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6.18.922A False Statement in Purchase of a Firearm (18 U.S.C. § 922(a)(6))

Count *(No.)* **of the indictment charges the defendant** *(name)* **with making a false statement in connection with the purchase** *(acquisition)* **of a firearm, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:

First: That (*seller)* **was a licensed** *[(dealer) (collector) (importer) (manufacturer)]***;**

Second: That *(name) [(made a false statement) (used false identification)]* **while acquiring a firearm from** *(seller)***;**

Third: That *(name)* **knew that** *[(the statement) (the identification)]* **was false; and**

Fourth: That the false *(statement) (identification)* **was intended or likely to deceive** *(seller)* **with respect to any fact material to the lawfulness of the sale of the firearm.**

Comment

Ninth Circuit § 8.52; Eleventh Circuit § 34.3; Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 35-34 (Matthew Bender 2003) [hereinafter, Sand et al., supra].

18 U.S.C. § 922(a)(6) provides that it is unlawful:

> for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented

> identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

In large part, the instruction adapts the language of the statute. The prosecution must establish that seller was a licensed dealer, that the item purchased was a firearm, and that the false statement related to a material fact. *See United States v. Letky*, 371 F. Supp. 1286 (W.D. Pa. 1974) (dismissing charge because prosecution introduced no evidence the seller was a licensed dealer). The definitions of these terms are found in Instructions 6.18.922A-1 (Firearm Offenses - Dealer Defined), 6.18.922A-2 (Firearm Offenses - Firearm Defined), and 6.18.922A-3 (Firearm Offenses - Material Defined).

The term "acquisition" used in the statute includes both sales and other types of transactions, such as the redemption of a firearm from a pawnshop. *See Huddleston v. United States*, 415 U.S. 814, 819-20 (1974).

The statute includes the mental state requirement that the defendant knew the statement or identification was false. The Third Circuit has not addressed the precise mental state required under this section of the statute. Other courts agree that the false statement must be made knowingly. In *United States v. Wright*, 537 F.2d. 1144, 1145-46 (1st Cir. 1976), the First Circuit noted that the statute requires that the false statements be made knowingly and went on to note that the required knowledge could be demonstrated by proof of the defendant's reckless disregard for the truth. *See also United States v. Rahman*, 83 F.3d 89, 92 (4th Cir. 1996); *United States v. Petijean*, 883 F.2d 1341, 1345 (7th Cir. 1989). Proof that the defendant acted with "deliberate disregard for whether it was true or false or with a conscious purpose to avoid learning the truth" will establish this element of the offense. *See United States v. Thomas*, 484 F.2d 909, 913 (3d Cir. 1973); *see also United States v. Hester*, 880 F.2d 799, 802-03 (4th Cir. 1989) (summarizing authority). See Chapter 5 for instructions on mental states. In an appropriate case, the court may want to give Instruction 5.06 (Willful Blindness).

In addition, the false statement must be intended to deceive or likely to deceive a federally licensed firearms dealer. In *Rahman*, the court upheld a jury instruction stating that the requirements of 922(a)(6) could be satisfied if the government demonstrated that the defendant's false statement was "intended or likely to deceive" a federally licensed firearms dealer. 83 F.3d at 92. In *United States v. Ortiz-Loya*, 777 F.2d 973, 979 (5th Cir. 1985), the Fifth Circuit stated that in order to determine whether the defendant had violated §922(a)(6) the government must demonstrate that the statements in question either (1) were given with the intent to deceive [the dealer] or (2) were "likely to deceive" [the dealer]. *See also Petijean*, 883 F.2d at 1345. The courts have also held that §922(a)(6) does not require specific intent. *See, e.g., United States v. Elias*, 917 F.2d 1514, 1518 (10th Cir. 1991); *United States v. Petitjean*, 883 F.2d at 1346; *United States v. Lawrence,* 680 F.2d 1126, 1128 (6th Cir.1982) (per curiam); *United States v. Behenna*, 552 F.2d 573 (4th Cir. 1977).

A question may arise concerning whether the defendant properly responded "no" to the question of whether the defendant has a prior felony conviction where the prior conviction was expunged or the defendant's civil rights had been restored. Section 921(a)(20) provides:

> What constitutes a conviction shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

In *Beecham v. United States*, 511 U.S. 368 (1994), the Supreme Court held that the defendants did not qualify under Section 921(a)(20) as having their civil rights restored even though their civil rights had been restored under state law. The Court concluded that the defendants, who had been convicted under federal law, could only qualify if their civil rights were restored under federal law and that restoration of rights under state law did not bring the defendants within the provision. In *United States v. Leuschen*, 395 F.3d 155 (3d Cir. 2005), the court considered this question in the context of a challenge to the defendant's conviction under 18 U.S.C. § 922(g)(1) for being a felon in possession of a firearm. The Third Circuit concluded that the defendant's civil rights had not been restored within the meaning of section 921(a)(20) where the Pennsylvania conviction had stripped the defendant of the right to serve on a jury - a core civil right - and that right had not been restored. The fact that Pennsylvania imposed no restrictions on the defendant's firearm rights as a result of the conviction was irrelevant where his core civil right had not been restored. *See also United States v. Essig*, 10 F.3d 968 (3d Cir. 1993). In *Caron v. United States*, 524 U.S. 308 (1998), the defendant's civil rights had been restored but the Court held that the "unless" clause applied because state law forbad the defendant to possess handguns outside his home or business. The Court concluded that the "unless" clause operates if the state restricts the defendant's possession of firearms in any way.

In *Logan v. United States*, 552 U.S. 23 (2007), the Supreme Court held that a conviction that never deprived the defendant of any civil rights can qualify as a predicate offense and is not subject to the exemption in § 921(a)(20). Not having been lost, the defendant's civil rights cannot be restored. *Logan*, 552 U.S. at 481-82. In *Logan*, the Court also noted that whether "§ 921(a)(20)'s 'unless' clause is triggered whenever state law provides for the continuation of firearm proscriptions, or only when the State provides individual notice to the offender of the firearms disabilities" remains an open question. *Logan*, 552 U.S. at 483 n.4.

(Revised 12/09)

6.18.922A-1 Firearm Offenses - Dealer Defined

A "dealer" is any person engaged in the business of selling firearms at wholesale or retail. The term "licensed dealer" means any dealer who is licensed under the provisions of the Gun Control Act of 1968.

Comment

18 U.S.C. § 921(a)(11) provides:

> The term "dealer" means (A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

6.18.922A-2 Firearm Offenses - Firearm Defined

The term "firearm" means any weapon which will expel, or is designed to or may readily be converted to expel, a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon *[or any firearm muffler or firearm silencer]***.**

Comment

18 U.S.C. § 921(a)(3) defines the term "firearm" for offenses falling within Title 18 as:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

For purposes of Title 26 of the United States Code, firearm is defined differently. *See* Instruction 6.26.5861 (Possession of an Unregistered Firearm (26 U.S.C. § 5861)).

To establish that the defendant used or possessed a firearm, the government need not produce the actual gun but can meet its burden of proof with testimony concerning the firearm. *See United States v. Beverly*, 99 F.3d 570 (3d Cir. 1996).

The Eighth Circuit makes the following suggestion for simplifying the instructions and limiting the number of definition instructions:

> The most effective way to avoid definitions relating to firearms is to use the most specific designation available. For example, assume that a defendant is being tried for transporting a rocket having a propellant charge of more than four ounces in violation of 18 U.S.C. § 922(a)(4). Examples of the ways the judge might instruct the jury on one of the elements are as follows:
> (1) "The defendant transported a firearm." It will then be necessary to have an additional instruction that a rocket having a propellant charge of more than four ounces is a firearm. *See* 18 U.S.C. § 921(a)(4)(A)(iii); or
> (2) "The defendant transported a destructive device." Even here, it will then be necessary to instruct that a rocket having a propellant charge of more than four ounces is a destructive device. *Id.*; or
> (3) "The defendant transported a rocket having a propellant charge of more than four ounces." Using the third alternative, no additional instruction is necessary.

Eighth Circuit § 843.

18 U.S.C. § 921(a)(4) defines the term "destructive device" for purposes of offenses falling within Title 18 as:

> (A) any explosive, incendiary, or poison gas
> (i) bomb,
> (ii) grenade,
> (iii) rocket having a propellant charge of more than four ounces,
> (iv) missile having an explosive or incendiary charge of more than one-quarter ounce,
> (v) mine, or
> (vi) device similar to any of the devices described in the preceding clauses;
> (B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and
> (C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.
>
> The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

If the firearm providing the basis for the offense charged is a destructive device as defined in section 921(a)(4), the Government may be required to prove that the defendant intended to use the components as a weapon. In *United States v. Urban,* 140 F.3d 229, 233 (3d Cir. 1998), the Third Circuit addressed the proof necessary to establish possession of an unregistered destructive device in violation of 26 U.S.C. § 5861 and held that "intent is a required element when the components are commercial in nature and are not designed or redesigned for use as a weapon." However, the court also made it clear that if there is no ambiguity concerning the nature of the device, the government need not prove that the defendant intended to use the components as a weapon. 140 F.3d at 234. For example, in *Urban*, where it was "undisputed that the parts were clearly designed to create a grenade," the trial court was not required to instruct on intent to use the components as a weapon. 140 F.3d at 234.

