

Chapter 12.00

FIREARMS OFFENSES

Introduction to Firearms Instructions

(current through October 1, 2021)

This chapter includes an instruction for the firearms crime defined in 18 U.S.C. § 922(g)(1) (possession of firearm or ammunition by convicted felon). If the crime charged is based on § 922(g)(3) (possession of firearm by unlawful user of controlled substance), the instruction can be easily modified by substituting the term unlawful user and using the definition provided in the commentary. If the crime charged is based on the other disabilities affecting firearms established in subsection (g)(2) or subsections (g)(4) through (g)(9), the instruction can be modified as necessary.

This chapter also includes four instructions for the crimes under 18 U.S.C. § 924(c)(1)(A)(i) (using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime; possessing a firearm in furtherance of a crime of violence or drug trafficking crime).

Title 18 U.S.C. § 922(g)(1) and (g)(3) provide:

(g) 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;

...

(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));

...

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.

The Committee drafted Instruction 12.01 to cover the offense of possessing a firearm or ammunition because it is the conduct most frequently prosecuted. If the conduct charged is shipping or transporting a firearm or receiving a firearm, the instruction should be modified.

Title 18 U.S.C. § 924(c) provides:

(c) (1) (A) ... [A]ny person who, during and in relation to any crime of violence or drug trafficking crime ... 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 [be sentenced to the mandatory terms provided in the statute].

The Committee drafted four instructions to cover the offenses of 18 U.S.C. § 924(c) based on *United States v. Combs*, 369 F.3d 925 (6th Cir. 2004) and *United States v. Henry*, 2015 WL 4774558 (6th Cir. Aug. 14, 2015). Instruction 12.02 covers using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime under subsection (c)(1)(A)(i), and Instruction 12.03 covers possessing a firearm in furtherance of a crime of violence or drug trafficking crime under the same subsection, (c)(1)(A)(i). Instruction 12.04 covers the using-or-carrying offense of Instruction 12.02 when the charge is based on aiding and abetting under 18 U.S.C. § 2, and Instruction 12.05 covers the possession-in-furtherance offense of Instruction 12.03 when the charge is based on aiding and abetting under § 2.

The Committee did not draft instructions specifically to cover subsections (c)(1)(A)(ii) (brandishing a firearm) or (c)(1)(A)(iii) (discharging a firearm), but the pattern instructions can be easily modified to fit these provisions.

Chapter 12.00

FIREARMS OFFENSES

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12.01 FIREARMS – Possession of Firearm or Ammunition by Convicted Felon (18 U.S.C. § 922(g)(1))

(1) Count ___ of the indictment charges the defendant with being a convicted felon in possession of a firearm [ammunition].

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant has been convicted of a crime punishable by imprisonment for more than one year. [The government and the defendant have agreed that defendant has previously been convicted of a crime punishable by imprisonment for more than one year.]

(B) Second: That the defendant, following his conviction, knowingly possessed a firearm [the ammunition] specified in the indictment.

(C) Third: That at the time the defendant possessed the firearm [ammunition], he knew he had been convicted of a crime punishable by imprisonment for more than one year.

(D) Fourth: That the specified firearm [ammunition] crossed a state line prior to [during] the alleged possession. [It is sufficient for this element to show that the firearm [ammunition] was manufactured in a state other than [name state in which offense occurred].]

(2) Now I will give you more detailed instructions on some of these elements.

(A) *[Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction].* [The defendant does not have to own the firearm in order to possess the firearm.]

(B) *[Insert one or both of the definitions below].*

[(1) The term “firearm” means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. [The term firearm also means the frame or receiver of any such weapon, any firearm muffler or firearm silencer, or any destructive device.] [The term firearm does not include an antique firearm.] [The term firearm includes starter guns.]]

[(2) The term “ammunition” means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.]

(C) The term “knowingly” means voluntarily and intentionally, and not because of mistake or accident.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these

elements, then you must find the defendant not guilty of this charge.

Use Note

This instruction covers only the conduct of possession; if the prosecution is based on the conduct of shipping, transporting or receiving a firearm or ammunition, the instruction should be modified.

This instruction assumes that the prosecution is based on firearms; if the prosecution is based on ammunition, the court should substitute that term which is provided in brackets following the term firearm. The court should also provide the definition of ammunition in bracketed paragraph (2)(B)(2).

This instruction covers only subsection 922(g)(1). If the crime charged is based on subsection 922(g)(3) (possession of firearm or ammunition by unlawful user of controlled substance), the instruction can be easily modified by substituting the term unlawful user in paragraph (1) and using the definition of unlawful user (provided below in the commentary) in paragraph (2). If the crime charged is based on the other disabilities affecting firearms or ammunition established in subsection (g)(2) or subsections (g)(4) through (g)(9), the instruction can be modified as necessary.

Brackets indicate options for the court. Brackets with italics are notes to the court.

In paragraph (2)(A), the second bracketed sentence should be used only if relevant.

Committee Commentary Instruction 12.01

(current through October 1, 2021)

The language of § 922(g)(1) relating to the conduct of possession provides, “It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm or ammunition; . . .” Section 924(a)(2) provides that anyone who “knowingly violates” § 922(g) shall be fined or imprisoned.

The four elements listed in paragraph (1) are supported by *Rehaif v. United States*, 139 S. Ct. 2191, 2195-2196 (2019) (identifying the elements as “(1) a status element . . .; (2) a possession element . . .; (3) a jurisdictional element . . .; and (4) a firearm element . . .”). In the instruction, these elements are in a slightly different order. The element in paragraph (1)(C) (that at the time the defendant possessed the firearm, he knew he had been convicted of a crime punishable by imprisonment for more than one year) was added to the instruction in 2019 based on *Rehaif, id.*

For the element in paragraph (1)(A) that the defendant have a conviction for a crime punishable by imprisonment for a term exceeding one year, § 921(a)(20) provides that a “crime punishable for a term exceeding one year” does not include any Federal or State offenses

pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulations of business practices, or any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less. The laws of the jurisdiction in which the proceedings are held determine what constitutes a conviction. The phrase in § 922(g)(1) “convicted in any court” refers only to domestic, not foreign, courts, *Small v. United States*, 544 U.S. 385 (2005), so the element in paragraph (1)(A) that the defendant be convicted of a crime includes only domestic convictions.

Section 921(a)(20) further provides, “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.” This restoration of rights provision is a difficult area that has generated many opinions. *See, e.g.* *United States v. Cassidy*, 899 F.2d 543 (6th Cir.1990); *United States v. Driscoll*, 970 F.2d 1472 (6th Cir. 1992); *United States v. Gilliam*, 979 F.2d 436 (6th Cir. 1992); *United States v. Morgan*, 216 F.3d 557 (6th Cir. 2000). The meaning of this restoration of rights provision is a question of law, so it is not implicated in the instruction, but it is an area of caution for the district judge.

