

## DEFENDING FEDERAL FIREARMS CASES<sup>1</sup>

### I. Introduction

This outline is meant to give federal defense attorneys some ammunition in litigating firearms cases by giving a general overview of the variety of issues, from pretrial to sentencing, that we face in defending these cases – with particular emphasis on cases involving prosecutions under 18 U.S.C. § 922(g) and 18 U.S.C. § 924(c), the two most common federal firearms prosecutions.

### II. “Firearm” Definitions

#### A. Title 18's Definition

The word “firearm” is a term of art. The term “firearm” is defined in 18 U.S.C. § 921(a)(3) 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.

#### B. Tax Code or NFA “Firearms”

The above definition applies to prosecutions under 18 U.S.C. § 922, affecting mostly prohibited persons, while another, set forth below, applies to cases prosecuted under 26 U.S.C. § 5861 (also known as the National Firearms Act of 1934), affecting machine guns, sawed-off shotguns/rifles, and silencers: “Firearm” is defined in 26 U.S.C. § 5845(a) as:

(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 . . . .

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### **C. Assault Weapons**

Another category of “firearm” is the “assault weapon,” formerly defined under 18 U.S.C. § 921(A)(30).

The Assault Weapons Ban (AWB) contained a “sunset” clause repealing itself on September 13, 2004, the tenth anniversary of the enactment of the Act. Thus, all of the AWB amendments have been repealed, including the definition section, 18 U.S.C. § 921(a)(30), the assault weapon and high capacity magazine prohibitions, 18 U.S.C. §§ 922(v) and (w), and the enhancement for using an assault weapon in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c)(1)(B)(i). Pub.L. No. 103-332, 108 Stat. 1796 § 110105. The provisions are now a nullity.

The basis of Congress’ “decision” to allow the ban to lapse may be important to any sentencing argument regarding assault weapons, whether the case itself involves assault weapons, or they appear as a prior conviction. The Ninth Circuit recently addressed whether a California conviction for possession of an assault weapon was a crime of violence under the Career Offender provision of the Guidelines. Based largely on Congress’ nullification of the assault weapons ban, the Court concluded that possession of an assault weapon is not crime of violence:

In the end, the temporary federal ban on assault weapons is largely a wash. The most plausible inference to be drawn from the evolution of federal law as to assault weapons is that Congress allowed the ban to lapse, having found it unnecessary. Because current federal policy places assault weapons on the same footing as other non-registerable weapons, we see this, on balance, as supporting Serna's position. We find more significant the fact that, when the federal assault-weapon ban ended, Congress didn't require previously-banned semiautomatic weapons to be registered. The fact that semiautomatic weapons are not now, nor have ever been, subject to a blanket registration requirement suggests that mere possession of them does not pose the same risk of physical injury as possession of weapons subject to a blanket federal registration requirement – like silencers and sawed-off shotguns.

*United States v. Serna*, 2006 WL 156731 at 3 (9<sup>th</sup> Cir. January 23, 2006). This argument should be applied to any proposed enhancement or adjustment based on assault weapons.

A final, probably academic note: The AW ban probably still applies to assault weapons crimes committed before September 13, 2004. A saving statute applies to maintain the effect of repealed statutes over pre-repeal conduct. 1 U.S.C. § 109.

### **D. Frame or Receiver**

Each gun (at least under the 922 subsections) has a single piece which is actually the legally operable “firearm.” 18 U.S.C. § 921(a)(3)(B). This is referred to as the “frame” or “receiver.” A frame or receiver is the portion of the weapon in which is contained the firing mechanism, and to which is generally attached the grip frame, the trigger housing, the stock, the barrel, etc . . . A “frame

or receiver” may not resemble a firearm at all. It may comprise most of the firearm or very little. A collection of parts which appears to be 90% of a weapon is not a firearm if it lacks a receiver. The subtle nature of the receiver may change its legal status. For example: A receiver may have been manufactured before 1898, rendering the gun, even if composed of newer parts, an antique.

### **III. Prohibited Persons Categories, 18 U.S.C. § 922(g)**

This code section imposes a maximum ten-year sentence for possession of a firearm or ammunition. It prohibits possession of guns by: 1) felons; 2) addicts/users of controlled substances; 3) “adjudicated mental defectives”; 4) fugitives; 5) illegal aliens; 6) dishonorably discharged persons; 7) persons who have renounced U.S. citizenship; 8) persons subject to domestic violence restraining orders; and 9) persons convicted of misdemeanor domestic violence offenses.

