80257
United States

Re: United States v. Sebastian Eccleston 95-cr-0014 LH

United States v. Johnson - Retroactive US S.Ct 135 2551 (2015)

Dear Clerk,

I am seeking permission to file a second or successive 2255(f)(3) based on the Johnson ruling in the U.S. S.Ct.

I was charged with 18 USC § 2119(1) and;

18 USC § 1951(a).

My question is whether those statutes are categorically "crimes of violence" for the purpose of enhancing me under 18 USC 924(c)(3)(b). I was charged with 2 counts of 924(c)(1)(A). The second 924(c)(1)(A) was a redivist clause enhancement.(career offenders)

I hope for a positive response and remain;

Please see motion for details.

04-28-2016

Yours Truly,

X Sebastian Eccleston

Sebastian Eccleston #12207-051
Federal Correctional Institution
P.O. Box 1000
Cumberland, MD 21501

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MOTION UNDER 28 U.S.C. § 2244 FOR ORDER AUTHORIZING DISTRICT COURT TO CONSIDER SECOND OR SUCCESSIVE APPLICATION FOR RELIEF UNDER 28 U.S.C. §§ 2254 OR 2255

Name of Movant	Prisoner Number	Case Number (leave blank)
SEBASTIAN LEIGH ECCLESTON	12207-051	
Place of Confinement		
Federal Correctional Institution (Cumberland, MD)		

IN RE: UNITED STATESV. SEBASTIAN ECCLESTON , MOVANT
95-CR-00014LH

1. Name and location of court which entered the judgment of conviction from which relief is sought:
United Staes District Court for the District of New Mexico

2. Parties' Names: United States vs. Sebastian Eccleston

3. Docket Number: 95-cr-00014LH 4. Date Filed: March 1995

5. Date of judgment of conviction: October 29, 1996 6. Length of sentence: 417 months

7. Nature of offense(s) involved (all counts):

1. 18 USC § 2 Aiding and abetting
2. Carjacking §2119(1)))))))))))))))))))) 18 USC § 924(c)(1)(A)
3. Interference with commerce by threats or violence § 1951(a) § 924(c)(1)(A)

8. What was your plea? (Check one) ☐ Not Guilty ☑ Guilty ☐ Nolo Contendere

9. If you pleaded not guilty, what kind of trial did you have? (Check one) ☐ Jury ☐ Judge only

10. Did you testify at your trial? (Check one) ☐ Yes ☑ No

11. Did you appeal from the judgment of conviction? (Check one) ☑ Yes ☐ No

12. If you did appeal, what was the

Name of court appealed to: United States District Court (D.N.M)

Parties' names on appeal: United States v. Eccleston vs.

Docket number of appeal: 95-cr-00014LH Date of decision: 10th Cir No.96-2272

Result of appeal: Affirmed

13. Other than a direct appeal from the judgment of conviction and sentence, have you filed any other petitions, applications for relief, or other motions regarding this judgment in any federal court? ☑ Yes ☐ No

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14. If you answered "Yes" to question 13, answer the following questions:

A. First Petition, Application, or Motion

(1) In what court did you file the petition, application, or motion? U.S District (DNM)

(2) What were the parties' names? Eccleston vs. United States

(3) What was the docket number of the case? 01-CV-500

(4) What relief did you seek? Correction of Sentence

(5) What grounds for relief did you state in your petition, application, or motion?
To be taken into federal custody based on plea agreement that State and federal Sentences were concurrent.

(6) Did the court hold an evidentiary hearing on your petition, application or motion? ☐ Yes ☒ No

(7) What was the result? ☐ Relief granted ☐ Relief denied on the merits ☐ Relief denied for failure to exhaust ☑ Relief denied for procedural default

(8) Date of court's decision: June 15, 2001

B. Second Petition, Application, or Motion

(1) In what court did you file the petition, application, or motion? United States Dist. (DNM)

(2) What were the parties' names? United States vs. Eccleston

(3) What was the docket number of the case? 04-CV-250

(4) What relief did you seek? Correction of Sentence.

(5) What grounds for relief did you state in your petition, application, or motion?
That federal and state sentences run concurrent. ORDERED to exhaust federal BOP remedies

(6) Did the court hold an evidentiary hearing on your petition, application or motion? ☑ Yes ☐ No

(7) What was the result? ☐ Relief granted ☐ Relief denied on the merits ☑ Relief denied for failure to exhaust ☐ Relief denied for procedural default

(8) Date of court's decision: April 25, 2007

C. Third and Subsequent Petitions, Applications, or Motions
For any third or subsequent petition, application, or motion, attach a separate page providing the information required in items (1) through (8) above for first and second petitions, applications, or motions.

