

**6.26.5861 Possession of an Unregistered Firearm (26 U.S.C. § 5861)**

**Count (No.) of the indictment charges (name of defendant) with possession of an unregistered firearm, namely (describe the firearm; e.g., a shotgun having a barrel of less than 18 inches in length), which is a violation of federal law.**

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

**First: That (name) knowingly possessed a firearm;**

**Second: That this firearm was a (describe the firearm; e.g., a shotgun having a barrel of less than 18 inches in length);**

**Third: That (name) knew of the characteristics of the firearm, (that is, that it was (describe the firearm; e.g., a shotgun having a barrel of less than 18 inches in length));**

**Fourth: That this firearm was (could readily have been put) in operating condition; and**

**Fifth: That this firearm was not registered to the defendant in the National Firearms Registration and Transfer Record. It does not matter whether (name) knew that the firearm was not registered or had to be registered.**

**The evidence in this case contains a certificate showing that after diligent search of the National Firearms Registration and Transfer Record, no record was**

**found that the firearm which the government claims was involved in this case was registered to (name). From such evidence you may, but do not need to, find that the government has sustained its burden of proving beyond a reasonable doubt the non-registration of the firearm.**

### **Comment**

Fifth Circuit § 2.94.

This instruction should be used when the defendant is charged with violating 26 U.S.C. § 5861. Section 5861 provides:

It shall be unlawful for any person—

\* \* \* \*

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.

The term firearm is used differently in this section than in the firearms offenses found in Title 18. 26 U.S.C. § 5845 includes the following definitions of “firearm” :

- (1) a shotgun having a barrel or barrels of less than 18 inches in length;
- (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length;
- (3) a rifle having a barrel or barrels of less than 16 inches in length;
- (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length;
- (5) any other weapon, as defined in subsection (e);
- (6) a machinegun;
- (7) any silencer (as defined in section 921 of title 18, United States Code); and
- (8) a destructive device.

Section 5845(a) further provides:

The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

Sections 5845(b) through (f) define the terms “machinegun,” “rifle,” “shotgun,” “any other weapon,” and “destructive device” respectively. The description of the firearm used in the instruction should track the statutory language of section 5845. For the definition of possessed, *see* Instruction 6.18.922G-4 (Firearm Offenses – Knowing Possession Defined).

It is not clear whether the provisions excepting some devices from the definition of firearms clarify the elements of the offense or define affirmative defenses. In *United States v. Neil*, 138 F. App’x. 418 (3d Cir. 2005), a non-precedential opinion, the Third Circuit noted that the circuits are divided and this circuit has not addressed the issue. The court cited *United States v. Hammond*, 371 F.3d 776, 780 (11th Cir. 2004), treating the question of whether a device was designed for use as a weapon as an element of the offense and *United States v. Beason*, 690 F.2d 439, 445 (5th Cir. 1982), concluding that the statutory exceptions are affirmative defenses.

To establish a violation of section 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. *Rogers v. United States*, 522 U.S. 252, 254-55 (1998); *Staples v. United States*, 511 U.S. 600, 619 (1994). As a result, the court must inform the jury of the characteristics of the item that bring it within the statutory definition of firearm found in section 5845. For example, in *Rogers*, the court’s instructions adequately communicated to the jury that it could not convict unless it found that the defendant knew that the item he possessed was a silencer. The Government does not need to prove that the defendant knew the firearm was unregistered. *United States v. Freed*, 401 U.S. 601, 607-10 (1971).

If the defendant is charged with possession of an unregistered destructive device as defined in section 5845(f), 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 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, 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. 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.)