The most common of these, by far, is section 922(g)(1). A defendant may be charged with being more than one type of prohibited person in possession of a firearm. This creates issues relating to multiplicity and severance, as it has been held that one cannot be punished multiple times for being in multiple categories while possessing a weapon, or for possessing multiple weapons, during a given incident. *See United States v. Dunford*, 148 F.3d 385 (4th Cir. 1998) (multiplicitous to charge fourteen counts under sections 922(g)(1) and 922(g)(3) for six guns and ammunition and two prohibited person categories); *but see United States v. Peterson*, 867 F.2d 1110 (8th Cir. 1989) (allowing for separate convictions under 922(g)(1) and 922(g)(3)).

#### **A. First issue: Try The Category Element**

##### **1. Felons:**

Has your client been convicted of an actual felony? If titled a misdemeanor under state law, even if sentenced up to two years, it is not a felony. 18 U.S.C. § 921(a)(20). If rights have been restored or the old case expunged, it is not a conviction. *Id.* Some states restore rights automatically on termination of a conviction. Some may restore rights by petition. Unfortunately, all firearm rights must be restored to allow possession under federal law of any gun. *Caron v. United States*, 524 U.S. 308 (1998).<sup>2</sup> Also, rights must have been restored or the conviction expunged/reduced or

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<sup>2</sup> Restoration may be case-specific (*e.g.*, defendant successfully petitioned court or state parole board for restoration) or may have occurred automatically by operation of state law (*e.g.*, automatic restoration after defendant discharges sentence). *See United States v. Dupaquier*, 74 F.3d 615, 617-19 (5th Cir. 1996); *see generally* Justice Department’s Office of Pardon Attorney, *Civil Disabilities of Convicted Felons: A State-By-State Survey*. Check the statutes and administrative regulations in the state of conviction; also, see if your client was given any paperwork when he was discharged from prison, parole, or probation. Even if the paperwork is incomplete as a matter of state law (insofar as your client lost his right to possess a firearm under a statute even though his other rights were restored on the paperwork), the paperwork still controls unless it expressly restricted his firearm rights. *See Dahler v. United States*, 143 F.3d

vacated prior to possession. *Lewis v. United States*, 445 U.S. 55 (1980) (constitutional invalidity of predicate felony no bar to 922(g)(1) prosecution). Foreign convictions do not make one a prohibited person. *United States v. Small*, 125 S.Ct. 752 (2005).

A related defense is that the defendant was not a “convicted” felon under state law at time of possession because of some aspect of state law. *See* 18 U.S.C. § 921(20) (“What constitutes a conviction of [a felony] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.”). *See, e.g., United States v. Chapman*, 7 F.3d 66, 67-68 (5th Cir. 1993) (fact that defendant’s state conviction was being appealed at the time that he possessed the firearm rendered him non-convicted under applicable state law).

## 2. Other Categories/Fact Issues:

Based on a challenge for unconstitutional vagueness, the user/addict term has been limited by some cases. *See e.g., United States v. Purdy*, 264 F.3d 809 (9th Cir. 2001) (rejecting vagueness as applied challenge but limiting offense to defendant who takes drugs with regularity, over an extended period of time, and contemporaneously with his purchase or possession of a firearm).

A defendant need not know that he is prohibited from firearm possession to be found guilty of a section 922(g) offense. *United States v. Langley*, 62 F.3d 602, 604 (4<sup>th</sup> Cir. 1995) (en banc); *United States v. Dancy*, 861 F.2d 77, 81 (5th Cir.1988). However, at least with respect to those classes of prohibited persons other than felons and similar “malum in se” categories (*e.g.*, illegal aliens), a strong argument can be made that the Due Process Clause requires the prosecution to prove the defendant’s knowledge that he was prohibited from possessing a firearm based on his status. *See United States v. Hutzell*, 217 F.3d 966, 969-83 (8<sup>th</sup> Cir. 2000) (Bennett, C.J., dissenting) (making such an argument concerning 18 U.S.C. § 922(g)(9), which prohibits persons convicted of domestic violence misdemeanors from possessing firearms); *United States v. Wilson*, 159 F.3d 280, 293-96 (7<sup>th</sup> Cir. 1998) (Posner, C.J., dissenting) (same); *cf. Lambert v. California*, 355 U.S. 225 (1957).

Adjudicated mental defective/committed to a mental institution should also create notice issues and trial issues. Unfortunately, the law is not very good. *See United States v. Midgett*, 198 F.3d 143 (4th Cir. 1999) (commitment for incompetency to stand trial satisfied element); *United States v. Vertz*, 102 F.Supp.2d 787 (W.D. Mich. 2000) (state judicial finding that D was mentally ill and required treatment was not adjudication of mental defectiveness without finding of danger to self or others or inability to manage affairs, but involuntary hospitalizations met commitment prong).