In *United States v. Hull*, 456 F.3d 133, 143-44 (3d Cir. 2006), the Third Circuit further

clarified the intent requirement under section 5861. The court rejected the defendant's argument for additional intent instructions and explained:

> The Government was required to prove that Hull knew of the features that made what he was making, possessing, or transferring, a "firearm," . . . and indeed the District Court instructed the jury accordingly. However, Hull claims that the Government also had to prove that he intended for the unassembled parts of the pipe bomb to be assembled into a fully functioning pipe bomb. This is simply not an element of 26 U.S.C. § 5861.* * * Accordingly, we discern no error in the District Court's refusal to instruct the jury that the Government must prove Hull intended that the parts be converted into a destructive device. (Citations omitted.)

The statute does not apply to antique firearms, which are defined in 18 U.S.C. § 921(a)(16) as follows:

> (A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or
> (B) any replica of any firearm described in subparagraph (A) if such replica--
> (i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or
> (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or
> (C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

The government does not initially bear the burden of establishing that the firearm is not an antique firearm. That a weapon qualifies as an antique falling within the exemption is an affirmative defense in the sense that the defendant bears the burden of production. *United States v. Lawrence*, 349 F.3d 109, 122 (3d Cir. 2003). Thus, the defendant must introduce some evidence that the weapon qualifies for the exemption before the government has the burden of establishing beyond a reasonable doubt that it is not an antique; it is not enough for the defendant to raise merely the possibility that the firearm is an antique. 349 F.3d at 123.

6.18.922A-3 Firearm Offenses - Material Defined

A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in connection with the sale of the firearm. In determining whether a fact was material to the lawfulness of the sale of the firearm, you may consider that

[Include language that applies:

(the law prohibits any person who has been convicted of a felony, that is, a crime punishable by a term of imprisonment exceeding one year, from possessing any firearm. (Name the felony of which the defendant was proven to have been convicted) is a crime punishable by imprisonment for a term exceeding one year.)

(a firearm sale is unlawful unless the seller records, among other matters, the name and age of the buyer. The fact that the buyer could lawfully obtain a firearm under (his)(her) true name and age does not make (his)(her) giving a false name and age immaterial. It is no defense with respect to this element that the buyer may have been eligible to acquire the firearm. A buyer who is eligible to lawfully acquire a firearm must nonetheless properly identify (himself)(herself) by name and age, among other matters.)]

Comment

Sand et al., supra, 44-4.

This instruction treats the question of "materiality" as a question for the jury and includes language to guide it in assessing materiality. In *United States v. Gaudin*, 515 U.S. 506 (1995), the Supreme Court held that the question of materiality in false statement cases under 18 U.S.C. § 1001 is for the jury. In *United States v. Klais*, 68 F.3d 1282 (11th Cir. 1995), the Eleventh Circuit distinguished *Gaudin* and held that the question of materiality under § 922(a)(6) is for the court. However, in *United States v. McLaughlin,* 386 F.3d 547, 552 (3d Cir. 2004), the Third

Circuit held that the trial court committed error when it treated materiality as a question of law in a prosecution for perjury and for violation of the Labor-Management Reporting and Disclosure Act. The court concluded that materiality was an element of the offense because the statute "expressly requires that the fact allegedly withheld be 'material.'" 386 F.3d at 552. Because § 922(a)(6) expressly requires materiality, the court should treat it as a question for the jury, unless the statement is clearly not material as a matter of law.

6.18.922D Sale of Firearm to Convicted Felon (18 U.S.C. § 922(d)(1))

Count *(No.)* **of the indictment charges the defendant** *(name)* **with selling a firearm to** *(a convicted felon) (a person who was under indictment for a felony)***, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That *(name)* **knowingly sold a firearm to** *(name of buyer)***;**

Second: That *(name of buyer)* **was** *[(convicted of a felony) (a person who was under indictment for a felony)]***, that is, a crime punishable by imprisonment for a term exceeding one year; and**

Third: That at the time of the sale, *(name)* **knew or had reasonable cause to believe that** *(name of buyer)* **was** *[(a convicted felon) (a person who was under indictment for a felony)]***.**

Comment

Fifth Circuit § 2.46.

18 U.S.C. § 922(d)(1) provides:

> (d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person -
>
> > (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.

The court should also instruct the jury on the definition of firearm Instruction 6.18.922A-2 (Firearm Offenses - Firearm Defined).

The instruction is based on the statutory language. In *United States v. Xavier*, 2 F.3d

1281, 1286 (3d Cir. 1993), the Third Circuit noted that a defendant cannot be convicted under § 922(d)(1) "without knowledge or reason to know of the transferee's status." The Third Circuit has not addressed the other requirements of the statute. Instruction 6.18.922D-1 (Firearm Offenses - Reasonable Cause to Believe Defined) defines reasonable cause to believe.

6.18.922D-1 Firearm Offenses - Reasonable Cause to Believe Defined

To have "reasonable cause to believe" that *(someone is a convicted felon)(someone is under indictment for a felony)(a firearm is stolen)* **means to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person, knowing the same things, to reasonably conclude that** *(the other person was in fact a convicted felon)(the other person was in fact under indictment for a felony)(the firearm was stolen)***.**

Comment

Eleventh Circuit § 34.5.

This instruction should be given when the defendant is charged with a violation of 18 U.S.C. § 922(d)(1) (sale of a firearm to a convicted felon) or § 922(j) (possession of a stolen firearm). Section 922(d)(1) requires proof that the defendant knew or had reasonable cause to believe that the defendant was a convicted felon or was under indictment for a felony. Section 922(j) requires proof that the defendant knew or had reasonable cause to believe that the firearm was stolen. The instruction should be tailored to the charges in the case.

6.18.922G Felon In Possession of Firearm (18 U.S.C. § 922(g)) (non-bifurcated proceeding)

Count *(No.)* **of the indictment charges the defendant** *(name)* **with being a felon in possession of a firearm, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That *(name)* **has been convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year;**

Second: That after this conviction, *(name)* **knowingly** *(possessed)(received)* **the firearm described in Count** *(No.)* **of the indictment; and**

Third: That *(name)***'s** *(possession)(receipt*) **was in or affecting interstate or foreign commerce.**

Comment

In some cases, the court may bifurcate a trial involving charges under 18 U.S.C. § 922(g). *See* Instruction 18.922G-1 (Felon In Possession of Firearm (18 U.S.C. § 922(g) (bifurcated proceeding)) and accompanying comment. Instruction 18.922G-1 should be given if the proceeding is not bifurcated. In addition, the court should give Instructions 6.18.922A-2 (Firearm Offenses - Firearm Defined*)*, 6.18.922G-5 (Firearm Offenses - In or Affecting Interstate or Foreign Commerce Defined), 6.18.922G-4 (Firearm Offenses - Possession Defined), 6.18.922G-2 (Proof of Prior Conviction), and 5.02 (Knowingly).

To obtain a conviction under Section 922(g), the government must prove beyond a reasonable doubt that (1) the defendant had previously been convicted of a crime punishable by imprisonment for a term exceeding one year; (2) the defendant knowingly possessed a firearm; and (3) the firearm had previously passed in interstate commerce. *See United States v. Higdon*, 638 F.3d 233, 239-40 (3d Cir. 2011); *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000).

The first element under Section 922(g) is that the defendant is a convicted felon. Evidence that the defendant is a convicted felon tends to prejudice the defendant, generating a risk that the jury will conclude that the defendant is more likely to have committed the offense(s)

for which the defendant is on trial simply because the defendant has previously been convicted. Despite this risk of prejudice, of course, the government must be allowed to prove the felony conviction at some point. It is error for the trial court to refuse to allow the jury to learn that the defendant is a convicted felon. *See United States v. Higdon*, 638 F.3d 233 (3d Cir. 2011) (issuing writ of mandamus directing trial court to allow prosecution to present stipulation that defendant had been convicted of a felony to the jury). If the trial is not bifurcated, the court should give Instruction 2.13 (Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C.A. § 922(g))) during the trial and Instruction 6.18.922G-3 (Evidence of Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))) in the concluding instructions to mitigate the risk of prejudice.

Because of this risk of prejudice, defendants generally request bifurcation of the issues to reduce the prejudicial impact of the prior conviction, seeking to have evidence of the prior conviction withheld until the jury has resolved the other issues in the case. A defendant who is charged only with violating Section 922(g) is not entitled to bifurcation of the issues. *See United States v. Jacobs*, 44 F.3d 1219 (3d Cir. 1995); *United States v. Higdon*, 638 F.3d 233, 244 (3d Cir. 2011) (upholding trial court's denial of defendant's motion to bifurcate filed after remand of case in *United States v. Higdon*, 638 F.3d 233 (3d Cir. 2011) (discussed above)). However, if the felon in possession charge under § 922(g) is joined with other charges, the court should strongly consider bifurcating the trial. If the court does not bifurcate the trial, the Third Circuit has expressed a preference for severance, unless the evidence of the prior conviction would be admissible even if the counts were tried separately. *See United States v. Busic*, 587 F.2d 577, 585 (3d Cir. 1978). The defendant is not entitled to severance if the trial court bifurcates the trial. *See United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992). If the defense does not request bifurcation, the judge may want to colloquy the defendant and defense counsel to establish on the record that they do not desire bifurcation.