Appendix D-3

D. PRIOR APPELLATE REVIEW(S)
Did you appeal the results of your petitions, applications, or motions to a federal court of appeals having jurisdiction over your case? If so, list the docket numbers and dates of final disposition for all subsequent petitions, applications, or motions filed in a federal court of appeals.

First petition, application, or motion	☐ Yes	Appeal No.		☒ No
Second petition, application, or motion	☑ Yes	Appeal No.	10th Cir 04-2101	☐ No
Subsequent petitions, applications or motions	☑ Yes	Appeal No.	09-2022	☐ No
Subsequent petitions, applications or motions	☑ Yes	Appeal No.	10-1525	☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.		☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.		☐ No

If you did not appeal from the denial of relief on **any** of your prior petitions, applications, or motions, state which denials you did not appeal and explain why you did not.
Time barred under § 2244

15. Did you present any of the claims in this application in any previous petition, application, or motion for relief under 28 U.S.C. § 2254 or § 2255? (Check one) ☐ Yes ☑ No

16. If your answer to question 15 is "Yes," give the docket number(s) and court(s) in which such claims were raised and state the basis on which relief was denied.

17. If your answer to question 15 is "No," why not? This Court will grant you authority to file in the district court only if you show that you could not have presented your present claims in your previous § 2254 or § 2255 application because . . .

A. (For § 2255 motions only) the claims involve "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [you] guilty"; or,

B. (For § 2254 petitions only) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [you] guilty of the offense"; or,

C. (For both § 2254 and § 2255 applicants) the claims involve "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court [of the United States], that was previously unavailable."

U.S. v. Johnson US S.Ct 135, 2551 (2015) 18 USC § 1951(a) and § 2119(1) are not categorically "crimes of violence" 18 USC § 924(c)(3)(B) residual clause is unconstitutional and void-for-vagueness. § 1951(a) may be "threats" and § 2119(1) "intimidation" which are not "crimes of violence" U.S. v. Fuertes 805 F3d 485 (4th Cir. 2015). The defendant's 2nd 18 USC § 924(c)(1)(A) was a "career offender" enhancement. See Argument B in attached motion to correct sentence § 2255 (f)(3).

I did not present the following claims in any previous petition, application, or motion for relief under 28 U.S.C. § 2254:

I did not present the claims listed above in any previous petition, application, or motion because

Johnson made retroactive by US Supreme Court. Defendant's attorney was ineffective for failing to object or argue prior which resulted in harsher penalty and more severe punishment which prejudiced the defendant.

Movant prays that the United States Court of Appeals for the Fourth Circuit grant an Order Authorizing the District Court to Consider Movant's Second or Successive Application for Relief Under 28 U.S.C. §§ 2254 or 2255.

Movant's Signature

I declare under Penalty of Perjury that my answers to all questions in this Motion are true and correct. Executed on 4-26-2016 [date]

Movant's Signature

PROOF OF SERVICE

A copy of this motion and all attachments must be sent to the state attorney general (§ 2254 cases) or the United States Attorney for the United States judicial district in which you were convicted (§ 2255 cases).

I certify that on 4-26-2016 [date] I mailed a copy of this motion and all attachments

to _____ at the following address:

⇔12207-051⇔
Jennifer Rozzoni
PO BOX 607
U.S. Attorney
Albuquerque, NM 87103
United States

Movant's Signature

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff,
v.
SEBASTIAN LEIGH ECCLESTON,
Defendant,

No. 95-CR-00014LH

EMERGENCY MOTION TO CORRECT SENTENCE UNDER 28 U.S.C § 2255

VACATUR OF ENHANCED SENTENCE UNDER 18 USC § 924(c) pursuant to JOHNSON v UNITED STATES 135 S.Ct 2551 (2015)

Petitioner, Sebastian Leigh Eccleston, respectfully moves this court to set aside the judgment in this case and correct the sentence pursuant to 28 U.S.C. § 2255.