When a defendant offers to concede a prior judgment, and the name or nature of the prior crime raises the risk of a verdict tainted by improper considerations and the purpose of the evidence is solely to prove the element of prior conviction, the court should use the bracketed language in paragraph (1)(A). *Old Chief v. United States*, 519 U.S. 172 (1997).

If the defendant is charged under § 922(g)(3) with possession of a firearm by an unlawful user of a controlled substance, the instruction should be modified to include the following definition of “unlawful user”:

The term “unlawful user of a controlled substance” contemplates the regular and repeated use of a controlled substance in a manner other than as prescribed by a licensed physician. The one time or infrequent use of a controlled substance is not sufficient to establish the defendant as an "unlawful user." Rather, the defendant must have been engaged in use that was sufficiently consistent and prolonged as to constitute a pattern of regular and repeated use of a controlled substance. The government need not show that defendant used a controlled substance at the precise time he possessed a firearm. It must, however, establish that he was engaged in a pattern of regular and repeated use of a controlled substance during a period that reasonably covers the time a firearm was possessed.

United States v. Burchard, 580 F.3d 341, 352 (6th Cir. 2009). *See also* *United States v. Roberge*, 565 F.3d 1005 (6th Cir. 2009).

In paragraph (2)(A), possession is defined by reference to Instructions 2.10, 2.10A and 2.11. For convictions under § 922(g)(1), both actual and constructive possession are sufficient. *United States v. Murphy*, 107 F.3d 1199, 1208 (6th Cir. 1997), *citing* *United States v. Craven*, 478 F.2d 1329, 1329-33 (6th Cir. 1973). Actual possession occurs when a party has “immediate possession or control” over the firearm. *Craven*, 478 F.2d at 1333; *see also* *United States v. Beverly*, 750 F.2d 34, 37 (6th Cir. 1984). Constructive possession exists when “a person does

not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.” *Moreno*, 933 F.2d at 373, *citing Craven*, 478 F.2d at 1333. Constructive possession also exists when the person has dominion over the premises where the firearm is located. *United States v. Clemis*, 11 F.3d 597, 601 (6th Cir. 1993). Actual and constructive possession are discussed further in commentary to Pattern Instructions 2.10 and 2.10A.

Aside from possession, § 922(g)(1) also prohibits persons from receiving or shipping or transporting firearms. The instruction is drafted only to cover possession, but if receipt, shipping or transporting are charged, the instruction can be modified. In *United States v. Manni*, 810 F.2d 80, 84 (6th Cir. 1987), the court stated that the term receipt included any knowing acceptance or possession of a firearm. Proof of possession is equivalent to proof of receipt for most purposes. *See also Beverly*, 750 F.2d at 36 (“To prove ‘receipt’ beyond a reasonable doubt, the government may establish ‘receipt’ by inference after proving constructive possession.”). The Sixth Circuit has “equated circumstantial proof of constructive possession with circumstantial proof of constructive receipt under § 922.” *Id.*, *citing Craven*, 478 F.2d at 1336.

The definition of “firearm” in paragraph (2)(B)(1) is based on the statute, which defines firearm 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.” 18 U.S.C. § 921(a)(3). Subsection 921(a)(4) defines destructive device in detail, and subsection 921(a)(16) defines antique firearm in detail. As to the antique firearms exception, *see United States v. Smith*, 981 F.2d 887, 891-92 (6th Cir.1992) (“antique firearms” exception is an affirmative defense which must be raised by defendant before the burden shifts to the government to disprove its applicability).

The firearm need not be operable to support a conviction. *United States v. Yannott*, 42 F.3d 999, 1006 (6th Cir. 1994). In *Yannott*, the court further held that it does not matter that the defendant may not have known how to alter the weapon to make it operable. The broken firing pin only temporarily altered the weapon’s capability and did not alter the design so that it no longer served the purpose for which it was originally designed. The determination of what constitutes a firearm under the statute is a question of law; however, whether a particular weapon fits in the legal definition of a firearm is a question of fact. *Id.* at 1005-07.

Section 922(g)(1) also prohibits the possession of ammunition by a convicted felon. *See* 18 U.S.C. § 922(g)(1); *United States v. Johnson*, 62 F.3d 849, 850 (6th Cir. 1995). The definition of the term “ammunition” in paragraph (2)(B)(2) is based on § 921(a)(17)(A), which states that “The term ‘ammunition’ means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.”

The mens rea requirement for § 922(g)(1) is set forth in § 924(a)(2), which states, “Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.” In *United States v. Odom*, 13 F.3d 949 (6th Cir. 1994), the Sixth Circuit approved an instruction defining knowingly under § 922(g)(1) as “voluntarily and intentionally, and not because of mistake or accident.” *Id.* at 961. The definition of knowingly in paragraph (2)(C) is based on this case.

The knowledge requirement applies to both the possession element and the status element of the offense. *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019) (“We conclude that in a prosecution under 18 U. S. C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.”). However, § 942(a)(2) does not require that the defendant knew that the conduct was illegal. *Rehaif, supra* at 2198 (citing *Lafave & Scott*, Substantive Criminal Law § 5.1(a); Model Penal Code § 2.04; and *Liparota v. United States*, 471 U. S. 419 (1985)); *see also* *United States v. Beavers*, 206 F.3d 706, 710 (6th Cir. 2000) (holding that § 922(g)(9) is constitutional even though it does not require the government to prove that the defendant knew his possession of a firearm was illegal).

The court has sometimes discussed the mens rea in terms of intent. Only general intent, not specific intent, is required for a firearms possession charge under § 922(g)(1). *United States v. Jobson*, 102 F.3d 214, 221 (6th Cir. 1996).

As to the jurisdictional element in paragraph (1)(D), the statute provides that the defendant must possess the firearm “in or affecting commerce....” 18 U.S.C. § 922(g)(1). The statute defines “interstate or foreign commerce” to include “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.” 18 U.S.C. § 921(a)(2).

In *Scarborough v. United States*, 431 U.S. 563, 566-67 (1977), the Court interpreted the phrase “in commerce or affecting commerce” in 18 U.S.C.App. § 1202(a), a predecessor statute of § 922(g)(1). It approved an instruction which provided that jurisdiction was established by proof that the firearm “previously traveled in interstate commerce.” *Id.* In the wake of *Scarborough*, the court has concluded that the commerce element is met if the defendant possessed the firearm outside its state of manufacture. *See, e.g.*, *United States v. Pedigo*, 879 F.2d 1315, 1319 (6th Cir. 1989), *citing* *Scarborough v. United States, supra*. *See also* *United States v. Fish*, 928 F.2d 185, 186 (6th Cir. 1991). A firearm that has moved in interstate commerce at any time provides a sufficient nexus between defendant’s conduct and interstate commerce. *United States v. Chesney*, 86 F.3d 564, 571 (6th Cir. 1996), *citing* *Scarborough*, 431 U.S. at 566-67. *See also* *United States v. Wolak*, 923 F.2d 1193, 1198 (6th Cir. 1991) (even if firearm possessed by defendant had been brought into country by serviceman, that transportation would still satisfy the interstate commerce nexus offense as to anyone who later possessed the weapon). *Cf.* *United States v. Lopez*, 514 U.S. 549 (1995) (18 U.S.C. § 922(q) prohibiting possession of firearm in school zone contains no requirement that the possession be connected in any way to interstate commerce, so the statute exceeds the authority of Congress and is unconstitutional).