The defendant may establish the defense of justification to the charge of being a felon in possession of a firearm by establishing the following four elements:

> (1) he was under unlawful and present threat of death or serious bodily injury;
> (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct;
> (3) he had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and
> (4) there is a direct causal relationship between the criminal action and the avoidance of the threatened harm.

United States v. Paolello, 951 F.2d 537, 540 (3d Cir. 1991). *See also United States v. Ponds*, 2012 WL 4335969 (3d Cir. 2012) (holding that justification instruction was not required on facts of case). The defendant has the burden of establishing these elements by a preponderance of the evidence. *United States v. Dodd*, 225 F.3d 340, 348 (3d Cir. 2000). An instruction on justification is found at 8.08 (Legal Justification).

The Third Circuit has not recognized the innocent possession defense to a

felon-in-possession charge but has not expressly rejected it. *See United States v. Langforddavis*, 454 F. App'x. 34 (3d Cir. 2011) (non-precedential) (noting that Third Circuit has not recognized defense but also concluding that defendant had not presented sufficient evidence to raise the defense); *United States v. Brantley*, 2009 WL 2618811 (3d Cir. 2009) (non-precedential); *United States v. Broadus*, 291 F. App'x. 486 (3d Cir. 2008) (non-precedential). In *Langforddavis*, 454 F. App'x. 34, the court also discussed the defense of entrapment by estoppel and held it was not supported by the evidence.

(Revised 10/2012)

6.18.922G-1 Felon In Possession of Firearm (18 U.S.C. § 922(g)) (bifurcated proceeding)

<u>Alternative 1:</u> Bifurcation as to prior conviction only.

Instruction to be included in first phase of trial:

In addition to your verdict on Count*(s)* *<u>(No.(s)</u> of the other counts of the indictment)* **the verdict form asks you to answer two special interrogatories or questions. Those two questions are:**

One, did the defendant, *(name)***, on or about** *(date)***, knowingly possess** *(describe firearm charged in the indictment)***?**

and

Two, did the defendant, *(name)***, possess that firearm in or affecting interstate or foreign commerce, as defined in these instructions?**

Please be aware that, after you complete your deliberations, there may be some additional evidence presented and an additional matter about which you will have to deliberate.

<u>Instruction to be given after the jury completes initial deliberations if, but only if, the jury answers both special interrogatories in the affirmative:</u>

Now that you have completed your initial deliberations, there is one additional matter for you to consider: Count *(No.)* **of the indictment. Count** *(No.)* **of the indictment charges the defendant** *(name)* **with being a felon in possession of a firearm, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the

government proved each of the following three elements beyond a reasonable doubt:

First: That *(name)* **was previously convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year;**

Second: That after this conviction, *(name)* **knowingly** *[(possessed)(received)] (describe firearm)***; and**

Third: That *(name)***'s** *(possession)(receipt*) **was in or affecting interstate or foreign commerce.**

By answering the two special interrogatories on the verdict form in the affirmative, you have already determined that the government has satisfied its burden of proving the second and third elements of this offence. The only remaining issue for you to decide with respect to Count *(No.)* **is whether the government has satisfied its burden of proving the first element of the offense beyond a reasonable doubt, that is, whether** *(name)* **had been convicted of a crime punishable by imprisonment for a term exceeding one year prior to the date charged in the indictment. The government may now present evidence to you on that question.**

<u>Alternative 2:</u> Bifurcation as to entire charge under Section 922(g).

Instruction to be included in first phase of trial:

Please be aware that, after you complete your deliberations, there may be some additional evidence presented and an additional matter about which you will

have to deliberate.

<u>Instruction to be given after the jury completes initial deliberations</u>:

Now that you have completed your initial deliberations, you must consider Count *(No.)* **of the indictment.** *[The court should then give the jury the preliminary instructions on Section 922(g) before taking evidence on that charge.]*

Comment

18 U.S.C. §922(g) provides in part:

> It shall be unlawful for any person--
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> (2) who is a fugitive from justice;
> (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
> * * *
> (6) who has been discharged from the Armed Forces under dishonorable conditions;
> * * *
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

See also 18 U.S.C. § 924(a)(1)(B) (prescribing the penalty for a knowing violation of §922(g)). This instruction addresses only the most commonly prosecuted violation of Section 922(g), being a felon in possession of a firearm. The instruction may be modified as required for violations of the other provisions of Section 922(g). For the reasons discussed below, the court may bifurcate the proceeding. The appropriate instructions (Alternative 1 or Alternative 2) will depend on how the trial is bifurcated. Instruction 18.922G-1 should be given if the proceeding is not bifurcated. If the trial is bifurcated, the court should give the instructions outlined above. In addition, the court should give Instructions 6.18.922A-2 (Firearm Offenses - Firearm Defined), 6.18.922G-5 (Firearm Offenses - In or Affecting Interstate or Foreign Commerce Defined), 6.18.922G-4 (Firearm Offenses - Possession Defined), and 6.18.922G-2 (Proof of Prior Conviction). The timing of these instructions depends on whether the second phase of the trial addresses all three elements of the felon in possession charge or only the question of the defendant's prior conviction.

To obtain a conviction under Section 922(g), the government must prove beyond a reasonable doubt that (1) the defendant had previously been convicted of a crime punishable by imprisonment for a term exceeding one year; (2) the defendant knowingly possessed a firearm;

and (3) the firearm had previously passed in interstate commerce. *See United States v. Higdon*, 638 F.3d 233, 239-40 (3d Cir. 2011); *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000).

The first element under Section 922(g) is that the defendant is a convicted felon. Evidence that the defendant is a convicted felon tends to prejudice the defendant, generating a risk that the jury will conclude that the defendant is more likely to have committed the offense(s) for which the defendant is on trial simply because the defendant has previously been convicted. Despite this risk of prejudice, of course, the government must be allowed to prove the felony conviction at some point. It is error for the trial court to refuse to allow the jury to learn that the defendant is a convicted felon. *See United States v. Higdon*, 638 F.3d 233 (3d Cir. 2011) (issuing writ of mandamus directing trial court to allow prosecution to present stipulation that defendant had been convicted of a felony to the jury). If the trial is not bifurcated, the court should give Instruction 2.13 (Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))) during the trial and Instruction 6.18.922G-3 (Evidence of Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))) in the concluding instructions to mitigate the risk of prejudice.

Because of this risk of prejudice, defendants generally request bifurcation of the issues to reduce the prejudicial impact of the prior conviction, seeking to have evidence of the prior conviction withheld until the jury has resolved the other issues in the case. A defendant who is charged only with violating Section 922(g) is not entitled to bifurcation of the issues. *See United States v. Jacobs*, 44 F.3d 1219 (3d Cir. 1995); United States v. Higdon, 2012 WL 3518476 (3d Cir. 2012) (non-precedential) (upholding trial court's denial of defendant's motion to bifurcate filed after remand of case in *United States v. Higdon*, 638 F.3d 233 (3d Cir. 2011) (discussed above)). However, if the felon in possession charge under § 922(g) is joined with other charges, the court should strongly consider bifurcating the trial. If the court does not bifurcate the trial, the Third Circuit has expressed a preference for severance, unless the evidence of the prior conviction would be admissible even if the counts were tried separately. *See United States v. Busic*, 587 F.2d 577, 585 (3d Cir. 1978). The defendant is not entitled to severance if the trial court bifurcates the trial. *See United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992). If the defense does not request bifurcation, the judge may want to colloquy the defendant and defense counsel to establish on the record that they do not desire bifurcation.

If the court agrees to bifurcate the trial, the court may bifurcate only the question of the defendant's prior conviction (Alternative 1) or the entire felon in possession charge (Alternative 2). The court should give the corresponding instructions above.

<u>Alternative 1:</u> If the court bifurcates only the question of the defendant's prior conviction, the jury should first hear evidence concerning the other counts of the indictment as well as the questions of knowing possession of the firearm and whether it was in or affecting interstate or foreign commerce. The jury should then deliberate on the other counts of the indictment and answer special interrogatories concerning those two elements of the felon in possession charge.[1]

---

[1] <u>Verdict Form</u>

<u>Count*(s) (No.(s))* of the Indictment</u>

If the jury answers the special interrogatories in the affirmative, the court would then proceed to the question of the defendant's prior conviction, giving the additional instructions included in Alternative 1 above. After the presentation of evidence on the question of the defendant's prior conviction, the court should instruct the jury on proof of prior conviction, Instruction 6.18.922G-2 (Proof of Prior Conviction).

Alternative 2: If the court bifurcates the entire felon in possession charge, the jury should first hear evidence and deliberate concerning the other counts of the indictment, and only then hear evidence and instruction and deliberate concerning the count charging a violation of Section 922(g). *See, e.g., United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992). In the first phase of the trial, the court should give the instruction indicated above, informing the jury that there may be a further proceeding. Once the jury completes its initial deliberation, the court should then give the instruction set out above, followed by the preliminary instructions on the felon in possession charge. The court should then receive evidence relating to the felon in possession charge, followed by final instructions on that charge. *See* Instruction 6.18.922G-1 (Felon In Possession of Firearm (18 U.S.C. § 922(g))(bifurcated proceeding)).

