

DEFENDING AGAINST A FEDERAL FIREARMS PROSECUTION
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I. Statutory provisions:

18 U.S.C. § 922(g):

(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;
- (2) who is a fugitive from justice;
- (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
- (5) who, being an alien-
 - (A) is illegally or unlawfully in the United States; or
 - (B) except as provided in subsection (y)(2), has been admitted to the United States under a non-immigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
- (6) who has been discharged from the Armed Forces under dishonorable conditions;
- (7) who, having been a citizen of the United States, has renounced his citizenship;
- (8) who is subject to a court order that-
 - (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
 - (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
 - (C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
- (9) who has been convicted in any court of a misdemeanor crime of domestic violence,

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.

18 U.S.C. § 921(a)(3)

The term “firearm” means (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; (D) any destructive device. Such term does not include any antique firearm.

18 U.S.C. § 921(a)(17)(A)

The term “ammunition” means ammunition or cartridge cases, primer, bullets, or propellant powder designed for use in any firearm.

18 U.S.C. § 921(a)(20)

The term “crime punishable by imprisonment for a term exceeding one year” does not include-

- (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
- (B) 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.

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

Logan v. United States, 552 U.S. 23 (2007) (defendant convicted under Wisconsin misdemeanor battery statute which doesn’t cause one to lose one’s civil rights cannot benefit from the “restoration” provision, thereby upholding ACCA mandatory minimum sentence of 15 years. In other words, “retention” doesn’t equal “restoration.”)

Small v. United States, 544 U.S. 385 (2005) (§ 922(g)(1)’s element of “convicted in any court” excludes foreign court convictions.)

18 U.S.C. § 921(a)(33)

(A) Except as provided in subparagraph (c), the term “misdemeanor crime of domestic violence means an offense that -

- (I) is a misdemeanor under Federal, State, or Tribal law; and
- (ii) 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, by 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

(B)(I) A person shall not be considered to have been convicted of such an offense 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; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

18 U.S.C. § 924(a)(2)

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.

18 U.S.C. § 924(e)(1)

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

II. Second Amendment challenges to firearms regulation post-*Heller*.

[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country. . . . Guns in general are not “deleterious devices or products or obnoxious waste materials,” [] that put their owners on notice that they stand “in responsible relation to a public danger[.]”

Staples v. United States, 511 U.S. 600, 610-611 (1994) (citation omitted). More recently in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Supreme Court held one’s right to keep and bear arms under the Second Amendment was an individual right that was grounded in “the inherent right of self-defense.” *Id.* at 2817. Unfortunately, in dictum, the Supreme Court also stated:

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.¹

¹ We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

Heller, 128 S. Ct. at 2816-17. Due to this dictum, every federal circuit to date has found felon in possession of firearms prosecutions are constitutional under the Second Amendment. See *United States v. Brunson*, 292 F.App'x 259, 261 (4th Cir. 2008); *United States v. Anderson*, 559 F.3d 348, 352 & n. 6 (5th Cir. 2009); *United States v. Frazier*, 314 F.App'x 801, 807 (6th Cir. 2008); *United States v. Irish*, 285 F.App'x 326, 327 (8th Cir. 2008); *United States v. Gilbert*, 286 F.App'x 383, 386 (9th Cir. 2008); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Brye*, 318 F.App'x 878, 880 (11th Cir. 2009). Yet, defense counsel should not be discouraged as it is far too premature to shovel dirt upon *Heller* or the Second Amendment.²

As with the confrontation clause jurisprudence after *Crawford v. Washington*, 541 U.S. 36 (2004) was decided, there are likely more Second Amendment decisions to follow over the coming years; the first, most likely, will be on the appropriate standard of review to apply to gun regulations. The Seventh Circuit has begun such a process by vacating and remanding for further findings the district court's denial of a defendant's motion to dismiss under *Heller*. See *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009) (Skoien's Second Amendment challenge for possessing the shotgun in question was not for the "core" right of self-defense, but under his right to bear arms for hunting).³

In *Skoien*'s Second Amendment challenge to 18 U.S.C. § 922(g)(9) (prohibiting firearm possession by a domestic violence misdemeanor), the Seventh Circuit chastised the government for solely relying on *Heller*'s dictum on felon-dispossession laws to support its burden of justifying restricting one's Second Amendment rights. The Seventh Circuit summarized its approach when analyzing firearms' regulations under the Second Amendment as follows:

Although the language about presumptive exceptions makes for some analytical difficulty, we read *Heller* as establishing the following general approach to Second Amendment cases. First, some gun laws will be valid because they regulate conduct that falls outside the terms of the right as publicly understood when the Bill of Rights was ratified. If the government can establish this, then the analysis need go no further. If, however, a law regulates conduct falling *within* the scope of the right, then the law will be valid (or not) depending on the government's ability to satisfy whatever level of means-end scrutiny is held to apply; the degree of fit required between the means and the end will depend on how closely the law comes to the core of the right and the severity of the law's burden on the right.