On October 29, 1996 Defendant was sentenced to (417) months in federal prison due to the unlawful enhancement of 18 U.S.C. § 924(c)(1)(A) under the "recidivist clause" of the Armed Career Criminal Act (ACCA). This Circuit has observed that the definition of "violent felony" in the (ACCA) is nearly identical to "crime of violence" in 18 U.S.C. § 924(c). In **Welsh v. United States** (No. 15-6418 (S.Ct April 18, 2016) the Supreme Court held that **Johnson v. United States**, 135 S.Ct 2551 (2015) is retroactively applicable on collateral review.

BACKGROUND

The defendant, Sebastian Leigh Eccleston, was charged as an accomplice in a carjacking and armed robbery that occurred twenty (20) minutes apart on December 15, 1994. The armed robbery 18 U.S.C.S. § 1951(a) was committed during commission of the carjacking. No one was physically injured and no kind of physical contact was made with the victims of the crimes. The Tenth Circuit observed on defendants appeal **United States v. Sebastian Eccleston** 132 F3d (10th Cir. 1997) that the crimes were commited in the same course of conduct. On February 02, 1996 the principal Ronald Martinez was sentenced to (198) months in federal prison. (He was not enhanced under the recidivist clause of 18 U.S.C. §924(c) and did not receive an enhanced sentence for the second count under 18 USC § 924(c). The defendant Sebastian Eccleston who was

charged for aiding and abetting Mr. Martinez' "use of a firearm during or in relation to a crime of violence" 18 U.S.C § 2 was sentenced on October 29, 1996 and was enhanced (240) months under the "recidivist clause" of 18 U.S.C. § 924(c) even though the principal was not found guilty of that count VI of the indictment. The defendant Mr. Eccleston was also a first time offender and had no prior convictions as an adult.

ARGUMENT

A. The Petitioner, Sebastian Eccleston, is factually innocent of the enhanced sentence under 18 U.S.C. § 924(c) Count VI. And but for the ineffective assistance of his lawyer, Reginald Storment, he would not have plead guilty to the second count of under 18 USC § 924(c). "If a sentencing counsel fails to object or argue a matter with the result of a longer sentence, this suffices to establish prejudice" **Glover v. United States** 531 U.S. 198, 203-04 121 S.Ct 696, L.Ed 2d 604 (2001). Specifically, Mr. Storment, failedto argue that the armed robbery was committed during the commission of the carjacking and therefore the predicate offense constituted only a "single offense". The carjacking was in preperation for the armed robbery and also in the course of attempting to avoid detection or responsibility for the crimes. **United States v. Flores,** 149 F.3d 1272, 1281 (10th Cir. 1998) (quoting §1B1.3(a)(1) "if the conduct at issue is not groupable under 3D1.2(d), then it qualifies as 'relevant conduct' only if it 'occurred during the commission of the offense of conviction, in preperation for that offense, or in the course of attempting to avoid detection or responsibility for that offense'" See also: **United States v. Maass,** 153 F.3d 729 (10th Cir. 1998) The defendant was sentenced under USSG 3D1.4 and Counts I & V were imposed concurrent. The predicate offense was a "single unit" under §1B1.3 and therefore the second count for 18 U.S.C. § 924(c) should be vacated because there was only one underlying predicate offense. The second count for § 924(c) does not qualify to enhance the defendant under the recidivist clause of § 924(c). As noted above the principal was not found guilty for the second count for "use of a firearm during or in relation to a crime of violence."

The defendant, who was a first time offender, received an unlawful enhancement and his sentence is beyond the statutory maximum. Not only in the second count for §924(c) groupable as a single offense under 1B1.3 app. n. 9(B) but the principal he was charged for aiding and abetting was not enhanced for the second count under § 924(c) and therefore it is an invalid enhancement that should be vacated. Allowing the sentence to remain in tact further violates the defendants due process rights and results in a fundamental miscarriage of justice. But for his attorney's ineffective assistance of counsel, the defendant would not have plead guilty to the invaid charge and now seeks to set aside the judgment in this case to correct the the sentence. Under 28 USC § 2255 a defendant is entitled to a re-sentencing when his original sentence was imposed in violation of the constitution or laws of the United States or is in excess of the maximum authorized by law.