The second element under Section 922(g) is the knowing possession of a firearm. Section 924(a)(1)(B) provides that to obtain a conviction under Section 922(g) the government must prove the defendant acted "knowingly." The government is not required to prove the defendant knew that possession or receipt of a firearm was unlawful or that the firearm possessed or received had traveled in interstate commerce. The government must prove that the defendant knew that he possessed or received a firearm. In *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000), the Third Circuit stated:

> The requirement that the government must show that the defendant "knowingly possessed a firearm" means only that the government must prove the defendant's

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1. On Count *(include for each count other than the felon in possession charge)* of the indictment, we, the jury, find the defendant *(name)*:

_____ Guilty
_____ Not guilty

Special Interrogatories:

1. Did the defendant, *(name)*, on or about *(date)*, knowingly possess *(describe firearm charged in the indictment)*?

_____ Yes
_____ No

If your answer is yes, go on to Special Interrogatory No. 2. If your answer is no, skip Special Interrogatory No. 2 and have your foreperson sign and date this verdict form.

2. Was the firearm described in Special Interrogatory No. 1 possessed in or affecting interstate or foreign commerce?

_____ Yes
_____ No

> awareness that he possessed the firearm; the government need not demonstrate that the defendant possessed the firearm with an intent to cause harm, or with knowledge that such possession was unlawful.

If there is a question concerning the defendant's knowledge, the court may want to add language elaborating on the knowledge requirement.

Simultaneous possession or receipt of multiple firearms constitutes a single violation of Section 922(g). *See United States v. Frankenberry*, 696 F.2d 239 (3d Cir. 1982). In some cases, the court may wish to instruct the jury on willful blindness. *See* Instruction 5.06 (Willful Blindness).

> The defendant may establish the defense of justification to the charge of being a felon in possession of a firearm by establishing the following four elements:
>
> (1) he was under unlawful and present threat of death or serious bodily injury;
> (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct;
> (3) he had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and
> (4) there is a direct causal relationship between the criminal action and the avoidance of the threatened harm.

United States v. Paolello, 951 F.2d 537, 540 (3d Cir. 1991). The defendant has the burden of establishing these elements by a preponderance of the evidence. *United States v. Dodd*, 225 F.3d 340, 348 (3d Cir. 2000). An instruction on justification is found at 8.08 (Legal Justification).

The Third Circuit has not recognized the innocent possession defense to a felon-in-possession charge but has not expressly rejected it. *See United States v. Langforddavis*, 454 F. App'x. 34 (3d Cir. 2011) (non-precedential) (noting that Third Circuit has not recognized defense but also concluding that defendant had not presented sufficient evidence to raise the defense); *United States v. Brantley*, 2009 WL 2618811 (3d Cir. 2009) (non-precedential); *United States v. Broadus*, 291 F. App'x. 486 (3d Cir. 2008) (non-precedential). In *Langforddavis*, 454 F. App'x. 34, the court also discussed the defense of entrapment by estoppel and held it was not supported by the evidence.

(Revised 10/2012)

6.18.922G-2 Proof of Prior Conviction

In order to find the defendant guilty of this offense, you must find that the government proved that before the date *(name)* **is charged with possessing** *(receiving) (transporting)* **the firearm,** *(name)* **had been convicted of a crime punishable by imprisonment for a term exceeding one year.**

The government contends that the defendant was convicted of *(insert crime)* **in state** *(federal)* **court. I charge you that as a matter of law,** *(insert crime)* **is a crime punishable by imprisonment for a term exceeding one year. However, you must determine beyond a reasonable doubt if** *(name)* **was convicted of this crime.**

To satisfy this *(first)* **element, you need only find beyond a reasonable doubt that** *(name)* **was, in fact, convicted of that crime and that the conviction was prior to the possession of the weapon as charged in the indictment. It is not necessary that the government prove that** *(name)* **knew that the crime was punishable by imprisonment for more than one year, nor is it necessary for** *(name)* **to have been sentenced to imprisonment for more than one year.** *(A plea of guilty has the same consequences as a conviction after trial.)*

[*If the parties stipulate, substitute:*

The parties have stipulated that (name) was convicted of a crime in state (federal) court and that this crime is punishable by imprisonment for a term exceeding one year. The parties have also stipulated that this felony conviction occurred prior to the time that (name) is alleged to have possessed the firearm charged in the indictment.]

Comment

Sand et al., supra, 35-48.

This instruction includes language for cases in which the defendant's prior conviction is the subject of proof at trial and alternative language for cases in which the parties stipulate to the prior conviction. The instruction should be modified accordingly. It is error for the trial court to refuse to instruct on the requirement that the government prove that the defendant is a convicted felon. *See United States v. Higdon*, 638 F.3d 233 (3d Cir. 2011) (issuing writ of mandamus directing trial court to allow prosecution to present stipulation that defendant had been convicted of a felony to the jury). Even if the defendant stipulates to the felony conviction, the court must instruct the jury on that element of the offense. *See Higdon*, 638 F.3d at 240-41.

The first element under Section 922(g) is that the defendant is a convicted felon.[2] In *United States v. Small*, 544 U.S. 385 (2005), the Supreme Court held that the government must establish that the defendant was convicted in a domestic court; the statute does not extend to foreign convictions.

In some cases, a defendant may be able to argue that state law has removed the status of being a convicted felon under the statute. 18 U.S.C. § 921(a)(20) provides:

> What constitutes a conviction shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

In *Beecham v. United States*, 511 U.S. 368 (1994), the Supreme Court held that the defendants did not qualify under Section 921(a)(20) as having their civil rights restored even though their civil rights had been restored under state law. The Court concluded that the defendants, who had been convicted under federal law, could only qualify if their civil rights were restored under federal law and that restoration of rights under state law did not bring the defendants within the provision. In *United States v. Leuschen*, 395 F.3d 155 (3d Cir. 2005), the Third Circuit concluded that the defendant was properly convicted of being a felon in possession. The court held that defendant's civil rights had not been restored within the meaning of section 921(a)(20) where the Pennsylvania conviction had stripped the defendant of the right to serve on a jury - a core civil right - and that right had not been restored. The fact that Pennsylvania imposed no restrictions on the defendant's firearm rights as a result of the conviction was irrelevant where his core civil right had not been restored. *See also United States v. Essig*, 10 F.3d 968 (3d Cir. 1993). In *Caron v. United States*, 524 U.S. 308 (1998), the defendant's civil rights had been restored but the Court held that the "unless" clause applied because state law forbad the

[2] Specified misdemeanor convictions involving domestic abuse may also bring a defendant within the statute. *See* 18 U.S.C. §§ 921(33)(A), 922(g)(9).

defendant to possess handguns outside his home or business. The Court concluded that the "unless" clause operates if the state restricts the defendant's possession of firearms in any way.

In *Logan v. United States*, 552 U.S. 23 (2007), the Supreme Court held that a conviction that never deprived the defendant of any civil rights can qualify as a predicate offense and is not subject to the exemption in § 921(a)(20). Not having been lost, the defendant's civil rights cannot be restored. *Logan*, 552 U.S. at 481-82. In *Logan*, the Court also noted that whether "§ 921(a)(20)'s 'unless' clause is triggered whenever state law provides for the continuation of firearm proscriptions, or only when the State provides individual notice to the offender of the firearms disabilities" remains an open question. *Logan*, 552 U.S. at 483 n.4.

(Revised 10/2012)

6.18.922G-3 Evidence of Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))

You heard evidence *(through a stipulation)* **that the defendant was convicted before this incident in** *(name of court; e.g., a court of the Commonwealth of Pennsylvania)* **of a crime punishable by imprisonment for a term exceeding one year. This prior conviction was brought to your attention only because it tends to establish one of the elements of the crime of possession of a firearm by a convicted felon as set forth in the indictment. You are not to speculate as to the nature of the conviction. You may not consider the prior conviction in deciding whether** *(name of defendant)* **was in knowing possession of the firearm that** *(he) (she)* **is charged in this case with possessing, which is a disputed issue in this case.**

The fact that the defendant was found guilty of another crime on another occasion does not mean that *(he)(she)* **committed this crime on** *(date of offense charged in indictment)***, and you must not use** *(his)(her)* **guilt of the other crime as proof of the crime charged in this case except for the one element of this crime which I have mentioned. You may find the defendant guilty of this crime only if the government has proved beyond a reasonable doubt all of the elements of this crime.**

Comment

This instruction is based on the instruction approved in *United States v. Belk*, 346 F.3d 305, 309 n.4 (2d Cir. 2003).

This instruction should be given in the final charge to the jury if the government introduced evidence that the defendant is a convicted felon as required to prove a violation of 18

U.S.C. § 922 (g). Evidence of the prior conviction tends to prejudice the defendant, generating a risk that the jury will conclude that the defendant is more likely to have committed the offense(s) for which the defendant is on trial simply because the defendant has previously been convicted. Despite this risk of prejudice, the government must be allowed to prove the felony conviction.