The instruction reflects this case law by requiring for the jurisdictional element that the specified firearm at some time crossed state lines. If a particular case involves possession of a firearm that did not travel in interstate commerce but in some other way “affected” commerce, the instruction should be modified.

The government need not prove that the defendant knew that the firearm traveled in or

affected interstate commerce. *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (“No one here claims that the word ‘knowingly’ modifies the statute’s jurisdictional element. . . . Because jurisdictional elements normally have nothing to do with the wrongfulness of the defendant’s conduct, such elements are not subject to the presumption in favor of scienter.”) (*citing* *Luna Torres v. Lynch*, 136 S. Ct. 1619, 1630-1631 (2016)).

The court has held that “the particular firearm possessed is not an element of the crime under § 922(g), but instead the means used to satisfy the element of ‘any firearm.’” *United States v. DeJohn*, 368 F.3d 533, 542 (6th Cir. 2004). *See also* reference to *DeJohn* in Commentary to Instruction 8.03B Unanimity Not Required – Means.

In 1990, the Sixth Circuit held that a defense of justification for possession of a firearm by a convicted felon may arise in rare situations. *United States v. Singleton*, 902 F.2d 471, 472-73 (6th Cir. 1990). This defense is covered in Instruction 6.07 Justification. *See also* Instruction 6.05 Coercion/Duress.

12.02 FIREARMS – USING OR CARRYING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME (18 U.S.C. § 924(c)(1)(A)(i))

(1) Count ____ of the indictment charges the defendant with using or carrying a firearm during and in relation to a crime of violence or a drug trafficking crime.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant committed the crime charged in Count _____. _____ is a [crime of violence] [drug trafficking crime] which may be prosecuted in a court of the United States.

(B) Second: That the defendant knowingly used or carried a firearm.

(C) Third: That the use or carrying of the firearm was during and in relation to the crime charged in Count _____.

(2) Now I will give you more detailed instructions on some of these terms.

(A) To establish “use,” the government must prove active employment of the firearm during and in relation to the crime charged in Count _____. “Active employment” means activities such as brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. “Use” also includes a person’s reference to a firearm in his possession for the purpose of helping to commit the crime charged in Count _____. “Use” requires more than mere possession or storage. [The term "use" includes receiving drugs in exchange for giving a firearm.] [The term "use" does not include receiving a firearm in exchange for giving drugs.]

(B) “Carrying” a firearm includes carrying it on or about one’s person. [“Carrying” also includes knowingly possessing and conveying a firearm in a vehicle which the person accompanies including in the glove compartment or trunk.]

(C) The term “firearm” means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. [The term "firearm" also includes the frame or receiver of any such weapon, and any firearm muffler or firearm silencer, and any destructive device.] [The term firearm does not include an antique firearm.] [The term firearm includes starter guns.][The firearm need not be loaded.]

(D) The term “during and in relation to” means that the firearm must have some purpose or effect with respect to the crime charged in Count _____; in other words, the firearm must facilitate or further, or have the potential of facilitating or furthering the crime charged in Count _____, and its presence or involvement cannot be the result of accident or coincidence.

(E) The term “knowingly” means voluntarily and intentionally, and not because of

mistake or accident.

[(3) The government need not prove that a particular firearm was used or carried during and in relation to the [crime of violence] [drug trafficking crime]].

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any of these elements, then you must find the defendant not guilty of this charge.

Use Note

If aiding and abetting is involved, use Instruction 12.04 instead of Instruction 4.01.

Any fact that increases the maximum penalty or triggers a mandatory minimum penalty must be submitted to the jury and found beyond a reasonable doubt.

Brackets indicate options for the judge.

In paragraph (2)(B), the bracketed sentence should be used only if raised by the facts.

In paragraph (2)(C), the four bracketed sentences should be used only if raised by the facts.

In paragraph (3), the bracketed sentence should be used only if raised by the facts.

The Committee did not draft instructions specifically to cover subsections (c)(1)(A)(ii) (brandishing a firearm) or (c)(1)(A)(iii) (discharging a firearm), but the pattern instructions can be easily modified to fit these provisions.

Committee Commentary Instruction 12.02

(current through October 1, 2021)

Title 18 U.S.C. § 924(c)(1)(A) provides that “any person who, during and in relation to any crime of violence or drug trafficking crime . . . 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 [be sentenced to the mandatory terms provided in the statute].”

This instruction is designed to cover the use-or-carry-during-and-in-relation-to offense in subsection (c)(1)(A)(i). If aiding and abetting is involved, use Instruction 12.04 along with this instruction.

This instruction assumes that the defendant is charged in the same indictment with both the predicate crime of violence or drug trafficking crime and the § 924(c) firearms crime, and that the evidence of both is sufficient. The Committee took this approach because the underlying crime and the firearms crime are usually charged in the same indictment. *See generally* United States v. Davis, 139 S. Ct. 2319, 2327, 2337-2338 (2019) (all justices agree that § 924(c)

prosecutions are based on currently charged conduct rather than on a prior conviction). But the law does not require the two offenses to be charged together; indeed, the predicate crime may not even be charged. *See* *United States v. Smith*, 182 F.3d 452, 457 (6th Cir. 1999) (§ 924(c) “does not even require that the [predicate] crime be charged; a fortiori, it does not require that [the defendant] be convicted.”). So if the § 924(c) firearms count is charged separately, the instruction should be modified. Specifically, if the predicate crime is not charged in the same indictment, the court must instruct the jury on its duty to find the elements of the predicate offense beyond a reasonable doubt. *United States v. Kuehne*, 547 F.3d 667, 680-81 (6th Cir. 2008) (failure to separately instruct jury regarding elements of underlying drug trafficking offense was error but harmless).

This instruction assumes that the defendant is charged with both using and carrying a firearm. If the defendant is charged with both, sufficient evidence under either element will sustain a § 924(c) conviction. *United States v. Layne*, 192 F.3d 556, 569 (6th Cir. 1999), *citing* *Fair v. United States*, 157 F.3d 427, 430 (6th Cir. 1998). *See also* *United States v. Kuehne*, 547 F.3d 667, 683-85 (6th Cir. 2008) (instruction permitting jurors to convict defendant of either “using or carrying” although the indictment alleged only “using” a firearm was error but not reversible because instructing on two different methods of committing the same crime was variance that did not affect defendant’s substantial rights).