Here, the armed robbery does not qualify as a prior offense for the purpose of enhancing the defendnat under 18 U.S.C § 924(c). The defendant was not a "career offender" under the statute as the predicate offense was a "single unit". "Analysis of similarity, regularity, and temporal proximity of the armed robbery to the carjacking constitutes only a "single unit" 1B1.3 app. n. 9(B) **United States v. Cuthbertson** 138 F.3d 1325, 1327 (10th Cir. 1998) (See: Attached appeal 10th Cir 1997). The armed robbery clearly clearly cannot be interpretted to qualify the defendant under the (Career Criminal Statute). The definition of "crime of violence" §924(c) is not satisfied here. An enhanced sentence is a congressional directive, not a mandatory minimum sentence statute. Count VI of the defendants indictment is a career offender enhancement that should be vacated for the above stated reasons. **United States v. Martin** 961 F2d 493, 496 (4th Cir. 1992) (Sentencing outside the statutory maximum is illegal and thus can never be upheld). The sentnecing courts finding of a predicate offense indisputably increased the maximum penalty. Count VI is also invalid because of the following:

18 USC § 1951(a) & 2119(1) are not categorically "crimes of violence"

B. The US Supreme Court has applied **Johnson Supra** retroactively to cases on collateral review. 18 U.S.C § 16(b) provides a generic

definition of "crime of violence" under a similar residual clause in 18 USC § 924(c)(3)(B). In **United States v. Fuertes**, 805 F.3d 485 4th Cir. 2015) (invalidating §924(c)(3)(B) conviction when 18 USC § 1951(a) was not catagorically a crime of violence). As the Petitioner has shown, he was unlawfully enhanced under the "redivist (career offender) clause" of 18 U.S.C. § 924(c)(1)(A) based on the predicate offenses 18 USC § 2119(1) "Cajacking" and 18 USC § 1951(a) Interference with Commerce (aiding and abetting the use of a sawed-off shotgun). The offenses were groupable and constituted a "single unit" for sentencing purposes. The residual clause of §924(c)(3)(B) in relation to the Hobb's Act §1951(a) was unconstitutional because catagorically it was not a crime of violence. Furthermore, it was a single unit of offense in the same course of conduct as the carjacking 2119(1) which also has a residual clause requirement because there is an element of "intimidation" that is not a "crime of violence" in the catagorical approach of that offense. None of these elements were considered in this case where the crimes were part of a common scheme or plan. The conviction was obtained unlawfully because the defendant was not a career offender. The court does not consider the "particular facts disclosed by the record of...conviction" under the catagorical approach. In this case §2119(1) and §1951(a) **James v United States** 550 U.S. 192,202 2007. Thus the point of the categorical inquiry is not to determine whether the defendant's conduct could support a conviction for "a crime of violence", but to determine whether the defendant was "in fact convicted" of a crime that qualifies as a crime of violence. This inquiry is important because if the statute of conviction is deemed to contain a single indivisible set of elements then the statute itself can not be considered a crime of violence regardless of the facts of the case.

The Petitioner was enhanced under 18 USC §924(c) as an accomplice for Carjacking §2119(1) and Interference with Commerce §1951(a). Both charges need to be evaluated to see which within the statute was the basis of the defendant's predicate conviction, under the residual clause §924(c)(3)(B) as a "crime of violence" if either.

Respectfully Submitted
Sebastian Eccleston S Eccleston

Please hold me to less stringent standards under Haines v. Kerner 404 US 519-20, 30 L.Ed 2d 92 S.Ct 594 (1972).

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. SEBASTIAN L. ECCLESTON, Defendant - Appellant.
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
1997 U.S. App. LEXIS 35615; 1997 Colo. J. C.A.R. 3392
No. 96-2272
December 17, 1997, Filed

Notice:

RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Editorial Information: Subsequent History

Reported in Table Case Format at: 1997 U.S. App. LEXIS 40002. Writ of habeas corpus dismissed **Eccleston** v. United States, 2011 U.S. Dist. LEXIS 140585 (D.N.J., Dec. 7, 2011)Post-conviction relief denied at, Decision reached on appeal by, Motion granted by United States v. **Eccleston**, 2013 U.S. App. LEXIS 23624 (10th Cir., Nov. 25, 2013)

Editorial Information: Prior History

(District of New Mexico). (D.C. No. CR-95-14-LH). United States v. **Eccleston**, 132 F.3d 43, 1997 U.S. App. LEXIS 40002 (10th Cir. N.M., 1997)

Disposition:
AFFIRMED.