In a fugitive case, “the prosecution must meet the burden of proving that the accused concealed himself with the intent to avoid arrest or prosecution.” *United States v. Durcan*, 539 F.2d

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1084, 1087 (7th Cir. 1998).

29, 31 (9th Cir. 1976).

Illegal alien cases may present some interesting factual/legal issues depending on the timing of the alleged possession/receipt. *United States v. Orellana*, 405 F.3d 360 (5th Cir. 2005) (alien who illegally entered United States but who subsequently was granted “temporary protected status” was not an “illegal” alien under the federal statute based on TPS status); *United States v. Hernandez*, 913 F.2d 1506 (10th Cir. 1990) (while applying for legalization of status, alien may not be deported, and is thus not illegal alien for purposes of firearm possession).

Section 921(a)(33) defines “misdemeanor crime of domestic violence” as an “offense that is a misdemeanor under Federal or State law that has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” The circuits are split on whether a simple misdemeanor assault conviction (not requiring as an element the familial nature of the victim but in fact which involved such an assault) qualifies under the statute. *Compare United States v. Hayes*, 482 F.3d 749 (4th Cir. 2007) (state assault statute must have, as an element, the familial nature of victim), *with United States v. Barnes*, 295 F.3d 1354 (D.C. Cir. 2002) (state statute need not contain such an element). Additionally, it appears that the circuits are divided as well on the issue of whether a state assault statute that does not require the intentional use of force as an element qualifies under the federal statute. *Compare United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006) (state assault statute must require intentional use of force; overruling *United States v. Shelton*, (5th Cir. 2003)), *with United States v. Nason*, 269 F.3d 10 (1st Cir. 2001) (state assault statute need not require intentional use of force).

Title 18 Section 921(a)(33)(B)(I), contains a defense for unrepresented priors: “[a] person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence] for purposes of this chapter unless--(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case.” *See United States v. Akins*, 276 F.3d 1141 (9th Cir. 2002) (holding that a misdemeanor defendant who has signed a waiver of counsel and guilty plea form must have also been advised of the dangers and disadvantages of self-representation in order for waiver of counsel to be valid in underlying domestic violence conviction); *but cf. Iowa v. Tovar*, 541 U.S. 77 (2004).

## **B. Second Issue: Try The Firearm Element and Knowledge of the Characteristics of the Firearm**

Do not take for granted that a firearm is actually a “firearm.” A common firearm which uses a primitive form of ignition, such as black powder, does not meet the § 922 element, regardless of its date. Likewise, a firearm which can not be dated may raise the specter of pre-1898 manufacture and unregulated antique status. There are guns which were manufactured both before and after the 1898 date which do not appear distinct from one another.

An inoperable firearm generally counts as a gun, but at some point, modification must defeat the “designed to” or “may be converted to” “fire a projectile” requirement. Even the ATF allows certain cuts to be made in a receiver, rendering it a nonfirearm. If inoperability in your case goes beyond mere breakage, push for instructions and make a motion for judgment of acquittal on the issue that it must be possible to make a nongun into a gun. *See United States v. Seven Misc. Firearms*, 503 F.Supp. 565 (D.D.C. 1980) (finding some weapons redesigned to be museum pieces not to be firearms).

Finally, whether or not the gun is a firearm, your client must have known that it was. While the government does not have to prove that a defendant had actual knowledge that he was prohibited from possessing firearms, and due process is not violated where a defendant is unaware of the statute, *United States v. Hancock*, 231 F.3d 557 (9<sup>th</sup> Cir. 2000), the government does have to prove that the defendant “knew the particular characteristics that made his [gun] a statutory firearm.” *United States v. Reed*, 114 F.3d 1053 (10<sup>th</sup> Cir. 1997). *See also United States v. Deleveaux*, 205 F.3d 1292 (11<sup>th</sup> Cir. 2000); *United States v. Fraxier-El*, 204 F.3d 553, 561 (4<sup>th</sup> Cir. 2000); *United States v. Jones*, 222 F.3d 349 (7<sup>th</sup> Cir. 2000). This analysis derives from the reasoning in *Staples v. United States*, 511 U.S. 600 (1994), in which the Supreme Court held that a conviction for possession of an unregistered firearm under 26 U.S.C. §5861(d), based on defendant’s possession of a machine gun, required that the government prove that defendant knew of the features of his gun that brought it within the act. Look for whether there is some reason that your client may not have known that the firearm was a firearm, as that term is defined in the U.S. Code. There are guns which appear unique and may be easily mistaken for replicas, antiques, black powder guns, life-like pellet (air) guns, or toys. *See Shotgun News* and *Gun List* for the wide availability of non-guns, often accompanied by the boast “No FFL (federal firearms license) required!” Widely available movie replicas are usually constructed from real surplus parts but substitute a “dummy receiver” for the original. It is metal, appears genuine, and may include moving parts. Caution: this may open the door for the government to introduce evidence about your client’s knowledge of guns (such as his prior three convictions for gun possession, so be careful).