The definition of “use” in paragraph (2)(A) is derived from *Bailey v. United States*, 516 U.S. 137 (1995) and *United States v. Combs*, 369 F.3d 925, 932 (6th Cir. 2004) (*quoting* *Bailey*’s definition of use). In *Bailey*, the Court held that under § 924(c)(1), use of a firearm requires more than mere possession of the firearm. The correct definition of use “requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.” *Bailey*, 516 U.S. at 143. The Court explained further:

To illustrate the activities that fall within the definition of “use” provided here, we briefly describe some of the activities that fall within “active employment” for a firearm, and those that do not.

The active-employment understanding of “use” certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. ... [E]ven an offender’s reference to a firearm in his possession could satisfy § 924(c)(1). Thus, a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a “use,” just as the silent but obvious and forceful presence of a gun on a table can be a “use.”

....

“[U]se” takes on different meanings depending on context. ... [M]ere possession of a firearm by a drug offender, at or near the site of a drug crime or its proceeds or paraphernalia, is [not sufficient]. ... [T]he inert presence of a firearm, without more, is not enough to trigger § 924(c)(1). Perhaps the nonactive nature of this asserted “use” is clearer if a synonym is used: storage. A defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds. Storage of a firearm, without its

more active employment, is not reasonably distinguishable from possession.

A possibly more difficult question arises where an offender conceals a gun nearby to be at the ready for an imminent confrontation [citation omitted]. ... In our view, “use” cannot extend to encompass this action. If the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not “used.” ... Placement for later active use does not constitute “use.”

Bailey, 516 U.S. at 148-49.

The bracketed sentence at the end of paragraph (2)(A) stating that “use” does not include receiving a firearm in exchange for giving drugs is based on *Watson v. United States*, 128 S. Ct. 579 (2007). In explaining why use of a firearm during and in relation to a drug trafficking crime is not met when a defendant receives a firearm in exchange for giving drugs, the Court reaffirmed its conclusion in *Smith v. United States*, 508 U.S. 223 (1993) that use is established in the converse situation, *i.e.*, when a defendant receives drugs in exchange for giving firearms.

In the aftermath of *Bailey*, the Sixth Circuit has interpreted use under § 924(c)(1) to be established in the following circumstances: reaching for a gun under a mattress, *United States v. Anderson*, 89 F.3d 1306, 1315 (6th Cir. 1996); orally referring to a gun in such a way as to influence others, *Darnell v. United States*, 1999 WL 1281773 at 2, 1999 U.S. App. LEXIS 34587 at 7 (6th Cir. 1999) (unpublished), *quoting* *United States v. Anderson*, *supra*; admitting in plea agreement that defendant used a gun to protect himself while selling cocaine, *United States v. Mitchell*, 1997 WL 720435 at 2, 1997 U.S. App. LEXIS 32348 at 7 (6th Cir. 1997) (unpublished); actively negotiating an exchange of firearms for drugs, *United States v. Jones*, 102 F.3d 804, 809 (6th Cir. 1996).

The Sixth Circuit has held that use was not established in the following circumstances: inert presence of firearm without display, *Darnell*, 1999 WL at 3, 1999 U.S. App. LEXIS at 7-8; passively receiving a firearm from an undercover officer in exchange for drugs, *Layne*, 192 F.3d at 570 and *United States v. Warwick*, 167 F.3d 965, 975 (6th Cir. 1999); clandestinely placing an undetonated bomb nearby with intent to put firearm to a future active use, *United States v. Stotts*, 176 F.3d 880, 888-89 (6th Cir. 1999); carrying firearm in back pocket when it is not visible until exiting the car, *Napier v. United States*, 159 F.3d 956, 960 (6th Cir. 1998); transferring a firearm to co-conspirator days in advance of the time when the object of the conspiracy was to occur, *United States v. Taylor*, 176 F.3d 331, 339 (6th Cir. 1999); reaching for firearm in briefcase, *United States v. Allen*, 106 F.3d 695, 702 (6th Cir. 1997); storing firearm under the seat of a car, *United States v. Myers*, 102 F.3d 227, 237 (6th Cir. 1996); storing six firearms throughout residence where drug trafficking occurred, *United States v. Deveaux*, 1996 WL 683765, 3-4, 1996 U.S. App. Lexis 330877, 10-11 (6th Cir. 1996) (unpublished).

The language in paragraph (2)(A) “for the purpose of helping to commit the crime charged in Count ___” is a plain English version of the standard “calculated to bring about a change in the circumstances of the predicate offense” articulated in *Bailey* and quoted *supra*.

The definition of “carry” in paragraph (2)(B) is based on *Muscarello v. United States*, 524 U.S. 125 (1998) and *Combs*, 369 F.3d at 932 (*quoting* *Muscarello*’s definition of carry). In

Muscarello, the Court held that under § 924(c), the word carry is not limited to the carrying of firearms directly on the person but also “applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies.” 524 U.S. at 126-27. To come within the definition of carry, the firearm need not be immediately accessible to the defendant; as long as he meets the requirement of carrying the firearm both “during and in relation to” the predicate offense, the elements of § 924(c) are satisfied. *Id.* at 137. However, carrying requires more than mere transportation. The Court explained: “‘Carry’ implies personal agency and some degree of possession, whereas ‘transport’ does not have such a limited connotation.... Therefore, ‘transport’ is a broader category that includes ‘carry’ but also encompasses other activity.” *Id.* at 134-35.

The Sixth Circuit or panels of the circuit have found carrying to be established in the following cases: *Rose v. United States*, 1999 WL 1000852, 2, 1999 U.S. App. LEXIS 28517, 6 (6th Cir. 1999) (unpublished) (firearm in front seat console of defendant’s car); *United States v. Gibbs*, 182 F.3d 408 (6th Cir. 1999) (firearm tucked in defendant’s pants); *United States v. Clemons*, 2001 WL 278596 at 4, 2001 U.S. App. LEXIS 4403 at 12 (6th Cir. 2001) (unpublished) (defendant had firearm on his person and threw firearm into car); *United States v. Davis*, 1999 WL 238664 at 2, 1999 U.S. App. LEXIS 7287 at 7 (6th Cir. 1999) (unpublished) (defendant aided and abetted another who physically transported firearm and had it immediately available for use); *United States v. Mann*, 2001 WL 302049 at 2, 2001 U.S. App. LEXIS at 6-7 (6th Cir. 2001) (unpublished) (defendant aided and abetted as getaway driver although he did not carry firearm personally); *Clark v. United States*, 2000 WL 282447 at 4, 2000 U.S. App. LEXIS 3642 at 13 (6th Cir. 2000) (unpublished) (defendant conspired with co-defendant who carried firearm personally); *Carthorn v. United States*, 1999 WL 644347 at 2, 1999 U.S. App. LEXIS 20366 at 6 (6th Cir. 1999) (unpublished) (firearm found under driver’s seat of defendant’s car); *Hilliard v. United States*, 157 F.3d 444 (6th Cir. 1998) (defendant fleeing scene of drug crime had firearm in his waistband).