² For example, in the Tenth Circuit's decision in *McCane*, *supra*, Judge Tymkovich's concurring opinion points to a possible tension between *Heller*'s holding and the aforementioned dictum, given the undeveloped history of felon-dispossession laws. See *McCane*, 573 F.3d at 1047 (Tymkovich, J., concurring). Judge Tymkovich questioned permanently prohibiting the possession of firearms for felons, or non-violent felons, from one's home for protection when the Second Amendment's core principle is one's right to self-defense. *Id.* at 1048-49. Judge Tymkovich suggested the *Heller* dictum has swallowed the *Heller* rule. *Id.* at 1049.

³ "The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense **and hunting**." *Heller*, 128 S. Ct. at 2801 (emphasis supplied).

Skoien, 587 F.3d at 808-809 (emphasis by court).

In determining which standard of review or scrutiny to apply, the Seventh Circuit first ruled out a rational basis test which *Heller* specifically found could not apply to the Second Amendment. *See Heller*, 128 S. Ct. at 2818 n. 27. This leaves either strict scrutiny (“typically reserved for laws that restrict fundamental rights), or a form of intermediate scrutiny.

If strict scrutiny *did* apply here, there is reason to doubt whether *Skoien*’s conviction under § 922(g)(9) could survive Second Amendment challenge. A law subject to strict scrutiny must be narrowly tailored to achieve a compelling governmental interest. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Although “[s]trict scrutiny is not strict in theory, but fatal in fact,” *id.* (internal quotation marks omitted), it is an exacting standard and deliberately difficult to pass, in deference to the primacy of the individual liberties the Constitution secures. Section 922(g)(9) bars *all* persons who have been convicted of a domestic-violence misdemeanor from *ever* possessing a firearm for *any* reason. It is a comprehensive lifetime ban; the prohibition does not expire after a certain period of time, nor does it permit the offender to reacquire the right to possess a gun on a showing that he is no longer a danger. There are no exceptions. The statute does not require any individualized finding that the misdemeanant presents a risk of using a gun in a future crime. *Skoien* was caught in possession of a hunting shotgun about a year after his domestic-violence misdemeanor conviction, while he was still on probation—not five or ten or twenty years later. Perhaps that should make some difference in the analysis. But while preventing domestic gun crime is unquestionably a compelling governmental interest, *United States v. Salerno*, 481 U.S. 739, 749 (1987), the government has made precious little effort here to establish that § 922(g)(9)’s automatic, exceptionless, and perpetual firearms prohibition is the least restrictive means available to achieve this goal.

Skoien, 587 F.3d at 811 fn. 5 (emphasis by court).

Ultimately, the Seventh Circuit found strict scrutiny could not apply because the right asserted by *Skoien* was his right to possess his shotgun for hunting purposes, and not for the “core” Second Amendment right of self-defense. *Id.* at 812. The Seventh Circuit pointed to two Supreme Court decisions that applied differing levels of “intermediate” scrutiny, one regarding gender-based classifications, the other regarding regulating commercial speech. *See Skoien*, 587 F.3d at 812-813, citing *United States v. Virginia*, 518 U.S. 515, 533 (1996) (government’s proffered justification must be “exceedingly persuasive” for gender-based classification); whereas in *Bd. Of Trs. Of State Univ. Of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (the intermediate scrutiny standard requires the government simply provide a “reasonable” fit between the statute’s “means” justifying the governmental interest “ends.” As the Seventh Circuit explained:

Adapting this doctrine to the Second Amendment context makes sense. The Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right. Gun-control regulations impose varying degrees of burden

on Second Amendment rights, and individual assertions of the right will come in many forms. A severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified.