Finally, never forget that in a section 922(g) case, the prosecution must prove beyond a reasonable doubt that your client *knowingly* possessed the firearm. Often, trials involve the defense that the defendant did not know that the firearm was in his house or car. *See, e.g., United States v. Mergerson*, 4 F.3d 337, 349 (5<sup>th</sup> Cir. 1993).

### **C. Third Issue: Try/Litigate the Commerce Element**

#### **1. Preserving Commerce Issue:**

First, you should preserve a constitutional commerce challenge (whether the case goes to trial or results in a guilty plea) and request a constitutional jury instruction<sup>3</sup> and move for a judgment of

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<sup>3</sup> The following is a proposed jury instruction:

acquittal in every case that goes to trial. A common practice is to file a short motion explaining that the Supreme Court may one day change the law and that you are raising the issue simply to preserve it for appeal. If you want to preserve the issue to the fullest, enter a conditional plea or do a stipulated facts bench trial; at the very least, object to the legal sufficiency of the prosecution's factual basis at the guilty plea hearing (while not contesting the truth of those facts and acknowledging that current appellate precedent is against you and requires your objection to be overruled). Circuit precedent forecloses this issue now, but you should nonetheless preserve the issue based on signs of a future change in the law. See United States v. Patton, 451 F.3d 615, 635-36 (10th Cir. 2006) (opinion of McConnell, J.); United States v. Rawls, 85 F.3d 240, 243-44 (5th Cir. 1996) (Garwood, J., specially concurring, joined by Wiener & E. Garza, JJ.); see generally Brent E. Newton, *Felons, Firearms, and Federalism: Reconsidering Scarborough in Light of Lopez*, 3 JOURNAL OF APPELLATE PRACTICE & PROCESS 671 (2001).

## **2. The Commerce Element At Trial:**

The government will ask if you stipulate to this element. Unless you are afraid of looking overly technical and stubborn, e.g., you have a good justification issue, do not stipulate. The government will put on an ATF "expert." There are many permutations of this expert testimony: 1) this firearm was manufactured in state X, and we are in State Y; 2) this firearm has never been manufactured in State Y; 3) There are no registered firearms manufacturers in State Y; 4) This brand of firearm is made in State Y, where we are, but our trace report shows that it was shipped to State X at one time; 5) This brand is made in States X and Y, but this model was made in State X, not here. Consider each hypothetical for a manufacturer that no longer exists. The experts will rely on the ATF reference library, a trace report, a review of annotations from other agents, markings on the firearm, learned treatises, sales and manufacturing forms and invoices, and contact with the factory. Given the actual proposed testimony and basis of opinion, evidentiary and closing argument issues arise. Is the government calling an expert to recount that he called the factory to find out where a gun was made? Are they calling an expert to read the hearsay contained in the trace report? Some of the evidentiary challenge have been lost, but given the permutations, many opinions are distinguishable. For a discussion of this process and the Rule 702-703 and hearsay challenge, see *United States v. Corey*, 207 F.3d 84, 92 (1st Cir. 2000) (Toruella, J., dissenting).

Find out where this expert has testified and get some transcripts. Obtain all sources upon which the expert relies. What exactly does each say? Does it physically place the manufacture of this gun or merely of the corporate entity. ATF experts will testify that a gun was manufactured in Philadelphia, even though the learned treatises actually state that the company was "of Philadelphia,"

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In order to convict the defendant of being a felon in possession of a firearm, you must find beyond a reasonable doubt that the firearm was "possessed in" or "affected" interstate commerce. Not every firearm is "possessed in" or "affects" interstate commerce. Rather, a firearm is possessed in or affects interstate commerce only if the firearm has had an explicit connection with or substantial effect on commerce occurring between at least two states. If you do not find beyond a reasonable doubt that the firearm possessed by the defendant has such an explicit connection or substantial effect on interstate commerce, then you must find the defendant not guilty.

which in firearms terminology may only mean base of operations (Smith and Wesson of Springfield, Mass. does not refer to place of manufacturer of all guns so marked.)