When the defendant is charged only with a violation of Section 922(g), the defendant is not entitled to bifurcation of the issues. *See United States v. Jacobs*, 44 F.3d 1219 (3d Cir. 1995). The court should give Instruction 2.13 (Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))) when the evidence of the prior conviction is introduced and should include this instruction in the final charge to the jury.

If the felon in possession charge under § 922(g) is joined with other charges, the court should consider bifurcating the trial. In the bifurcated trial, the jury should first hear evidence and deliberate concerning the other counts of the indictment and the determination of knowing possession of a firearm. Of course, if the trial is bifurcated, voir dire cannot include any questions related to the prior conviction, and the government must not mention that element in its opening statement. Only if the jury finds knowing possession of the firearm at the end of the first phase of the trial will it hear evidence of the defendant's criminal record and deliberate concerning the final element of the Section 922(g) charge. *See, e.g., United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992). In a bifurcated proceeding, Instruction 2.13 (Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))) should be given when the prior conviction is introduced, and this instruction should be included in the final charge to the jury.

There are additional steps that the court should take to reduce the prejudice. In *Old Chief v. United States*, 519 U.S. 172 (1997), the Supreme Court recognized the risk of prejudice and held that, where the defendant offered to stipulate that he was a convicted felon, it was reversible error to admit evidence of the name and nature of the offense of which the defendant was convicted. In *United States v. Smith,* 104 F. App'x. 266, 275 (3d Cir. 2004), a non-precedential decision, the Third Circuit noted that "careful *voir dire* can help insure that jurors who would be influenced by knowledge of the element of a prior felony conviction are not chosen for the jury."

6.18.922G-4 Firearm Offenses - Knowing Possession Defined

To establish the second element of the offense, the government must prove that *(name)* **possessed the firearm in question. To "possess" means to have something within a person's control. The government does not have to prove that** *(name)* **physically held the firearm, that is, had actual possession of it. As long as the firearm was within** *(name)***'s control,** *(he)(she)* **possessed it. If you find that** *(name)* **either had actual possession of the firearm or had the power and intention to exercise control over it, even though it was not in** *(name)***'s physical possession - that is, that** *(name)* **had the ability to take actual possession of the object when** *(name)* **wanted to do so - you may find that the government has proven possession. Possession may be momentary or fleeting.**

[The law also recognizes that possession may be sole or joint. If one person alone possesses a firearm, that is sole possession. However, more than one person may have the power and intention to exercise control over a firearm. This is called joint possession. If you find that (name) had such power and intention, then (he)(she) possessed the firearm even if (he)(she) possessed it jointly with another.]

[Mere proximity to the firearm or mere presence on the property where it is located or mere association with the person who does control the firearm or the property, is insufficient to support a finding of possession.]

Proof of ownership of the firearm is not required.

The government must prove that *(name)* **knowingly possessed the firearm**

described in the indictment. This means that *(name)* possessed the firearm purposely and voluntarily, and not by accident or mistake. It also means that *(name)* knew the object was a firearm.

Comment

Sand et al., supra, 35-49; *United States v. Mercado*, 412 F.3d 243, 251 (1st Cir. 2005). *See also United States v. Fields*, 507 F. App'x. 144, 2012 WL 6041630 (3d Cir. 2012) (non-precedential) (approving possession instruction consistent with Model Instruction 6.18.922G-4).

The government must establish that the defendant possessed the firearm. Possession may be actual or constructive. To establish constructive possession the government must prove that the defendant knew of the object and had control over it. In *United States v. Brown*, 3 F.3d 673 (3d Cir. 1993), a case involving possession of drugs, the Third Circuit stated:

> Although the government need not show proof of actual possession, to show "constructive" possession of an illegal substance the government must submit sufficient evidence to support an inference that the individual "knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons. Constructive possession necessarily requires both 'dominion and control' over an object and knowledge of that object's existence."

3 F.3d at 680 (citing *United States v. Iafelice*, 978 F.2d 92 (3d Cir. 1992)). *See also United States v. Heilman*, 2010 WL 1583097 (3d Cir. 2010) (non-precedential) (affirming firearm possession charges based on constructive possession); *United States v. Smith,* 352 F. App'x. 709 (3d Cir. 2009) (non-precedential); *United States v. Basley*, 357 F. App'x. 455, 461-62 (3d Cir. 2009) (non-precedential) (concluding that defendant had constructive possession of one of two guns, but not the other); *United States v. Brightwell*, 104 F. App'x. 823 (3d Cir. 2004) (affirming conviction for possessing a firearm in relation to a drug trafficking crime on basis of constructive possession); *United States v. Garth*, 188 F.3d 99, 112 (3d Cir.1999) (holding that prosecution had failed to establish that defendant had constructive possession).

In *United States v. Lowery*, 265 F. App'x. 111 (3d Cir. 2008), the Third Circuit rejected the defendant's challenge to the following instruction on possession:

> To possess means to have something within a person's control. This does not necessarily mean that the defendant must hold it physically, that is, have actual possession of it. Possession includes sole and joint possession. Possession also includes both actual and constructive possession. A person who has direct physical control of something on or around his person is then in actual possession of it. A person who is not in actual possession but who has both the power and the

> intention to exercise control over something is in constructive possession of it. So whenever I use the term "possession" in these instructions, I mean actual as well as constructive possession.

If the government's case rests heavily on the defendant's presence in combination with other circumstances, the court may wish to include the optional language instructing the jury that mere presence or association is not sufficient to establish possession. It is clear that mere presence or association is insufficient to prove possession. *See United States v. Davis*, 461 F.2d 1026, 1036 (3d Cir. 1972) (addressing possession of drugs). In *United States v. Stewart*, 131 F. App'x. 350, 354 (3d Cir. 2005), a non-precedential decision, however, the court held that the defendant was not entitled to a "mere presence" instruction because the jury instructions given adequately conveyed the requirements for constructive possession:

> The instructions concerning actual and constructive possession were legally correct and complete. The District Court made clear that, in order to have actual possession of an object, a person must have direct physical control or authority over the object, such as the control one has when one holds an object in one's hands. And in order to have "constructive" possession over an object, the District Court explained, a person must have the ability to take actual possession of the object when the person wants to do so. Because mere proximity, mere presence, or mere association is not enough for even constructive possession, these instructions adequately conveyed to the jury that constructive possession is not established by mere proximity, mere presence, or mere association.

The instruction does not use the terms "constructive possession" or "dominion," which are commonly used by the courts when discussing the legal concept of possession. Jurors cannot be expected to understand these terms. However, if the attorneys have used either or both of these terms during the trial, the court may choose to modify the instruction accordingly.

Section 922(g) requires proof that the possession was "knowing." *See United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000). The Supreme Court has held that to establish a violation of 26 U.S.C. § 5861(d), the Government must prove beyond a reasonable doubt that the defendant knowingly possessed the item and also knew "the item he possessed had the characteristics that brought it within the statutory definition of a firearm" but need not prove that the defendant knew that the item fell within the statutory definition. *See Rogers v. United States*, 522 U.S. 252, 254-55 (1998); *Staples v. United States*, 511 U.S. 600, 619 (1994). Section 922(g) thus appears to require that the government prove both that the defendant possessed the firearm purposely and that the defendant knew the object was a firearm. *See United States v. Tomlinson*, 67 F.3d 508, 513 (4th Cir. 1995) (holding *Staples*' scienter requirement applies to prosecutions under 922(g) and requires proof that defendant was aware of character of firearm possessed); *see also United States v. Field*, 39 F.3d 15, 17 (1st Cir. 1994).

(Revised 11/2013)

6.18.922G-5 Firearm Offenses - In or Affecting Interstate or Foreign Commerce Defined

The *(specify which element; i.e., second)* **element that the government must prove beyond a reasonable doubt is that the firearm specified in the indictment**

[For 18 U.S.C. § 922(g)(1) use the following language: was in or affecting interstate (foreign) commerce. This means that the government must prove that at some time before the defendant's possession, the firearm had traveled in interstate commerce. For 18 U.S.C. §§ 922(j) and (k) use the following language: had at some time traveled in interstate commerce.]

It is sufficient for the government to satisfy this element by proving that at any time prior to the date charged in the indictment, the firearm crossed a state line *(the United States border)***. The government does not need to prove that** *(name) (himself)(herself)* **carried it across a state line** *(the border)***, or to prove who carried it across or how it was transported. It is also not necessary for the government to prove that** *(name)* **knew that the firearm had traveled in interstate commerce.**

In this regard, there has been evidence that the firearm in question was manufactured in a different state *(country)* **than the state where** *(name)* **is charged with possessing it. You are permitted to infer from this fact that the firearm traveled in interstate commerce; however, you are not required to do so.**

Comment

Sand et al., supra, 35-50.

18 U.S.C. §921(a)(2) provides:

> The term "interstate or foreign commerce" includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

The government must prove the connection to interstate commerce to establish a violation of 18 U.S.C. § 922(g)(1), (j) or (k). The government must meet that obligation regardless of whether it charges the defendant with possessing, receiving or transporting the firearm. *United States v. Bass*, 404 U.S. 336 (1971).