What this means more specifically is that for gun laws that do not severely burden the core Second Amendment right of self-defense there need only be a “reasonable fit” between an important governmental end and the regulatory means chosen by the government to serve that end. *See Fox*, 492 U.S. at 480, 109 S. Ct. 3028. This “require[s] the government goal to be substantial, and the cost to be carefully calculated.” *Id.* The inquiry tests whether the regulation’s “scope is in proportion to the interest served,” *id.* (internal quotation marks omitted), but also accounts for “the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires,” *id.* at 481, 109 S. Ct. 3028.

Skoien, 587 F.3d at 813-814. Thus, the key issue then becomes “whether there is a ‘reasonable fit’ between the permanent disarmament of domestic-violence misdemeanants and the important goal of preventing gun violence against domestic intimates.” *Id.* at 814.

III. Common law defenses.

“A defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” *Mathews v. United States*, 485 U.S. 58, 63 (1988), citing *Stevenson v. United States*, 162 U.S. 313 (1896). Which party is saddled with the burden of proof depends upon whether or not the defense directly attacks an element of the offense.

For example, in *Davis v. United States*, 160 U.S. 469 (1895), the Supreme Court required the government to prove defendant’s sanity by beyond a reasonable doubt as it went to the *mens rea* element of the murder charge in that case. The Due Process Clause likewise was employed when, in *Sandstrom v. Montana*, 442 U.S. 510 (1979), the trial court erred in its jury instruction which shifted the burden to the defendant on the issue of intent where it, too, was an element of the offense. Thus, if the defense employed goes to an element of the offense, as with intent, the burden will fall to the government.

As will be discussed more fully below (*see Mens rea defenses post-Flores-Figueroa topic, infra*), challenges under the *mens rea* element to all offenses, not simply firearms’ offenses, have recently been given new life to cases with a knowledge or willfulness requirement. Historically, most common law defenses, but for intent, rarely went to an element of the offense, but fell under some sort of overall “justification” defense. These include the “necessity” defense, the “duress” defense, and in some jurisdictions a hybrid “fleeting,” “transitory” or “innocent possession” defense.

A number of common law defenses exist even though they are not codified like the insanity (see 18 U.S.C. § 17 and Fed. R. Crim. P. 12.2) and alibi (Fed. R. Crim. P. 12.1) defenses. For example, defenses of entrapment, duress and necessity are not codified, yet judicially recognized in our respective pattern jury instructions. See e.g., *United States v. Bailey*, 444 U.S. 394 (1980) (recognizing the necessity defense); *United States v. Dixon*, 548 U.S. 1 (2006) (recognizing the duress defense).

At common law, the burden of proving any affirmative defense, as with the “justification” defenses, always fell upon the defendant as the facts regarding these defenses rested largely with the party raising them. See *Dixon*, 548 U.S. at 8-9 (citations omitted); see also *Patterson v. New York*, 432 U.S. 197 (1977) (Constitution permits allocation of the burden of proof to the defendant with respect to defenses which do not negate an element of the crime). As recognized in *Patterson*, these defenses explain why a defendant should be found not guilty even though all the elements have been proven.

. . . [T]he existence of duress normally does not controvert any of the elements of the offense itself. . . . Like the defense of necessity, the defense of duress does not negate a defendant’ criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to “avoid liability . . . because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present.” 444 U.S., at 402, 100 S. Ct. 624.[]

Dixon, 548 U.S. at 7 (citations and footnote omitted).

Moreover, the Supreme Court in *Dixon* answered the question left open in *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483 (2001), *i.e.*, when Congress is silent upon a particular common law defense, “it is up to the federal courts to effectuate the affirmative defense of duress as Congress ‘may have contemplated’ it in an offense-specific context.” *Dixon*, 548 U.S. at 17 (citation omitted).

The facts in *Dixon* were the defendant was forced by her boyfriend to purchase firearms for him or risk her own life and the health of her daughters as the boyfriend had threatened. She knew she couldn’t purchase or possess the firearms, yet did so under duress. The district court did instruct the jury on duress, but required the burden be placed on the defendant to prove the affirmative defense by a preponderance of the evidence. The trial court rejected the defense instruction that placed the burden on the government to disprove the duress defense by beyond a reasonable doubt. The Supreme Court affirmed.