Also look for errors or mysteries in the expert texts, e.g., “it is unknown how many models were produced.” If it appears that the expert's testimony is based merely on reading a trace or on contacting the factory, a strong hearsay challenge should be made during trial, after it is more difficult for the government to fix the problem by calling the actual manufacturer.

Question whether the ID of the firearm is accurate. Many guns are collections of unoriginal parts. Are the identification markings, if any, stamped on a fungible or replaceable part of the firearm, like the grip, or even barrel? Was the stamp made simultaneous with production?

Furthermore, firearms may be counterfeited. It is very easy to make a cast of a receiver or frame. This is why S&W has “marcas registradas” stamped on its side: a warning to Central and South America. Firearms have been copied the world over. Furthermore, firearm parts and production facilities may be liquidated and used by others, who may keep the original model name and patent markings. Many firearms, such as the AR-15 type rifle, a .223 caliber semi-automatic version of the M-16 rifle, are made in numerous parts of the country by multiple manufacturers. The capability to fabricate the receiver is found in every state, and it can be as easy as pouring an aluminum mold.

### **3. Trace and Multiple Sales Databases:**

The ATF uses two databases to assist local police in tracking guns involved in crime. Since ATF does not keep a national registry of the guns and their owners, it must contact the manufacturer and find out to which the distributor the gun was sold. This continues down the purchasing line until the individual consumer is reached. After ATF completes the trace for local law enforcement, it enters the result into the Trace Database. The other Database is the Multiple Sales Database. When a person buys more than one gun in five days, the dealer submits a multiple purchase form to the ATF, which then enters the report into its Multiple Sales Database.

These databases may be requested through FOIA. *See Center for the Prevention of Handgun Violence v. Dept. of the Treasury*, 981 F.Supp. 20 (D.D.C. 1997) (permitting FOIA requests for multiple sales database over ATF's claimed exemptions).

These databases may be used in your case. A trace may be used to show that your gun was shipped from one state to another (if the gun was manufactured in your state but left as in the case of numerous guns from Southern California: Bryco Jennings, etc . . .). These records may show that your client actually purchased the gun. They sometimes contain useful information as well. If the gun was reported stolen by someone associated with multiple sales reports, query whether it was stolen or sold on the black market. The Report may state that numerous weapons are associated with a particular location. There may be significance in the fact that 5 guns have been found in one yard

over the years.

A trace is nothing more than a written report of a series of witnesses who have been contacted regarding the disposition of the firearm. See *United States v. Trenkler*, 61 F.3d 45 (1st Cir. 1995) and *United States v. Davis*, 571 F.2d 1354 (5th Cir. 1978) (excluding ATF trace reports as hearsay).

#### **D. Entrapment/Entrapment by Estoppel/Entrapment Departure:**

Your client may be entrapped into dealing in firearms or into dealing with them illegally. The fact that this can be a legitimate business helps both the predisposition and the inducement prongs. This area is conducive to outrageous government misconduct, too.

Entrapment by estoppel is a separate defense based on reliance on federal officials. See *United States v. Tallmadge*, 829 F.2d 767 (9th Cir. 1987) (reasonable reliance on federally licensed firearms dealer was defense to 922(g)). It is an important defense in gun cases for two basic reasons: It is a part of the gun culture to make legal representation about the item sold, such as “ATF approved” or “No FFL required,” and the gun culture always takes its behavior to the limits of regulation, generating a great deal of dialogue about legality. Companies are constantly developing weapons meant to circumvent regulations. This may mean the sale of black powder guns, antiques, and other non-firearms to prohibited persons; or the sale of parts kits, dummy weapons, and grand fathered guns to the public. Listen to your client about what he or she believed to be the legal status of the weapon. Use of outdated forms may also provide an entrapment by estoppel defense. *United States v. Batterjee*, 361 F.3d 1210 (9<sup>th</sup> Cir 2004) (alien who, after truthfully disclosing all information required on form promulgated by the Bureau of Alcohol, Tobacco and Firearms, had been advised by federally licensed firearms dealer that he could purchase firearm could not be prosecuted).

An interesting case is *United States v. Brady*, 710 F.Supp. 290 (D.Colo. 1989). It discusses the term “any other weapon” within the 26 U.S.C. § 5845 definition, and it holds that if a state judge informs a person that his conviction will permit him to have guns for hunting, due process prevents a federal conviction for possession under those terms. Where these issues do not arise to the level of a defense, they may be used to obtain departures.