The government need only show that the firearm has been, at some time, in interstate commerce, a minimal nexus. In *Scarborough v. United States*, 431 U.S. 563 (1977), the Court held that the defendant was properly convicted of being a felon in possession of a firearm even though he had acquired the firearm before his conviction and it had not moved in interstate commerce since that time. In *United States v. Singletary*, 268 F.3d 196, 200 (3d Cir. 2001), the Third Circuit noted:

> [T]he *Scarborough* Court established the proposition that the transport of a weapon in interstate commerce, however remote in the distant past, gives its present intrastate possession a sufficient nexus to interstate commerce to fall within the ambit of the statute.

In *Singletary*, the court affirmed the defendant's conviction, rejecting a constitutional challenge to Section 922(g). In that case, the defendant was charged on the basis of his possession of a gun that was manufactured in Brazil and shipped to Texas, but could not be traced beyond that point until it was found in Pennsylvania. The trial court gave the following instruction on the question of interstate or foreign commerce:

> To prove that the firearm was possessed in or affecting interstate or foreign commerce, the Government must prove that at some time prior to defendant's possession of the firearm, the firearm had traveled in interstate or foreign commerce ... that at any time prior to the date charged in the Indictment, the firearm crossed a state line.

Singletary, 268 F.3d at 198.

6.18.922J Possession of Stolen Firearm (18 U.S.C. § 922(j))

Count *(No.)* **of the indictment charges** *(name)* **with possession of a stolen firearm, which is a violation of federal law.**

In order to find *(name)* **guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt.**

First: That *(name)* **knowingly possessed the firearm described in the indictment. This means that** *(name)* **possessed the firearm purposely and voluntarily, and not by accident or mistake. It also means that** *(name)* **knew the object was a firearm.**

Second: That at the time *(name)* **possessed it, the firearm was stolen and** *(name)* **knew or had reasonable cause to believe that the firearm was stolen. However, the government is not required to prove that** *(name)* **knew** *(he)(she)* **was breaking the law.**

Third: That the firearm had at some time traveled in interstate commerce.

Comment

Sand et al., supra, 35-53, 35-56.

18 U.S.C. §922(j) provides:

> It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

In addition to this instruction, the court should also give Instruction 5.02 (Knowingly), Instruction 6.18.922A-2 (Firearm Offenses - Firearm Defined), Instruction 6.18.922G-4 (Firearm Offenses - Possession Defined), and Instruction 6.18.922G-5 (Firearm Offenses - In or Affecting Interstate or Foreign Commerce Defined).

In *United States v. Howard*, 214 F.3d 361, 363 (2d Cir.), *cert. denied,* 531 U.S. 909 (2000), the Second Circuit explained the knowledge requirement:

> The government did not have to establish that appellant knew that possessing a stolen firearm was unlawful or "adduce specific evidence to prove that 'an evil-meaning mind' directed the 'evil-doing hand' "; rather, the government had merely to show that appellant knew or had reason to know that the gun that he possessed was stolen. (Citations omitted.)

The Third Circuit has not addressed the knowledge requirement under Section 922(j). In other contexts, the court has held that circumstantial evidence may be sufficient to establish that the defendant knew or should have known that property was stolen. *See United States v. Clemmons*, 892 F.2d 1153, 1159 (3d Cir. 1989).

6.18.922K Possession of Firearm With Serial Number Removed, Obliterated, or Altered (18 U.S.C. § 922(k))

Count *(No.)* **of the indictment charges** *(name)* **with possessing a firearm which had the serial number removed or altered, which is a violation of federal law. In order to find** *(name)* **guilty of this charge, you must find that the government has proved each of the following four elements beyond a reasonable doubt:**

First: That *(name)* **knowingly possessed the firearm described in the indictment. This means that** *(name)* **possessed the firearm purposely and voluntarily, and not by accident or mistake. It also means that** *(name)* **knew that the object was a firearm.**

Second: That the serial number of the firearm in question had been removed, obliterated, or altered;

Third: That *(name)* **knew that the serial number had been removed, obliterated, or altered. However, the government is not required to prove that** *(name) (himself)(herself)* **removed, obliterated or altered the serial number.**

Fourth: That the firearm had at some time traveled in interstate commerce.

Comment

See Ninth Circuit § 8.62, 2 Sand et al., supra, 35-59, 35-62.

18 U.S.C. § 922(k) provides in part:

> It shall be unlawful for any person knowingly . . . to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

In addition to this instruction, the court should also give Instruction 5.02 (Knowingly), Instruction 6.18.922A-2 (Firearm Offenses - Firearm Defined), Instruction 6.18.922G-4 (Firearm Offenses - Possession Defined), and Instruction 6.18.922G-5 (Firearm Offenses - In or Affecting Interstate or Foreign Commerce Defined).

The Third Circuit does not appear to have considered the knowledge requirement under Section 922(k). Other courts have held that in addition to knowingly possessing the firearm, the defendant must know that the serial number has been removed. *See United States v. Moore,* 54 F.3d 92 (2d Cir. 1995), *cert. denied*, 516 U.S. 1081 (1996); *United States v. Lanoue,* 71 F.3d 966 (1st Cir. 1995).

In *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), the Third Circuit rejected a constitutional challenge to Section 922(k) based on the Second Amendment.

(Revised 11/2010)

6.18.924A Possession of a Firearm in Furtherance of Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1))

Count *(No.)* **of the indictment charges** *(name of defendant)* **with possessing a firearm in furtherance of a** *(crime of violence) (drug trafficking crime)*, **which is a violation of federal law. The offense alleged in Count** *(No. of count charging predicate crime)* **is a** *(crime of violence)(drug trafficking crime)*.

In order to find *(name)* **guilty of this offense, you must find that the government proved each of the following two elements beyond a reasonable doubt:**

First: That *(name)* **committed the crime of** *(name of crime)* **as charged in Count** *(No. of count charging predicate crime)* **of the indictment; and**

Second: That *(name of defendant)* **knowingly possessed a firearm in furtherance of this crime. If you find** *(name of defendant)* **possessed the firearm, you must consider whether the possession was in furtherance of** *(name of crime)*.

Comment

Tenth Circuit § 2.45.1.

18 U.S.C. §924(c)(1)(A) provides in part:

> [A]ny 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 a 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.

See also United States v. Mainor, 2010 WL 3449138 (3d Cir. 2010) (non-precedential) (stating elements); *United States v. Basley*, 357 F. App'x. 455, 461 (3d Cir. 2009) (non-precedential) (recognizing elements of charge under § 924(c)(1)(A)).

This instruction should be used if the defendant is charged with possessing the firearm in furtherance of the crime. Instruction 6.18.924B (Using or Carrying a Firearm During Any Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1))) should be used if the defendant is charged with using or carrying the firearm.[3] However, in *United States v. Johnson*, 452 F. App'x. 219 (3d Cir. 2011), a non-precedential decision, the Third Circuit held that where the defendant was charged with possessing a firearm both "in relation to" and "in furtherance of" drug trafficking activity, the trial court properly instructed the jury that a unanimous finding on either would support a conviction on the charges. In addition to this instruction, the court should also give Instruction 5.02 (Knowingly), Instruction 6.18.922A-2 (Firearm Offenses - Firearm Defined), Instruction 6.18.922G-4 (Firearm Offenses - Possession Defined), and Instruction 6.18.924A-1 ("In Furtherance of" Defined).

The question of whether the predicate offense qualifies as a crime of violence[4] or a drug trafficking offense[5] is a question of law for the court. *See United States v. Moore,* 38 F.3d 977

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[3]18 U.S.C. § 924 was amended in 1998 to expand the bases of criminal liability. The statute now makes it a crime to possess a firearm in furtherance of as well as to use or carry a firearm in relation to any crime of violence or drug trafficking crime. Although most future prosecutions are likely to be brought under the possession in furtherance prong of the statute, we have included both instructions. It is critical that the instruction given match the offense charged. *See United States v. Jenkins*, 2009 WL 2518529 (3d Cir 2009) (non-precedential) (concluding that court committed reversible error when it instructed the jury on the "during and in relation to" language of § 924(c)(1)(A), instead of on the "in furtherance of" language charged in the indictment).

[4]18 U.S.C. §924 (c)(3) provides:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and--
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

[5]18 U.S.C. §924 (c)(2) provides:

> For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the

(8th Cir. 1994); *United States v. Weston*, 960 F.2d 212 (1st Cir. 1992). If the predicate crime is not charged in the indictment, the court must instruct the jury concerning the elements of the predicate crime.

In some cases, the defendant may raise the question of whether the jury must unanimously agree on the type of gun possessed by the defendant. In *United States v. Wise*, 515 F.3d 207 (3d Cir. 2008), the defendants were each charged with possessing and brandishing a firearm in furtherance of a drug trafficking offense. The Third Circuit held that the jury need not agree unanimously on the particular kind of weapon possessed by the defendant because the type of firearm is not an element of the offense. *Wise*, 515 F.3d at 214. The court explained:

> This court has previously remarked in dicta that a district court had properly instructed the jury that it must unanimously agree on which weapon a defendant had used during a drug trafficking crime in order to convict him under 18 U.S.C. § 924(c)(1) (1986). *United States v. Theodoropoulos*, 866 F.2d 587, 597 (3d Cir.1989), overruled on other grounds by *United States v. Price*, 76 F.3d 526, 528 (3d Cir.1996). But we did not state that such an instruction is required in every case, nor do we believe, in light of the Supreme Court's subsequent opinion in *Richardson*, that such an instruction was required in this case. The two defendants, charged both as principals and aiders and abettors, were found with two firearms. Eyewitness testimony described each of them brandishing the firearms during their drug dealing. Further specificity about the weapons is not necessary to sustain a conviction under the statute.