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: John J. Kelly, U.S. Attorney, Robert D. Kimball, Office of the United States Attorney, Albuquerque, NM.
For SEBASTIAN L. **ECCLESTON**, Defendant - Appellant: Reginald J. Storment, Albuquerque, NM.

Judges: Before ANDERSON, EBEL and LUCERO, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed from the United States District Court for the District of New Mexico, which sentenced him for carjacking, using and carrying a sawed-off shotgun in relation to carjacking, interference with commerce by threat or violence against the victim, and carrying a sawed-off shotgun in relation to interference with commerce in violation of 18 U.S.C.S. §§ 2119(1), 1951(a), 924(c).Defendant, charged as an accomplice, was properly sentenced on two convictions of using a sawed-off shotgun in relation to carjacking and interference with commerce, even though they arose out of the same prosecution.

OVERVIEW: Defendant was also charged as an accomplice under 18 U.S.C.S. § 2 in all the counts to which he pleaded guilty. On appeal, he argued that, because he was convicted as an accomplice, both sentences imposed for carrying a sawed-off shotgun pursuant to 18 U.S.C.S. § 924(c) were improper. He contended that the "active employment" requirement required a reversal of his sentence because, as an

accomplice, he did not actively employ the shotgun. The court found no support in the case law for defendant's contention that, as an accomplice, he was not subject to liability under § 924(c). Additionally, the court noted that defendant entered guilty pleas to both counts charging violations of 18 U.S.C.S. §§ 924(c), 2 and had not sought to withdraw those guilty pleas, which were supported by ample evidence.

OUTCOME: The court affirmed the enhanced sentence imposed by the district court.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > General Overview

The application of the sentencing provisions of 18 U.S.C.S. § 924(c) is a question of law that an appellate court reviews de novo.

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview

18 U.S.C.S. § 924(c)(1) states, in part: Whoever, during and in relation to any crime of violence for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years, and if the firearm is a short-barreled shotgun, to imprisonment for ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years.

Criminal Law & Procedure > Accessories > Aiding & Abetting

The United States Court of Appeals for the 10th Circuit has impliedly found that liability under 18 U.S.C.S. § 924(c) is applicable to accomplices.

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > Elements

"Use" in 18 U.S.C.S. § 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense. "Use" certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm.

Criminal Law & Procedure > Accessories > Aiding & Abetting

18 U.S.C.S. § 2 does not create an independent crime; rather, it serves to abolish the common law distinction between principal and accessory. The statute provides that whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview

The mandatory 20-year sentence for the second or subsequent conviction under 18 U.S.C.S. § 924(c) may be imposed even though the first sentence has not become final. Thus, the enhanced sentence may be applied to a second conviction which arises from the same prosecution as the first.

Opinion

Opinion by: CARLOS F. LUCERO

Opinion

ORDER AND JUDGMENT *

Sebastian **Eccleston** pled guilty to carjacking in violation of 18 U.S.C. § 2119(1), using and carrying a sawed-off shotgun in relation to carjacking in violation of 18 U.S.C. § 924(c), interference with commerce by threat or violence against the victim in violation of 18 U.S.C. § 1951(a), and carrying a sawed-off shotgun in relation to interference with commerce in violation of 18 U.S.C. § 924(c). He was also charged as an accomplice under 18 U.S.C. § 2 in all the counts to which he pled. The district court imposed a sentence of 57 months for carjacking and interference with commerce, to run concurrently; the mandatory 120 months for the first § 924(c) offense; and the mandatory 240 months for the second § 924(c) offense, for a total of 417 months in prison. **Eccleston** appeals, arguing that, because he was convicted as an accomplice, both sentences imposed pursuant to § 924(c) were improper. We affirm.

I

On December 15, 1994, Sebastian **Eccleston** and Ronald Martinez approached a vehicle in an Albuquerque, New Mexico motel parking lot. Martinez pointed a sawed-off shotgun at the driver's head and ordered him to get out of the car. As the victim exited the car, he saw **Eccleston** pointing a gun at him. The victim took cover and **Eccleston** and Martinez drove away in the vehicle.

Roughly half an hour later, **Eccleston** and Martinez robbed two individuals in the parking lot of another motel. According to the victims, **Eccleston** pointed a handgun at the female victim, took her purse, and then pointed his gun at the male victim and demanded his wallet. The victims saw Martinez standing near the vehicle with a sawed-off shotgun and heard him chamber a round. **Eccleston** and Martinez drove away in the stolen car.