#### **E. Defenses: Justification; Self Defense; Transitory Possession**

These are defenses in which the defendant admits that he or she had the gun, but explains that there was good reason to do so. “Allowing for a meaningful justification defense ensures that 18 U.S.C. § 922(g)(1) does not collide with the Second Amendment.” *United States v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996) (note 7 not joined by Hawkins, Hall, JJ.)

Unlawful firearm possession may be justified. It requires a showing of 1) an immediate and unlawful threat of death or serious injury; 2) which was not recklessly brought about by the defendant; 3) where there was no lawful alternative to possession; and 4) where a direct causal connection existed between the firearm possession and avoidance of the harm. *United States v. Gomez*, 92 F.3d 770 (9th Cir. 1996). Many circuits have recognized the justification defense. *See also, United States v. Newcomb*, 6 F.3d 1129 (6<sup>th</sup> Cir. 1993), as well as cases listed below. This defense is much more viable when the time frame of possession is very short. Explaining the presence of a gun through duress, if it does not amount to a defense, may lead to a downward departure for imperfect duress, and it may help distance a firearm from any drugs that may be involved in your case. In general, in most circuits the defense justification has replaced the duress and necessity defenses in gun cases. *See Gomez*. Sometimes you may still want to argue necessity or duress however, depending on the facts of your cases. *See, e.g., United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989) (necessity); *United States v. Moreno*, 102 F.3d 994, 997 (9th Cir. 1996) (duress). There is also a defense of self-defense. *See United States v. Privolos*, 844 F.2d 415, 421 (7th Cir. 1988) (possibility of self-defense where "a convicted felon, reacting out of fear for the life or safety or himself, in the actual, physical course of a conflict that he did not provoke, takes temporary possession of a firearm for the purpose or in the course of defending himself."). Again, this is now more likely to be folded within the general justification defense in gun cases.

Innocent possession may be a defense as well. It was recognized by the United States Court of Appeals for the D.C. Circuit, in an excellent opinion in *United States v. Mason*, 233 F.3d 619 (D.C. Cir. 2001). In *Mason*, the D.C. Circuit held that a defendant may "successfully invoke the innocent possession defense," even when there is no justifiable possession defense, when "two general requirements [are] satisfied . . . (1) the firearm was attained innocently and held with no illicit purpose and (2) possession of the firearm was transitory--i.e., in light of the circumstances presented, there is a good basis to find that the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible." The court refined the second requirement to note that the defendant had to intend to turn the weapon over to the police and to pursue that intent "with immediacy and through a reasonable course of conduct." The court found that this defense was "fully consistent with the legislative purpose underlying § 922(g)(1)" because "'it is the retention of [a firearm], rather than the brief possession for disposal ... , which poses the danger which is criminalized' by felon-in-possession statutes." The court found that this defense "focuse[d] precisely on how the defendant came into possession of the gun, the length of time of possession, and the manner in which the defendant acts to rid himself of possession." If you look at the fact of this case, the fact that the D.C. Circuit found that the district court should have given an innocent possession instruction and submitted the question to the jury is fairly remarkable.

The government will most likely try to force the defendant's hand and require a proffer that is not under seal. Unless you want a ruling prior to trial, resist this forced disclosure of your defense. While there are some cases in which the district court has held a pre-trial hearing or has required an offer of proof, there are a also myriad of cases in which the court has *first* allowed the admission of evidence and *then* decided whether to give an appropriate instruction at the close of the evidence. *See, e.g., United States v. Mason*, 233 F.3d 619, 624 (D.C. Cir. 2001) (above); *United States v.*

*Deleveaux*, 205 F.3d 1292 (11th Cir. 2000) (defendant had testified at trial that he knew he was not allowed to possess a gun, that he knew where in the attic his wife kept her gun, and that he used the gun to scare off a man who shot at him; although it was a close question as to whether defendant was allowed to assert the defense, where the defendant admitted that he did not relinquish the gun and instead hid it back in the attic, the district court "erred on the side of giving the defendant the opportunity to argue this matter to the jury."); *United States v. Elder*, 16 F.3d 733 (7th Cir. 1994) (affirming district court's refusal to give jury instructions regarding the necessity defense to possession of a firearm by a felon; defendant was permitted to testify extensively at trial as to facts he believed supported his necessity defense); *United States v. Paul*, 110 F.3d 869 (2nd Cir. 1997) (reversing district court's refusal to instruct jury on issue of duress; district court had permitted defendant to present his version of facts to the jury, but decided that there was not sufficient evidence to warrant an instruction); *United States v. Lemon*, 824 F.2d 763 (9th Cir. 1987) (defendant permitted to testify as to reasons for why he possessed the gun; district court did not err in failing to give requested jury instruction re self-defense).