Wise, 515 F.3d at 214-15.[6]

Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901 et seq.).

[6]In some cases, however, the trial court may choose to give a unanimity instruction. In *United States v. Ross*, 323 F. App'x. 117 (3d Cir. 2009) (non-precedential), the indictment charged the defendant with possession of two different firearms. The district court instructed the jury that it must agree unanimously on which of the two firearms the defendant possessed and provided the jury with a special verdict form. The court's instruction was as follows:

> The Government is not required to prove that both firearms were possessed as alleged in Count Seven of the indictment, but only one of them. However, you must unanimously agree that the same means or methods, in other words, the same firearm alleged in Count Seven of the indictment was in fact possessed by Mr. Ross in committing the crime charged in Count Seven. You need not unanimously agree on each means and method, but in order to convict Mr. Ross under Count Seven, you the jury must unanimously agree upon which firearm he possessed in furtherance of the controlled substance offense. Unless the Government has proven the same means or method to each of you beyond a reasonable doubt you must acquit Mr. Ross of the crime alleged in Count Seven.

The district court further reinforced the unanimity requirement by later instructing the jury that "[i]n order to return a verdict, it is necessary that each juror agree to it. Your verdict, in other words, must be unanimous and it must [be] unanimous in each respect as you go through the verdict form."

Even though a particular defendant did not personally possess the firearm, the defendant may be found guilty of violating § 924(c) under the theory of *Pinkerton v. United States*, 328 U.S. 640 (1946), which holds defendants liable for the foreseeable actions of their coconspirators in furtherance of the conspiracy. *See United States v. Ramos,* 147 F.3d 281, 286 (3d Cir.1998); *United States v. Casiano*, 113 F.3d 420, 427 (3d Cir. 1997). To impose liability under *Pinkerton*, the jury must find that the coconspirator possessed a firearm during and in relation to the conspiracy, in furtherance of or as a natural, foreseeable consequence of the conspiracy, and that the defendant was a member of the conspiracy at the time. *See United States v. Goines*, 988 F.2d 750, 774 (7th Cir. 1993). *See* Instruction 7.03 (Responsibility for Substantive Offenses Committed by Co-Conspirators (*Pinkerton* Liability).

Under 18 U.S.C. §924(c)(1)(A), the defendant may receive a higher sentence for brandishing or discharging the firearm. In *Dean v. United States*, 129 S. Ct. 1849 (2009), the Court held that §924(c)(1)(A)(iii) does not require proof that the defendant intended to discharge the firearm, noting, however, that the definition of "brandish" at § 924(c)(4) includes an intent requirement.[7] *Dean*, 129 S. Ct. at 1853. *See also United States v. St. Jean*, 353 F. App'x. 765, 768 (3d Cir. 2009) (non-precedential) (holding that accomplice may be held liable for aiding and abetting brandishing). In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Court held that the determination of whether the defendant brandished the gun is an element of the offense rather than a sentencing factor and must be determined by the jury, overruling *Harris v. United States*, 536 U.S. 545 (2002). As a result, if the defendant is charged with brandishing or discharging the weapon, the jury should be instructed to determine separately whether the evidence establishes beyond a reasonable doubt that the defendant used the firearm in the manner alleged and should be given a special interrogatory to guide the determination.

Similarly, Section 924(c) provides for higher mandatory penalties where certain types of weapons, such as machine guns, are involved. In *United States v. O'Brien*, 130 S. Ct. 2169 (2010), the Supreme Court held that this provision defines an element of the offense rather than a sentencing factor. The court should therefore provide instruction and special interrogatories regarding those provisions when they are included in the charges.

(Revised 11/2013)

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[7] Section 924(c)(4) provides:

> For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

6.18.924A-1 "In Furtherance of" Defined

Possession "in furtherance of" means for the purpose of assisting in, promoting, accomplishing, advancing, or achieving the goal or objective of *(name of crime)***.**

Mere presence of a firearm at the scene is not enough to find possession in furtherance of a *(crime of violence)(drug trafficking crime)***. The firearm's presence may be coincidental or entirely unrelated to the underlying crime. Some factors that may help you determine whether possession of a firearm furthers a** *(crime of violence)(drug trafficking crime)* **include, but are not limited to:**

1. the type of criminal activity that is being conducted;

2. accessibility of the firearm;

3. the type of firearm;

4. whether the firearm is stolen;

5. whether the defendant possesses the firearm legally or illegally;

6. whether the firearm is loaded;

7. the time and circumstances under which the firearm is found; and

8. proximity to drugs or drug profits.

Comment

See United States v. Sparrow, 371 F.3d 851 (3d Cir. 2004).

The offense of possessing a firearm in furtherance of a crime of violence or drug trafficking offense is intended to reach situations not covered by the crimes of using or carrying a firearm during and in relation to any crime of violence or drug trafficking crime. In *Bailey v.*

United States, 516 U.S. 137, 143 (1995), the Supreme Court construed "use" narrowly under the statute, holding that the term connotes more than mere possession of a firearm by a person who commits a drug offense and concluding that the government must show "active employment of the firearm." 516 U.S. at 144. In 1998, in direct response to *Bailey* (*see* H.R. Rep. No. 105-344 (1997)), Congress amended the statute and added the phrase "or who, in furtherance of any such crime, possesses a firearm . . . ." Pub. L. 105-386, 112 Stat. 3469 (1998). The stated purpose and effect of this amendment was to overcome the *Bailey* court's restrictive interpretation of the scope of the statute and to extend its reach to any drug trafficking or violent crime in which the defendant merely possesses a firearm "in furtherance of any such crime."

In *United States v. Sparrow*, 371 F.3d 851, 853 (3d Cir. 2004), the Third Circuit stated:

> Under § 924(c), the 'mere presence' of a gun is not enough. 'What is instead required is evidence more specific to the particular defendant, showing that his or her possession actually furthered the drug trafficking offense.' Put another way, the evidence must demonstrate that possession of the firearm advanced or helped forward a drug trafficking crime. In making this determination, the following nonexclusive factors are relevant: the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found. (Citations omitted).

See also United States v. Walker, 657 F.3d 160 (3d Cir. 2011) (discussing requirements). The firearm need not be immediately accessible to the defendant during the crime. *Sparrow*, 371 F.3d at 853. In *Sparrow*, the court noted that the firearm "was strategically located." The firearm was in a compartment under the floor with the defendant's cache of drugs and money, so the defendant was able to access the firearm whenever he reached into the compartment for drugs or money. The court concluded that it was "reasonable to assume the firearm was placed in the floor compartment for that purpose and was possessed in furtherance of [the defendant]'s drug activities." 371 F.3d at 854. *See also United States v. Walker*, 657 F.3d 160 (3d Cir. 2011) (recognizing that conviction may rest on proof of constructive possession); *United States v. Iglesias*, 535 F.3d 150, 157 (3d Cir. 2008); *United States v. Bobb*, 471 F.3d 491, 494 (3d Cir.2006). In addition, the Third Circuit has repeatedly relied on *Sparrow* in non-precedential decisions to affirm convictions under this prong of § 924. *See, e.g., United States v. Barrett,* 2010 WL 3622993 (3d Cir. 2010) (non-precedential); *United States v. Arzola,* 361 F. App'x. 309, 311-14 (3d Cir. 2009) (non-precedential); *United States v. Basley*, 357 F. App'x. 455, 462 (3d Cir. 2009) (non-precedential).

(Revised 10/2012)

6.18.924B Using or Carrying a Firearm During Any Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1))

Count *(No.)* **of the indictment charges** *(name of defendant)* **with** *(using)(carrying)* **a firearm during** *(a crime of violence)(a drug trafficking crime)***, which is a violation of federal law. The offense alleged in Count** *(No. of count charging predicate crime)* **is a** *(crime of violence)(drug trafficking crime)***.**

In order to find *(name)* **guilty of the offense charged in the indictment, you must find that the government proved each of the following three elements beyond a reasonable doubt.**

First: That *(name)* **committed the crime of** *(name of crime)* **as charged in Count** *(No. of count charging predicate crime)* **of the indictment, and**

Second: That during and in relation to the commission of that crime, *(name)* **knowingly** *(used)(carried)* **a firearm. The phrase "uses or carries a firearm" means having a firearm, or firearms, available to assist or aid in the commission of the crime of** *(name of crime)***. "Use" means more than mere possession of a firearm by a person who commits a crime; to establish use, the government must show active employment of the firearm. If the defendant did not either disclose or mention the firearm or actively employ it, the defendant did not use the firearm. "Carry" means that the defendant** *(had the firearm on (his)(her) person) (possessed the firearm).*

Third: That *(name) (used)(carried)* **the firearm during and in relation to the crime of** *(name of crime).* **During and in relation to means that the firearm must have had some purpose or effect with respect to** *(name of crime).* **The firearm must**

have at least facilitated or had the potential of facilitating *(name of crime)***.**

In determining whether *(name)* **used or carried a firearm in relation to the** *(name of crime)***, you may consider all of the factors received in evidence in the case including the nature of the underlying crime,** *(name of crime)***, how close** *(name)* **was to the firearm in question, the usefulness of the firearm to** *(name of crime)***, and the circumstances surrounding the presence of the firearm.**

The government is not required to show that *(name)* **actually displayed or fired the weapon. However, the government must prove beyond a reasonable doubt that the firearm was in** *(name)***'s possession or under** *(his)(her)* **control at the time that the crime of** *(name of crime)* **was committed and that the firearm facilitated or had the potential of facilitating the** *(name of crime)***.**

Comment

Eleventh Circuit § 35.2; O'Malley et al., supra, § 39.20; *United States v. Williams*, 344 F.3d 365 (3d Cir. 2003).