Although the Supreme Court did not establish the elements of a “justification” defense, whether it be necessity, duress, or fleeting, transitory or innocent possession, circuit courts of appeal have generally found the following elements, or ones similar thereto, must be proven by the defendant to obtain a jury instruction for one’s affirmative defense.

- 1) the defendant must be under an unlawful and imminent threat of death or serious bodily injury to self or loved ones;⁴
- 2) the defendant had not recklessly or negligently placed him or herself in a situation where he or she would be forced to perform the criminal conduct;
- 3) the defendant had no reasonable, or legal alternative to violating the law, *i.e.*, where he or she could refuse to violate the law and avoid the threatened harm; and
- 4) that a direct causal relationship may be reasonably anticipated between the criminal act and avoidance of the threatened harm.

See e.g., United States v. Ricks, 573 F.3d 198 (4th Cir. 2009) (re: justification defense).

The innocent possession defense recognized in *United States v. Mason*, 233 F.3d 619 (D.C. Cir. 2000), and which a number of other circuit courts of appeal have rejected, was recently raised and rejected by the Tenth Circuit in *United States v. Baker*, 508 F.3d 1321 (10th Cir. 2007). In a very sympathetic case where the jury verdict clearly accepted the defendant's testimony by dismissing the other count, defendant Baker was sentenced under the Armed Career Criminal Act to 19 years for the (potentially innocent) possession of six bullets he picked up off the street on Halloween night to prevent children from finding them. Defense counsel was able to obtain a dissent from the panel, as well as a dissent by a second judge on its petition for rehearing *en banc*. *See United States v. Baker*, 523 F.3d 1141 (10th Cir. 2008) (McConnell, J., dissenting from the denial of rehearing *en banc*). As pointed out by Judge McConnell, not only is there a conflict among the circuits on this issue, it appears in tension with the Supreme Court's recent decision in *Dixon*, *supra*.

As was the case in *Dixon*, Baker's innocent possession defense did not negate an element of the offense or defendant's *mens rea* as Baker admitted to possessing the bullets. The D.C. Circuit stated the following test for a defendant to successfully invoke the innocent possession defense:

The record must reveal that (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. In particular, "a defendant's actions must demonstrate both that he had the intent to turn the weapon over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct."

Mason, 233 F.3d at 624, quoting *Logan v. United States*, 402 A.2d 822, 827 (D.C. 1979).

Judge McConnell's dissent from rehearing *en banc* eloquently states why the innocent possession defense instruction should have been given.

⁴ In some cases, courts have permitted the duress defense to be extended to third parties who are not related to the defendant. *See e.g., United States v. Haney*, 287 F.3d 1266, 1270-73 (10th Cir. 2002).

As this case illustrates, the current state of our jurisprudence regarding implicit affirmative defenses is in disarray. We recognize the affirmative defenses of necessity and duress despite the lack of textual basis in the statute, but invoke the lack of textual statutory basis as a reason for refusing to recognize other affirmative defenses of seemingly equal importance. *Baker*, 508 F.3d at 1325-26. At a time when the Supreme Court was cautioning that the authority of federal courts to craft such non-textual defenses was an “open question,” *Oakland Cannabis Buyer’s Co-op.*, 532 U.S. at 490, 121 S. Ct. 1711, we might well have been justified in drawing the line at the defenses previously recognized, and creating no more. See *United States v. Patton*, 451 F.3d 615, 638 (10th Cir. 2006) (McConnell, J.) (declining to recognize a broader version of the necessity defense, partly on authority of *Oakland Cannabis Buyer’s Co-op.*). But now that the Supreme Court has resolved that Congress enacts criminal statutes against the background of unstated common law defenses, which the federal courts are charged with putting into effect, *Dixon*, 126 S. Ct. at 2447, it is time for us to reexamine this field and determine the applicability of common law defenses in a more coherent and consistent fashion. This case would have provided an excellent opportunity to do so.

Baker, 523 F.3d at 1143 (McConnell, J., dissenting from denial of rehearing *en banc*). For further argument on the “innocent possession” “defense, see *Baker’s cert. petition*.

Thus, to obtain an affirmative defense instruction, you must first request it, *i.e.*, submit a proposed instruction to the district court; it must be a correct statement of the law on the subject defense; and finally, you must offer (usually through defendant testimony) sufficient evidence for the jury to find in your favor. The standard for sufficient evidence appears to be by a preponderance of the evidence. See *Dixon, supra*.