#### **IV. Unregistered Weapons/National Firearms Act, 26 U.S.C. § 5861.**

The most likely charges here are for possession of a machine gun or a short-barreled rifle or shotgun. The defense of these cases involves issues beyond those present in a § 922 case.

First, a greater number of factual issues is presented by the definition of firearm here. More importantly, there are more knowledge issues in these cases. The defendant must know that the weapon possesses the characteristics that bring it within the act. *Staples v. United States*, 511 U.S. 600 (1994). *Staples* applied to machine guns. Try to apply it to any type of weapon. See *United States v. Gergen*, 172 F.3d 719 (9th Cir. 1999) (extending to short-barreled shotgun); *United States v. Sanders*, 240 F.3d 1279 (10th Cir. 2001) (applying *Staples* to knowledge of silencer characteristics). Apply this logic to all characteristics, as well: not just the length of the weapon but also whether it is actually a shotgun, to wit, smooth bore and meant to be fired from the shoulder.

Second, it is a defense that the weapon is registered. This will be rare, but it should be explored in discovery, and if the client believes that it was registered, explore the knowledge issue.

Entrapment by estoppel can be important in these cases, as these weapons are surrounded by myriad complicated and contradictory regulations, and their possession is not per se illegal.

Remember that the definitions of antique are not the same between the § 921 and § 5845 sections. An unregistered weapon must not be able to fire modern ammunition in order to be an antique. A 922 gun can fire modern ammo as long as it was made in or before 1898.

#### **V. Title 18, Section 924(c).**

This charge is a mandatory minimum consecutive enhancement for using or carrying a firearm during and in relation to a drug trafficking crime (punishable as a federal drug felony) or federal crime of violence, or possessing a firearm in furtherance of “any such crime.”

A person may be convicted of this count and not the underlying count. The section 924(c) count may be used to tie your gun and drug case and prevent severance. If charged with a drug count and a 924(c) count, a common strategy is to go to trial on the “intent to distribute” element and argue that the 924(c) is tied to it. In other words, if you beat the distribution aspect, the 924(c) should fall, as well.

A qualifying “crime of violence” must be punishable in federal court. *See, e.g., United States v. McLemore*, 28 F.3d 1160 (11th Cir. 1994) (“crime of violence” in § 924(c)(3) refers to “federal” violent felonies and does not include “state” violent felonies); *United States v. Acosta*, 124 F. Supp.2d 631 (E.D. Wis. 2000) (same); *Gov’t of the Virgin Islands v. Frett*, 684 F. Supp. 1324 (D. V.I. 1988) (same).

Multiple 924(c) counts stack on each other. *See Deal v. United States*, 508 U.S. 129 (1993). Thus, for example, two armed bank robbery cases can result in a 30 year consecutive mandatory sentence (on top of the sentence for the robberies). Look for ways to settle a case for dramatically less prison time.

Under *Apprendi*, these counts may be charged as a simple section 924(c) charge but have greater than a 5-year exposure because the maximum sentence in all such cases is life. *But cf. Castillo v. United States*, 120 S.Ct. 2090 (2000) (as a matter of statutory interpretation, “machine gun” in 924(c)(1) is element of separate offense, not sentencing factor).

The most common defense at trial is to challenge the *nexus* between the gun and the drug activity. There is a large body of law on this. Though you may not have a justification defense to the 922(g), possession of firearm for protection against a threat, unrelated to the concurrent drug possession, can be a defense to 924(c). *See, e.g., United States v. Hernandez*, 187 F.3d 806 (8th Cir. 1999). The government will often present an expert on the correlation between drug dealing and weapons possession. There are excellent statistics on the D.O.J. website showing only a 5% correlation between drug possession and firearms possession, varying by drug type. (Email Jerome Matthews, Oakland AFPD, for an excellent cross based on these stats.)

The greater enhancements under section 924(c) may not require knowledge of the characteristics of the weapon. *See United States v. Shea*, 150 F.3d 44, 51-52 (1st Cir.) (detailing reasons *Staples* rationale is inapplicable to § 924(c)).

## **VI. Title 18 Section 924(e), Armed Career Criminal Act and USSG sec. 4B1.4.**

This section, 18 U.S.C. § 924(e)(1) provides a 15 year mandatory minimum to life sentence for a section 922(g) convict who has **three** prior convictions for a violent felony or a serious drug

offense.

The drug offense must be punishable by 10 years or more to qualify as an ACCA prior.