18 U.S.C. §924(c)(1)(A) provides in part:

> [A]ny 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 a 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.

This instruction should be used if the defendant is charged with using or carrying the firearm. Instruction 6.18.924A (Possession of a Firearm In Furtherance of Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1))) should be used if the defendant is charged with possessing the firearm in furtherance of the crime.[8] However, in *United States v. Johnson*, 452 F. App'x. 219 (3d Cir. 2011), a non-precedential decision, the Third Circuit held that where the defendant was charged with possessing a firearm both "in relation to" and "in furtherance of" drug trafficking activity, the trial court properly instructed the jury that a unanimous finding on either would support a convict on the charges. For instructions defining the legal terms of the offense, *see* Instructions 6.18.922A-2 (Firearm Offenses - Firearm Defined) and 5.02 (Knowingly).

The question of whether the predicate offense qualifies as a crime of violence[9] or a drug trafficking offense[10] is a question of law for the court. *See United States v. Moore,* 38 F.3d 977 (8th Cir. 1994); *United States v. Weston*, 960 F.2d 212 (1st Cir. 1992). While the government must prove the predicate offense, that offense need not be separately charged in the indictment. *United States v. Lake*, 150 F.3d 269, 275 (3d Cir. 1998). If the court's charge to the jury covers the elements of the predicate offense elsewhere, the court need not reiterate those elements in the instruction on § 924. *Lake*, 150 F.3d at 274. However, if the predicate crime is not charged in the indictment and therefore not covered elsewhere in the instructions, the court must instruct the jury concerning the elements of the predicate crime as part of the instructions on § 924.

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[8] It is critical that the instruction given match the offense charged. *See United States v. Jenkins*, 2009 WL 2518529 (3d Cir 2009) (non-precedential) (concluding that court committed reversible error when it instructed the jury on the "during and in relation to" language of § 924(c)(1)(A), instead of on the "in furtherance of" language charged in the indictment).

[9] 18 U.S.C. §924 (c)(3) provides:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and-
>
> > (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> > (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

[10] 18 U.S.C. §924 (c)(2) provides:

> For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

The courts have been called upon to clarify what constitutes using or carrying a firearm under the statute. The two terms are not interchangeable. "Use" is the narrower of the two terms. In *Bailey v. United States*, 516 U.S. 137, 143 (1995), the Supreme Court stated that "'use' must connote more than mere possession of a firearm by a person who commits a drug offense."[11] The Court concluded that the government must show "active employment of the firearm." 516 U.S. at 144. The Court also stated:

> Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.,* when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.,* when an offender keeps a gun hidden in his clothing throughout a drug transaction. 516 U.S. at 146.

In *United States v. Garth*, 188 F.3d 99, 110 (3d Cir. 1999), the Third Circuit explained:

> "[T]he active employment understanding of 'use' certainly includes brandishing, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." However, "if the gun is not disclosed or mentioned by the offender, it is not actively employed and it is not 'used.'" Accordingly, "[i]t is no longer enough that the weapon be available to the defendant; rather, it must have played an active role in the perpetration of the predicate offense beyond emboldening the perpetrator." (Citations omitted.)

Trading a firearm to acquire drugs constitutes use of the firearm in connection with drug trafficking in violation of the statute. *See Smith v. United States*, 508 U.S. 223 (1993); *United States v. Sumler*, 294 F.3d 579 (3d Cir. 2002). However, in *United States v. Watson*, 552 U.S. 74 (2007), the Supreme Court held that the converse is not true; one who trades drugs in order to acquire a firearm does not use the firearm in violation of the statute.

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[11]In 1998, Congress responded to *Bailey* by amending the statute in several respects, including the insertion of the phrase "or who, in furtherance of any such crime, possesses a firearm . . . ." *See* H.R. Rep. No. 105-344 (1997); Pub. L. 105-386, 112 Stat. 3469 (1998). The stated purpose and effect of this amendment was to overcome the *Bailey* court's restrictive interpretation of the scope of the statute and to extend its reach to any drug trafficking or violent crime in which the defendant merely possesses a firearm "in furtherance of any such crime." For instruction on this offense, *see* Instruction 6.18.924A (Possession of a Firearm In Furtherance of Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1))).

In *Muscarello v. United States*, 524 U.S. 125 (1998), the Supreme Court considered whether having a firearm in the locked glove compartment or the trunk of a car ready for use in a drug transaction could constitute carrying the firearm within the meaning of the statute. The Court concluded that the statute did not require that the firearm be carried on the defendant's person. The Court nevertheless stated that the term "implies personal agency and some degree of possession." *Muscarello,* 524 U.S. at 134. The Court further stated that "having construed 'use' narrowly in *Bailey*, we cannot also construe 'carry' narrowly without undercutting the statute's basic objective." 524 U.S. 136. In *Garth*, the court also discussed the definition of "carrying," quoting from *Muscarello* but acknowledging that it was not clear what type of possession would constitute and expressly reserving judgment on whether constructive possession would satisfy this requirement. 188 F.3d at 110.

In *United States v. Williams*, 344 F.3d 365, 369-70 (3d Cir. 2003), the Third Circuit rejected the defendant's challenge to his conviction for carrying a firearm in relation to a crime of violence. The evidence showed that the defendant had a gun in the getaway car with him as he fled from the police after a bank robbery. The court also discussed whether the defendant carried the gun "in relation to" the robbery, since he had not had it with him during the robbery. The court emphasized that "in relation to" requires "some purpose or effect" as to, and must have at least "'facilitate[d], or [had] the potential of facilitating,'" the underlying offense. *Williams*, 344 F.3d at 371 (citations omitted). *See also United States v. Ressam*, 128 S. Ct. 1858 (2008) (noting relational requirement in § 924(c)).

In *Williams*, the court also considered the jury instructions and concluded that the trial court did not commit reversible error by instructing the jury that it could find the defendant carried the firearm if, inter alia, it was available "to aid or embolden the defendant in making his escape." 344 F.3d at 377. Nevertheless, the court did not approve that language. Rather, the court emphasized that the trial court's instructions on the term "carry" were lengthy and pointed to other language in the court's instructions:

Importantly, the trial judge also instructed the jury that:

> If you find that the defendant carried a firearm, you must determine whether the carrying of the firearm was during and in relation to the unarmed bank robbery. During and in relation to means that the firearm must have had some purpose or effect with respect to the unarmed bank robbery. The firearm must have at least facilitated or had the potential of facilitating the unarmed bank robbery.

344 F.3d at 377 (noting also that instruction tracked the language of *Smith v. United States*, 508 U.S. 223, 237 (1993)).

Under 18 U.S.C. §924(c)(1)(A), the defendant may receive a higher sentence for brandishing (7 years) or discharging (10 years) the firearm. In *Dean v. United States*, 129 S. Ct. 1849 (2009), the Court held that §924(c)(1)(A)(iii) does not require proof that the defendant intended to discharge the firearm, noting, however, that the definition of "brandish" at § 924(c)(4) includes an intent requirement. [12] *Dean*, 129 S. Ct. at 1853. *See also United States v. St. Jean*, 353 F. App'x. 765, 768 (3d Cir. 2009) (non-precedential) (holding that accomplice may be held liable for aiding and abetting brandishing). In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Court held that the determination of whether the defendant brandished the gun is an element of the offense rather than a sentencing factor and must be determined by the jury, overruling *Harris v. United States*, 536 U.S. 545 (2002). As a result, if the defendant is charged with brandishing or discharging the weapon, the jury should be instructed to determine separately whether the evidence establishes beyond a reasonable doubt that the defendant used the firearm in the manner alleged and should be given a special interrogatory to guide the determination.

Similarly, Section 924(c) provides for higher mandatory penalties where certain types of weapons, such as machine guns, are involved. In *United States v. O'Brien*, 130 S. Ct. 2169 (2010), the Supreme Court held that this provision defines an element of the offense rather than a sentencing factor. The court should therefore provide instructions and special interrogatories regarding those provisions when they are included in the charges.

(Revised 11/2013)

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[12] Section 924(c)(4) provides:

> For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.