Shortly thereafter, the Albuquerque police and the county sheriff's office were informed of the crimes. The stolen car was spotted and a high-speed chase ensued. **Eccleston** and Martinez lost control of the car, struck another vehicle, and then fled on foot. Martinez was apprehended and the shotgun was recovered. **Eccleston** was arrested at a later date; his weapon was not recovered.

II

Eccleston contends that the "active employment" requirement enunciated in *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 505, 133 L. Ed. 2d 472 (1995), requires a reversal of his sentence. He argues that the district court erred in imposing the mandatory ten-year sentence pursuant to 18 U.S.C. § 924(c) for using or carrying a sawed-off shotgun in relation to a crime of violence because, as an accomplice, he did not actively employ the shotgun. 1 The application of the sentencing provisions of § 924(c) is a question of law that we review de novo. *See United States v. Deal*, 954

F.2d 262, 262-63 (5th Cir. 1992), *aff'd*, 508 U.S. 129, 124 L. Ed. 2d 44, 113 S. Ct. 1993 (1993).

There is no support in the case law for Eccleston's contention that, as an accomplice, he is not subject to liability under § 924(c). This circuit has impliedly found that § 924(c) liability is applicable to accomplices. *See United States v. Spring*, 80 F.3d 1450, 1464-66 (10th Cir.) (reversing conviction on one count of aiding and abetting in violation of § 924(c) based on erroneous jury instructions but affirming on two other counts of aiding and abetting under § 924(c)), *cert. denied*, 136 L. Ed. 2d 302, 117 S. Ct. 385 (1996). *Bailey* cannot be read to prevent an accomplice from being convicted and sentenced under § 924(c).

In *Bailey*, the Supreme Court held that "use" in § 924(c)(1) requires "evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." 116 S. Ct. at 505. The Court explained that "'use' certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508. The decision in *Bailey* did not purport to alter our understanding of accomplice liability. Thus, we reiterate the well-established precept that 18 U.S.C. § 2 does not create an independent crime; rather, it serves to abolish the common law distinction between principal and accessory. *See United States v. Smith*, 838 F.2d 436, 441 (10th Cir. 1988); 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). This conclusion is supported by the case law of several of our sister circuits. *See United States v. Willis*, 89 F.3d 1371, 1377-79 (8th Cir.) (upholding § 924(c) convictions under accomplice liability theory), *cert. denied*, 136 L. Ed. 2d 196, 117 S. Ct. 273 (1996); *United States v. Sullivan*, 85 F.3d 743, 747-48 (1st Cir. 1996) (holding that jury properly could have found defendant guilty of § 924(c) as an accomplice); *United States v. Price*, 76 F.3d 526, 529 (3d Cir. 1996) (rejecting defendant's argument that he could not be convicted under § 924(c) based on aiding and abetting theory). 2

Additionally, we note that **Eccleston** entered guilty pleas to both counts charging violations of 18 U.S.C. §§ 924(c) and 2, and has not sought to withdraw those guilty pleas, which were supported by ample evidence.

III

Eccleston's second argument on appeal is that the district court erroneously imposed the mandatory twenty-year sentence for the second conviction under 18 U.S.C. § 924(c). In *Deal v. United States*, 508 U.S. 129, 132, 124 L. Ed. 2d 44, 113 S. Ct. 1993 (1993), the Supreme Court held that the mandatory twenty-year sentence for the second or subsequent conviction under 18 U.S.C. § 924(c) may be imposed even though the first sentence has not become final. Thus, the enhanced sentence may be applied to a second conviction which arises from the same prosecution as the first. *See United States v. Abreu*, 997 F.2d 825, 826 (10th Cir. 1993) (en banc) (affirming enhanced sentences in light of *Deal*). **Eccleston**, in an argument devoid of support in either law or logic, contends that the holding in *Deal* does not apply to him because he was convicted as an accessory, rather than as a principal. This argument does not comport with the theory of accomplice liability, *see* 18 U.S.C. § 2 (stating that whoever aids or abets in the commission of an offense is punishable as a principal), or with the language of *Deal*, *see* 508 U.S. at 136 (the penal goals of § 924(c) include "taking repeat offenders off the streets for especially long periods, or simply visiting society's retribution upon repeat offenders more severely"). We will not disturb the enhanced sentence imposed by the district court.

AFFIRM.

ENTERED FOR THE COURT