IV. *Mens rea* defenses post-*Flores-Figueroa*.

Defenses that go to the issue of the defendant’s intent have been discussed briefly in the common law defenses topic, *supra*. Title 18 U.S.C. § 922(g) doesn’t specify any intent element of either knowledge or willfulness. The term “knowingly” does, however, appear in the penalty section of 18 U.S.C. § 924(a)(2), which covers § 922(g). See 18 U.S.C. § 924(a)(2) (“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.”) (emphasis supplied).

To act “knowingly” merely requires proof of “knowledge of the facts that constitute the offense.” *Bryan v. United States*, 524 U.S. 184, 191 (1998). To act “willfully” requires the defendant to have “acted with knowledge that his conduct was unlawful. *Id.* at 191-192, quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994). A “willfulness” requirement does apply to some of the firearm statutes, but doesn’t appear to apply in the context of § 922(g) prosecutions. That does not mean the Supreme Court’s decision in *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009), will not aid defense counsel in support of a common law theory of defense instruction, or in attacking the *mens rea* elements the government is required to prove by beyond a reasonable doubt.

Although *Flores-Figueroa* dealt with the aggravated identity theft statute of 18 U.S.C. § 1028A, ultimately, it was decided on simple statutory construction grounds interpreting ordinary English grammar that is generically applicable to all criminal statutes. Although three justices concurred in the ultimate result, there were no dissenting opinions. The Court’s opinion reestablished the position that when the term “knowingly” is used, it is ordinarily understood to apply to **all** the elements of the offense charged.

The manner in which the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English usage. That is to say courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word “knowingly” as applying that word to each element.

Flores-Figueroa, 129 S. Ct. at 1891 (citation omitted).⁵

The fact that the term “knowingly” doesn’t appear in 18 U.S.C. § 922(g), but appears later in § 924(a)(2), should not concern us. The firearms’ statute in question in *Staples v. United States*, 511 U.S. 600 (1994) (re: machinegun registration), too, was silent on any *mens rea* element. Yet, that did not stop the Supreme Court from finding one existed as the concept of *mens rea* is firmly embedded in the principles of Anglo-American criminal jurisprudence. *Id.* at 605-606. For a passage from *Staples* on the common law rule that requires a *mens rea* element in every crime.

Even Justice Alito’s concurring opinion, which seems to parallel Justice Scalia’s concern in his concurrence (which Justice Thomas joined), speaks of the general presumption that the *mens rea* element applies to all the elements unless the statutory context wouldn’t support such a construction. See *Flores-Figueroa*, 129 S. Ct. at 1895 (Alito, J., concurring) (“In interpreting a criminal statute such as the one before us, I think it is fair to begin with a general presumption that the specified *mens rea* applies to all the elements of the offense, but it must be recognized that there are instances in which context may well rebut that presumption.”).

Given the *mens rea* element appears not in 18 U.S.C. § 922(g) which sets forth the elements, but in the penalty provision seemingly encompassing all the elements of § 922(g), the “knowingly” provision likely is to apply to all the elements of the respective § 922(g) offenses. Moreover, given the present statutory structure places the *mens rea* in an entirely different statute, it would appear impossible to argue the statutory text of § 922(g) somehow shouldn’t apply the general presumption that the *mens rea* is to apply to all the elements of the offense. Thus, the government should be required to prove, and defense counsel could propose an instruction on the elements of, *e.g.*, 18 U.S.C. § 922(g)(1), that includes the following: The government must prove each of the elements by beyond a reasonable doubt: 1) the defendant knowingly possessed a firearm; 2) the defendant knew he or she had previously been convicted of a crime in any court; 3) that the defendant knew

⁵ Or for all the English majors in the audience, “where the transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.” *Flores-Figueroa*, 129 S. Ct. at 1890.

this conviction was for a crime that was punishable by imprisonment for a term exceeding one year; and 4) and that the defendant knew the firearm possessed was either “in” commerce (which is rarely applicable) or “affecting” commerce⁶ at the time of his or her possession. Attaching a *mens rea* component to elements 2 and 3 above may not help as the defendants will likely know they were convicted and did time. But elements 1 and 4 should include a “knowingly” *mens rea* component per *Flores-Figueroa*

If there are any collateral issues regarding a particular case, such as the “firearm” in question was merely a starter’s pistol, or simply a frame or receiver, or was a heap of metal parts that could be readily converted into a working firearm, then it is imperative for defense counsel to request an elements instruction (pursuant to *Staples, infra*) that includes that the government must prove the defendant knew that what he or she possessed met the definition of a firearm under 21 U.S.C. § 921(a)(3).