The Sixth Circuit has found that carrying was not established in *United States v. Sheppard*, 149 F.3d 458 (6th Cir. 1998) (mere presence of firearm at scene of drug crime is not sufficient; “carry” requires more than the fact that the defendant at some time previously had carried the firearm to a particular location).

The second sentence of paragraph (2)(B) on the definition of carrying is bracketed because it is only relevant when a vehicle is involved.

“Firearm” is defined in paragraph (2)(C) based on the statute, which provides: “(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.” 18 U.S.C. § 921(a)(3). Subsection 921(a)(4) further defines destructive device, and subsection 921(a)(16) defines antique firearm. As to the antique firearms exception, *see United States v. Smith*, 981 F.2d 887, 891-92 (6th Cir. 1992) (“antique firearms” exception is an affirmative defense which must be raised by defendant before the burden shifts to the government to disprove its applicability). The last bracketed sentence in paragraph (2)(C) stating that the firearm need not be loaded is based on *United States v. Pannell*, 1999 WL 685936 at 6 n.3, 1999 U.S. App. LEXIS 20629 at 17 n.3 (6th Cir. 1999) (unpublished) and *United States*

v. Malcuit, 1999 WL 238672 at 2, 1999 U.S. App. LEXIS 7387 at 5 (6th Cir. 1999) (unpublished), *both citing* United States v. Turner, 157 F.3d 552, 557 (8th Cir. 1998). *See also* United States v. Bandy, 239 F.3d 802, 805 (6th Cir. 2001) (quoting with approval other circuits' conclusions that firearm need not be loaded). In addition, the firearm need not be operable. *Id.*

The definition of “during and in relation to” in paragraph (2)(D) is based on *Smith v. United States*, 508 U.S. 223 (1993). In *Smith*, the Supreme Court defined “in relation to” in these terms: “The phrase ‘in relation to’ thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. ... [T]he gun at least must ‘facilitate, or have the potential of facilitating,’ the drug trafficking offense.” *Id.* at 238 (citations omitted).

Furthermore, in *Smith*, the Court stated that the in-relation-to language “does illuminate § 924(c)(1)’s boundaries.” 508 U.S. at 237. The Court explained that the in-relation-to language “‘allay[s] explicitly the concern that a person could be’ punished under § 924(c)(1) . . . even though the firearm’s presence is coincidental or entirely ‘unrelated’ to the crime.” *Id.* at 238, *quoting* United States v. Stewart, 779 F.2d 538, 539 (9th Cir. 1985).

The Sixth Circuit has found the during-and-in-relation-to element satisfied in *United States v. Malcuit*, *supra* (in relation to element met even though firearm not within defendant’s immediate reach); *United States v. Fair*, *supra* at 430-31 (in relation to element met because inference clear that defendant carried gun to drug sale to ensure transfer completed without incident); *United States v. McRae*, 156 F.3d 708, 712 (6th Cir. 1998) (during and in relation element met where defendant had rifle and drugs together and close enough to grab when police entered).

The Sixth Circuit has found the element not met in *United States v. Layne*, 192 F.3d 556, 571 (6th Cir. 1999) (during and in relation to element not met when defendant carried firearm away from drug transaction because conduct occurred after the completion of the drug trafficking offense, not during it); *United States v. Gibbs*, 182 F.3d 408 (6th Cir. 1999) (attracting person with the allure of a drug sale and then robbing the person not enough to qualify as use of a firearm in relation to a drug sale).

In paragraph (2)(E), the definition of “knowingly” is based on *United States v. Odom*, 13 F.3d 949, 961 (6th Cir. 1994). Section 924(c) does not include any mens rea term in the language of the statute (*cf.* § 922(g), for which the mens rea of knowingly is supplied by § 924(a)), but courts have imposed a mens rea of knowingly. *See Muscarello v. United States*, 524 U.S. 125 (1998). In *Odom*, the Sixth Circuit defined the term knowingly in the context of a firearms offense under § 922(g)(1), and the Committee relied on that definition of knowingly for the § 924(c) firearms offense.

Paragraph (3) recognizes that as a general rule, the jury need not decide which specific gun a defendant used or carried. *See United States v. Steele*, 919 F.3d 965, 973 (6th Cir. 2019) (“§ 924(c) generally does not require jury unanimity as to a specific gun that a defendant possessed, used, or carried in violating § 924(c).”). The court stated there may be exceptions to this general rule, *id.*, *citing* *United States v. Correa-Ventura*, 6 F.3d 1070, 1087 (5th Cir. 1993), and concluded that the district court appropriately addressed the concerns underlying the

exceptions by giving the following instruction:

The Government does not have to prove that a particular firearm was possessed in furtherance of a drug trafficking crime, but in order to return a guilty verdict, all 12 of you must unanimously agree as to at least one specific occurrence on which [defendant] personally possessed a firearm in furtherance of a conspiracy to distribute a controlled substance.

The Sixth Circuit characterized this instruction as “proper” and not plain error. *Steele* at 973. In prosecutions based on using or carrying rather than possession, this instruction can be modified.

Conviction on the predicate offense is not required. *United States v. Smith*, *supra* at 458 (“We also hold that § 924(c) does not require a conviction for the predicate offense.”); *United States v. Ospina*, 18 F.3d 1332, 1335-36 (6th Cir. 1994) (mandatory sentence of § 924(c)(1) can be imposed in absence of conviction on underlying drug offense), *citing, inter alia*, *United States v. Hill*, 971 F.2d 1461, 1467 (10th Cir. 1992) (“[A] conviction on an underlying drug trafficking offense is not a prerequisite to a substantive 924(c) conviction”). As *Smith* indicates, the § 924(c) conviction can stand even if the jury acquits the defendant on the predicate crime of violence or drug trafficking. *United States v. Smith*, *supra*. However, the § 924(c) conviction cannot stand if the conviction on the predicate crime is declared void for lack of jurisdiction. *United States v. Wang*, 222 F.3d 234, 240-41 (6th Cir. 2000) (§ 924(c) conviction must be reversed because underlying Hobbs Act robbery charge had no effect on interstate commerce and therefore did not qualify as a crime that could be prosecuted in federal court).