The violent felony must have an element of force (or threat/attempt); it must be arson, burglary, extortion, or involve explosives; or, finally, it must “otherwise” involve conduct that presents a serious potential risk of physical injury to another. With respect to the “enumerated” offenses (e.g., burglary), the Supreme Court employs a “categorical” test that asks whether the prior conviction falls within the “generic, contemporary” definition of the crime. See Taylor v. United States, 495 U.S. 575 (1990); see also Shepard v. United States, 544 U.S. 13, 16-17 (2005). There is a large body of lower court precedent related to enumerated offenses. Be sure not to accept that your client’s prior conviction qualifies based on the state statutory label alone.

For the last category, the “otherwise” clause, be aware that the Supreme Court recently expanded the scope of this clause. See James v. United States, 127 S. Ct. 1586 (2007). It is generally bad for defendants, as it potentially sweeps in many prior convictions that do not appear “violent” (e.g., Florida burglary of a “dwelling,” where dwelling is defined under state law to include the fenced-in backyard of a residence).

There is no time limit excluding ACCA priors (unlike Career Offender), and as long as the offenses are committed on occasions different from one another, they count separately, unlike “related cases” under the Career Offender Guideline, even if they were consolidated for plea and sentencing. Whether prior offenses occurred on separate occasions is often debatable. *See, e.g., United States v. Brady*, 988 F.2d 664 (6th Cir. 1993) (en banc) (compare the majority and dissenting opinions).

Juvenile priors count, but they must meet the above definition and involve use or carrying of a knife, gun, or destructive device. Also, some circuits have held that under *Apprendi*, a judge cannot use a defendant’s prior *nonjury* juvenile adjudication to increase the statutorily mandated maximum punishment. *See United States v. Tighe*, 266 F.3d 1187 (9<sup>th</sup> Cir. 2001); *but see United States v. Smalley*, 294 F.3d 1030, 1033 (8<sup>th</sup> Cir. 2002).

This section makes it absolutely imperative that you gather all records of your client's priors: This means police reports, plea transcripts and all charging documents. Remember also, that the complexity of ACCA deters some Probation Officers from deeply analyzing it. A defender should generally not be the first person to broach the subject of ACCA exposure to authorities! If you believe that you may have an ACCA case, you should review the law in your circuit as to what qualifies as a prior. The law is constantly changing and varies from district to district. There are many outlines that focus only on ACCA that may be obtained to determine whether your client is at risk. Sometimes, the issue will be unclear, and you may want to resolve the case with a guaranteed deal (pursuant to Rule 11(e)(1)(C)) to avoid exposure. If everyone knows that it is an ACCA case, the AUSA may also allow your client to plead to a different charge to avoid the harsh sentence. Again though, be careful not to be the one who tells everyone that your client qualifies

under ACCA.

## **VII. *Old Chief***

The court must accept a defendant's stipulation to a prior felony conviction and keep from the jury the name and nature of the offense – unless the defendant chooses to testify and is thereby subject to impeachment with his prior felony conviction. *Old Chief v. United States*, 519 U.S. 172 (1997). Bifurcation of the felony and possession elements may also be requested where prejudice is likely. Bifurcation without government's consent has been held to be “generally error.” See *United States v. Amante*, 418 F.3d 220 (2d Cir. 2005).

## **VIII. Miscellaneous Issues/Cases:**

The Second Amendment is usually rejected in case law, but the judiciary is full of staunch adherents to the individual rights model. This may benefit the client *sub silencio*, or quite overtly, as in *United States v. Emerson*, 46 F.Supp.2d 598 (N.D.Tx. 1999) (dismissing indictment for possession of firearm while under restraining order as violative of 2d and 5th amendments), *affirmed in part and reversed in part*, 270 F.3d 203 (5th Cir. 2001). The appellate opinion by Judge Garwood holds that there is an individual right to keep and bear arms, but that it is subject to reasonable restrictions. See also *Klein v. Leis*, 146 Ohio App.3d 526, 767 N.E.2d 286 (Ohio Ct. App. 2002) (striking down Ohio concealed weapons and loaded weapon statutes based on state right to bear arms).

There are equal protection issues in firearm regulations as well. Many firearm prohibition statutes contain arbitrary cutoff dates and grandfather provisions. The antique exception to § 922 and the grandfather clause of the Assault Weapons Ban are key examples. These have been challenged, with some success. See *Springfield Armory v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994) (striking a local assault weapon ban on vagueness grounds but criticizing equal protection violation as well); *People's Rights Organization v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998) (holding ban that treated identical weapons differently to be violative of equal protection).

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