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Court vacated a conviction for using or carrying under § 924(c) based on aiding and abetting because of error in the jury instructions. In the wake of *Rosemond*, the Sixth Circuit reversed a § 924(c) conviction, finding a jury instruction using paragraph (2)(C) of Instruction 4.01 Aiding and Abetting to be plain error. The court explained, “*Rosemond* clarifies that intent must go to the *entire crime* – that [defendant] intended to aid in an *armed* bank robbery.” *United States v. Henry*, 2015 WL 4774558, at *2, (6th Cir. Aug. 14, 2015) (italics in original, *citing Rosemond*, 134 S. Ct. at 1248, 1251). *See also* *United States v. Richardson*, 2015 WL 4174809, at *14-15 (6th Cir. July 13, 2015) (jury instruction was error but harmless). New Instruction 12.04 Aiding and Abetting Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime responds to these cases and should be used in conjunction with Inst. 12.02 on Using or Carrying a Firearm when the charge is based on accomplice liability.

Any fact that increases a mandatory minimum sentence constitutes an element of the crime and must be proved to the jury beyond a reasonable doubt. *Alleyne v. United States*, 133 S. Ct. 2151 (2013), *citing* *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and overruling *Harris v. United States*, 536 U.S. 545 (2002). In *Alleyne*, the Court held that because the determination of whether the defendant “brandished” the firearm under § 924(c)(1)(A)(i) increased the mandatory minimum imprisonment from 5 years to 7 years, that fact had to be submitted to the jury and proved beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2160. Thus, the activities of brandishing and discharge must be submitted to the jury and proved beyond a reasonable doubt.

In addition, the type of firearm must be proved to the trier of fact beyond a reasonable

doubt. *Castillo v. United States*, 530 U.S. 120 (2000). The type of firearm involved, *i.e.*, a “short-barreled rifle, short-barreled shotgun or semiautomatic assault weapon” under subsection 924(c)(1)(B)(i); or “a machinegun or a destructive device, or . . . [a firearm] equipped with a firearm silencer or firearm muffler” under subsection 924(c)(1)(B)(ii), is an element of the offense and must be proved beyond a reasonable doubt to the trier of fact. *Castillo v. United States*, *supra*. *Castillo*, which interpreted the statute, was followed in the Sixth Circuit by *United States v. Harris*, 397 F.3d 404 (6th Cir. 2005), which reached the same conclusion based on Sixth Amendment grounds.

If the prosecution is based on a violation of § 924(c) involving an increase in the mandatory minimum sentence, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

12.03 FIREARMS – POSSESSING A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME (18 U.S.C. § 924(c)(1)(A)(i))

(1) Count ____ of the indictment charges the defendant with violating federal law by possessing a firearm in furtherance of a crime of violence or a drug trafficking crime.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant committed the crime charged in Count ____ .
_____ is a [crime of violence] [drug trafficking crime] which may be prosecuted in a court of the United States.

(B) Second: That the defendant knowingly possessed a firearm.

(C) Third: That the possession of the firearm was in furtherance of the crime charged in Count ____ .

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term “firearm” means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. [The term "firearm" also includes the frame or receiver of any such weapon, and any firearm muffler or firearm silencer, and any destructive device.] [The term firearm does not include an antique firearm.] [The term firearm includes starter guns.] [The firearm need not be loaded.]

(B) The term “knowingly” means voluntarily and intentionally, and not because of mistake or accident.

(C) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction*].

(D) The term “in furtherance of” means that the firearm was possessed to advance or promote the crime charged in Count ____ . In deciding whether the firearm was possessed to advance or promote the crime charged in Count ____ , you may consider these factors: (1) whether the firearm was strategically located so that it was quickly and easily available for use; (2) whether the firearm was loaded; (3) the type of weapon; (4) whether possession of the firearm was legal; (5) the type of [crime of violence] [drug trafficking crime]; and (6) the time and circumstances under which the firearm was found. This list is not exhaustive.

[(3) The government need not prove that a particular firearm was possessed in furtherance of the [crime of violence] [drug trafficking crime]].

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any of these elements, then you must find the defendant not guilty of this charge.

Use Note

If aiding and abetting is involved, use Instruction 12.05 instead of Instruction 4.01.

Any fact that increases the maximum penalty or triggers a mandatory minimum penalty must be submitted to the jury and found beyond a reasonable doubt.

In paragraph (2)(A), the four bracketed sentences should be used only if relevant.

The bracketed sentence in paragraph (3) should be used only if raised by the facts.

The Committee did not draft instructions specifically to cover subsections (c)(1)(A)(ii) (brandishing a firearm) or (c)(1)(A)(iii) (discharging a firearm), but the pattern instructions can be easily modified to fit these provisions.

Brackets indicate options for the judge. Brackets with italics are notes to the court.

Committee Commentary Instruction 12.03 (current through October 1, 2021)

Title 18 U.S.C. § 924(c)(1)(A)(i) provides that “any person who, during and in relation to any crime of violence or drug trafficking crime ... 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 [be sentenced to the mandatory terms provided in the statute].”

This instruction is designed to cover the possession-in-furtherance offense described last in subsection (c)(1)(A)(i), *i.e.*, the offense described by the language: “any person ... who, in furtherance of any such crime, possesses a firearm, shall [be sentenced to the mandatory terms provided in the statute].” Congress added this language to the statute in 1998 to respond to the *Bailey* holding that the term use did not include mere possession. See Public Law 105-386, November, 1998. In *Bailey*, the Court stated that, “Had Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided.” *Bailey v. United States*, 516 U.S. 137, 143 (1995). Congress added the possession-in-furtherance offense to insure that possession triggered the mandatory sentences of § 924(c)(1)(A)(i).

If aiding and abetting is involved, use Instruction 12.05 along with this instruction.

This instruction assumes that the defendant is charged in the same indictment with both the predicate crime of violence or drug trafficking crime and the § 924(c) firearms crime, and that the evidence of both is sufficient. The Committee took this approach because the underlying crime and the firearms crime are usually charged in the same indictment. See generally *United States v. Davis*, 139 S. Ct. 2319, 2327, 2337-2338 (2019) (all justices agree that § 924(c) prosecutions are based on currently charged conduct rather than on a prior conviction). But the law does not require the two offenses to be charged together; indeed, the predicate crime may not even be charged. See *United States v. Smith*, 182 F.3d 452, 457 (6th Cir. 1999)(§ 924(c) “does not even require that the [predicate] crime be charged; a fortiori, it does not require that [the

defendant] be convicted.”). So if the § 924(c) firearms count is charged separately, the instruction should be modified.

The definition of “firearm” in paragraph (2)(A) is based on the definition provided in the statute with no significant changes. *See* 18 U.S.C. § 921(a)(3). The last bracketed sentence stating that the firearm need not be loaded is based on *United States v. Pannell*, 1999 WL 685936 at 6 n.3, 1999 U.S. App. LEXIS 20629 at 17 n.3 (6th Cir. 1999) (unpublished) and *United States v. Malcuit*, 1999 WL 238672 at 2, 1999 U.S. App. LEXIS 7387 at 5 (6th Cir. 1999) (unpublished), *both citing* *United States v. Turner*, 157 F.3d 552, 557 (8th Cir. 1998). *See also* *United States v. Bandy*, 239 F.3d 802, 805 (6th Cir. 2001) (quoting with approval other circuits’ conclusions that firearm need not be loaded). In addition, the firearm need not be operable. *Id.*

In paragraph (2)(B), the definition of “knowingly” is based on *United States v. Odom*, 13 F.3d 949, 961 (6th Cir. 1994).

Paragraph (2)(C) of the instruction defines the term “possession” by reference to Instructions 2.10, 2.10A and 2.11. In *United States v. Paige*, 470 F.3d 603 (6th Cir. 2006), the court stated that possession in the context of § 924(c) “may be either actual or constructive and it need not be exclusive but may be joint.” *Id.* at 610 (interior quotation and citation omitted). This definition is consistent with Instructions 2.10, 2.10A and 2.11.

To define “in furtherance of” in paragraph (2)(D), the Committee relied on *United States v. Mackey*, 265 F.3d 457 (6th Cir. 2001). The overall requirement that the firearm “advance or promote” the underlying crime is drawn from *Mackey*, 265 F.3d at 461, *quoting* H.R. Rep. No. 105-344 (1977). The first factor, whether the firearm was strategically located so that it is quickly and easily available for use, is also based on *Mackey*, 265 F.3d at 462, *citing* *United States v. Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988), *overruled on other grounds by Bailey*, 516 U.S. 137. Factors (2) through (6) are based on the *Mackey* court’s statement:

Other factors that may be relevant to a determination of whether the weapon was possessed in furtherance of the crime include whether the gun was loaded, the type of weapon, the legality of its possession, the type of drug activity conducted, and the time and circumstances under which the firearm was found.

Mackey, 265 F.3d at 462, *citing* *United States v. Ceballos-Torres*, 218 F.3d 409, 414-15 (5th Cir. 2000). *See also* *United States v. Steele*, 919 F.3d 965, 970 (6th Cir. 2019) (*citing* *United States v. Swafford*, 385 F.3d 1026, 1029 (6th Cir. 2004)); *United States v. Brown*, 715 F.3d 985 (6th Cir. 2013); *United States v. Gill*, 685 F.3d 606 (6th Cir. 2012); *United States v. Ham*, 628 F.3d 801 (6th Cir. 2011).

The *Mackey* factors should not simply be added up but rather analyzed holistically; the absence of some factors does not mean that the evidence of possession-in-furtherance is insufficient. *United States v. Maya*, 966 F.3d 493, 501 (6th Cir. 2020). The in-furtherance-of element depends on the defendant’s intent to possess the firearm to aid drug trafficking, and this element may be proved by evidence the defendant possessed a firearm to protect drug proceeds alone (but not drugs or drug transactions). *Maya*, 966 F.3d at 503. The *Maya* court also collected conflicting Sixth Circuit cases on whether the first *Mackey* factor (whether the firearm

was “strategically located” so it was readily available for use) is required; the court noted that it was “skeptical of treating this factor as an absolute mandate” but declined to reconcile the cases because the facts in this case showed the firearm was strategically located. *Id.* at 502.

In *United States v. Frederick*, 406 F.3d 754, 759 (6th Cir. 2005), the court approved an instruction stating that the “in furtherance of” element was met if the defendant “acquired the gun by trading drugs or drug proceeds for the gun.” The *Frederick* court distinguished *United States v. Lawrence*, 308 F.3d 623, 631 (6th Cir. 2002), which held that the “in furtherance of” element was not met if the defendant acquired the gun as an unsolicited gift. *Frederick*, 406 F.3d at 764.

Generally, the mere possession of a firearm on the same premises as a drug transaction would not, without a showing of a connection between the two, sustain a § 924(c) conviction. *Mackey*, 265 F.3d at 462. The court further explained, “[W]e conclude that ‘in furtherance of’ differs from ‘during and in relation to’ and requires the government to prove a defendant used the firearm with greater participation in the commission of the crime or that the firearm’s presence in the vicinity of the crime was something more than mere chance or coincidence. Although the differences between the standards are ‘subtle’ and ‘somewhat elusive,’ they exist nonetheless.” *United States v. Combs*, 369 F.3d 925, 933 (6th Cir. 2004) (footnotes omitted); *see also* *United States v. Maya*, 966 F.3d 493, 500 (6th Cir. 2020).

Paragraph (3) recognizes that as a general rule, the jury need not decide which specific gun a defendant possessed. *See* *United States v. Steele*, 919 F.3d 965, 973 (6th Cir. 2019). The court stated there may be exceptions to this general rule, *id.*, *citing* *United States v. Correa-Ventura*, 6 F.3d 1070, 1087 (5th Cir. 1993)), and concluded that the district court appropriately addressed the concerns underlying the exceptions by giving the following instruction:

The Government does not have to prove that a particular firearm was possessed in furtherance of a drug trafficking crime, but in order to return a guilty verdict, all 12 of you must unanimously agree as to at least one specific occurrence on which [defendant] personally possessed a firearm in furtherance of a conspiracy to distribute a controlled substance.

The Sixth Circuit characterized this instruction as “proper” and not plain error. *Steele* at 973.

Conviction on the predicate offense is not required. *United States v. Smith*, *supra* at 458 (“We also hold that § 924(c) does not require a conviction for the predicate offense.”); *United States v. Ospina*, 18 F.3d 1332, 1335-1336 (6th Cir. 1994) (mandatory sentence of § 924(c)(1) can be imposed in absence of conviction on underlying drug offense), *citing, inter alia*, *United States v. Hill*, 971 F.2d 1461, 1467 (10th Cir. 1992) (“[A] conviction on an underlying drug trafficking offense is not a prerequisite to a substantive 924(c) conviction.”). As *Smith, supra* indicates, the § 924(c) conviction can stand even if the jury acquits the defendant on the predicate crime of violence or drug trafficking. However, the § 924(c) conviction cannot stand if the conviction on the predicate crime is declared void for lack of jurisdiction. *United States v. Wang*, 222 F.3d 234, 240-41 (6th Cir. 2000) (§ 924(c) conviction must be reversed because underlying Hobbs Act robbery charge had no effect on interstate commerce and therefore did not qualify as a crime that could be prosecuted in federal court).

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Court vacated a conviction for using or carrying under § 924(c) based on aiding and abetting because of error in the jury instructions. In the wake of *Rosemond*, the Sixth Circuit reversed a § 924(c) conviction, finding a jury instruction using paragraph (2)(C) of Instruction 4.01 Aiding and Abetting to be plain error. The court explained, “*Rosemond* clarifies that intent must go to the *entire crime* – that [defendant] intended to aid in an *armed* bank robbery.” *United States v. Henry*, 2015 WL 4774558, at *2, (6th Cir. Aug. 14, 2015) (italics in original, *citing Rosemond*, 134 S. Ct. at 1248, 1251). *See also* *United States v. Richardson*, 2015 WL 4174809, at *14-15 (6th Cir. July 13, 2015) (jury instruction was error but harmless). New Instruction 12.05 Aiding and Abetting Possession of a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime responds to these cases and should be used in conjunction with Inst. 12.03 when the charge is based on accomplice liability.

Any fact that increases a mandatory minimum sentence constitutes an element of the crime and must be proved to the jury beyond a reasonable doubt. *Alleyne v. United States*, 133 S. Ct. 2151 (2013), citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and overruling *Harris v. United States*, 536 U.S. 545 (2002). In *Alleyne*, the Court held that because the determination of whether the defendant “brandished” the firearm under § 924(c)(1)(A)(i) increased the mandatory minimum imprisonment from 5 years to 7 years, that fact had to be submitted to the jury and proved beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2160. Thus, the activities of brandishing and discharge must be submitted to the jury and proved beyond a reasonable doubt.

In addition, the type of firearm must be proved to the trier of fact beyond a reasonable doubt. *Castillo v. United States*, 530 U.S. 120 (2000). The type of firearm involved, *i.e.*, a “short-barreled rifle, short-barreled shotgun or semiautomatic assault weapon” under subsection 924(c)(1)(B)(i); or “a machinegun or a destructive device, or . . . [a firearm] equipped with a firearm silencer or firearm muffler” under subsection 924(c)(1)(B)(ii), is an element of the offense and must be proved beyond a reasonable doubt to the trier of fact. *Castillo v. United States*, *supra*. *Castillo*, which interpreted the statute, was followed in the Sixth Circuit by *United States v. Harris*, 397 F.3d 404 (6th Cir. 2005), which reached the same conclusion based on Sixth Amendment grounds.

If the prosecution is based on a violation of § 924(c) involving an increase in the mandatory minimum sentence, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

12.04 AIDING AND ABETTING USING OR CARRYING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME (18 U.S.C. §§ 924(c)(1)(A)(i) and 2)

(1) For you to find _____ guilty of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime], it is not necessary for you to find that he personally committed the crime. You may also find him guilty if he intentionally helped [or encouraged] someone else to commit the crime. A person who does this is called an aider and abettor.

(2) But for you to find _____ guilty of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] was committed.

(B) Second, that the defendant helped to commit [or encouraged someone else to commit] the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime].

(C) And third, that the defendant intended to help commit [or encourage] the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime]. The defendant intended to aid and abet the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] if he had advance knowledge that an accomplice would use or carry a firearm during the commission of a [crime of violence] [drug trafficking crime]. Advance knowledge means knowledge at a time the defendant can attempt to alter the plan or withdraw from the enterprise. Knowledge of the firearm may, but does not have to, exist before the underlying crime is begun. [It is sufficient if the defendant gained the knowledge in the midst of the underlying crime, as long as the defendant chose to continue to participate in the crime and had a realistic opportunity to withdraw. You may, but need not, infer that the defendant had sufficient foreknowledge if you find that the defendant chose to continue his participation in the crime after the defendant knew an accomplice was using or carrying a firearm.]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] as an aider and abettor.

Use Note

If aiding and abetting the offense of Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime (see Instruction 12.02) is involved, use this instruction instead of Instruction 4.01.

In paragraph (2)(C), the two bracketed sentences at the end of the paragraph should be used only if the evidence suggests that the defendant gained knowledge of the firearm in the midst of the underlying crime.

The Committee did not draft instructions specifically to cover subsections (c)(1)(A)(ii) (brandishing a firearm) or (c)(1)(A)(iii) (discharging a firearm), but the pattern instructions can be easily modified to fit these provisions.

Committee Commentary
(current through October 1, 2021)

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Court vacated a conviction for using or carrying under § 924(c) based on aiding and abetting because of error in the jury instructions. In the wake of *Rosemond*, the Sixth Circuit reversed a § 924(c) conviction, finding a jury instruction using paragraph (2)(C) in Instruction 4.01 Aiding and Abetting to be plain error. The court explained, “*Rosemond* clarifies that intent must go to the *entire crime* – that [defendant] intended to aid in an *armed* bank robbery.” *United States v. Henry*, 2015 WL 4774558, at *2, (6th Cir. Aug. 14, 2015) (italics in original, *citing Rosemond*, 134 S. Ct. at 1248, 1251). *See also* *United States v. Richardson*, 2015 WL 4174809, at *14-15 (6th Cir. July 13, 2015) (jury instruction was error but harmless). This new instruction, 12.04 Aiding and Abetting Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime, responds to these cases and should be used in conjunction with Instruction 12.02 Using or Carrying a Firearm when the charge is based on accomplice liability.

12.05 AIDING AND ABETTING POSSESSION OF A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME (18 U.S.C. §§ 924(c)(1)(A)(i) and 2)

(1) For you to find _____ guilty of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime], it is not necessary for you to find that he personally committed the crime. You may also find him guilty if he intentionally helped [or encouraged] someone else to commit the crime. A person who does this is called an aider and abettor.

(2) But for you to find _____ guilty of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime] as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime] was committed.

(B) Second, that the defendant helped to commit [or encouraged someone else to commit] the crime of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime].

(C) And third, that the defendant intended to help commit [or encourage] the crime of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime]. The defendant intended to aid and abet the crime of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime] if he had advance knowledge that an accomplice would possess a firearm during the commission of a [crime of violence] [drug trafficking crime]. Advance knowledge means knowledge at a time the defendant can attempt to alter the plan or withdraw from the enterprise. Knowledge of the firearm may, but does not have to, exist before the underlying crime is begun. [It is sufficient if the defendant gained the knowledge in the midst of the underlying crime, as long as the defendant chose to continue to participate in the crime and had a realistic opportunity to withdraw. You may, but need not, infer that the defendant had sufficient foreknowledge if you find that the defendant chose to continue his participation in the crime after the defendant knew an accomplice possessed a firearm.]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime] as an aider and abettor.

Use Note

If aiding and abetting the offense of Possessing a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime (see Instruction 12.03) is involved, use this instruction instead of Instruction 4.01.

In paragraph (2)(C), the two bracketed sentences at the end of the paragraph should be used only if the evidence suggests that the defendant gained knowledge of the firearm in the midst of the underlying crime.

The Committee did not draft instructions specifically to cover subsections (c)(1)(A)(ii) (brandishing a firearm) or (c)(1)(A)(iii) (discharging a firearm), but the pattern instructions can be easily modified to fit these provisions.

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