The Supreme Court in *Staples* held the government is required to prove to a jury by beyond a reasonable doubt that defendant knew the weapon he possessed (an AR-15 modified to fire as a fully automatic machinegun) had the characteristics that brought it within the statutory definition a machinegun under 26 U.S.C. § 5845(a)(6). *Staples v. United States*, 511 U.S. 600 (1994). *Staples* stands for the proposition that if Congress fails to establish the necessary *mens rea* as an element within the statute, the courts will do it for them. Thus, not only did defendant Staples have to “know” that he possessed a firearm, but that it was “machinegun” as that term is defined. In light of *Flores-Figueroa*, in those cases where the firearm is not obviously a firearm to the lay person, juries likewise should be instructed that the defendant know the item he possessed met the definition of a firearm under 18 U.S.C. § 921(a)(3).

V. Commerce Clause challenges.

In a nutshell:

- 1) In the usual firearms prosecution, and regardless of the particular subsection, 18 U.S.C. § 922(g) proscribes firearms possession that is “in or affecting commerce” The government’s interstate commerce theory has traditionally been that the firearm was manufactured in a different state or foreign country and had to travel in interstate commerce at sometime in the past to arrive in the state where the defendant possessed it.
- 2) To be “in commerce,” “denote[s] only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for

⁶ Pursuant to the argument made in Section IV of this outline regarding the Commerce Clause, these firearms are not actually “in” commerce as the Supreme Court has defined that term. Moreover, as to the “affecting” commerce prong, the jury should be instructed the defendant knew his or her possession not only affected commerce, but that it “substantially” affected commerce.

interstate markets and their transport and distribution to the consumer.” *United States v. American Building Maintenance Industries*, 422 U.S. 271, 276 (1975), citing *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 195 (1974), citing *Schechter Poultry Corp. V. United States*, 295 U.S. 495, 542-544 (1935).

3) Usually, our clients are caught possessing the firearms in their actual or constructive possession, whether at home, in a car, or on the street, *i.e.*, where the firearm has long since left the “flow” of interstate commerce. Given the above definition of “**in** commerce,” such possession clearly would seem to not qualify. Thus, the government should be required to go under a theory that our client’s possession is “affecting” commerce.

4) In *United States v. Lopez*, 514 U.S. 549, 558 (1995) (re: 18 U.S.C. § 922(q) Gun-free School Zone Act), the Supreme Court reiterated the “three broad categories of activity that Congress may regulate under its commerce power.” Those categories allow Congress to regulate a) the use of the channels of interstate commerce; b) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and c) those activities having a substantial affect on interstate commerce.

5) The Supreme Court found the firearms regulation in *Lopez* was unconstitutional under the third category as the **intrastate** activity of possessing a gun in a school zone does not substantially affect interstate commerce. As has been pointed out by a number of circuit courts of appeal, if the “thing” in interstate commerce being regulated, *i.e.*, the firearm, were to fall within the second category of *Lopez*, then *Lopez* itself would have been decided differently as the gun in that case was also likely manufactured out-of-state. *See United States v. Patton*, 451 F.3d 615, 620-622 (10th Cir. 2006) (re: “body armor” prosecution under 18 U.S.C. § 931), citing *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000). Thus, if our client’s isolated gun possession rightly falls under this third category, the government should be required to establish this possession substantially affects interstate commerce; a feat they can’t honestly accomplish if you can get a jury instruction stating this different standard.

For a complete Commerce Clause challenge to a § 922(g) firearms’ prosecution, *see also Patton, supra*, on why *Scarborough v. United States*, 431 U.S. 563 (1977), should no longer control in light of *Lopez, supra*, and *United States v. Morrison*, 529 U.S. 598 (2000).

VI. 18 U.S.C. § 922(g)(9) and the Domestic Violence misdemeanor.⁷

In *United States v. Hayes*, 129 S. Ct. 1079 (2009), the Supreme Court held the predicate crime of domestic violence is not required to have contained within it the domestic relationship as

⁷ *See* 18 U.S.C. § 921(a)(33) defining “misdemeanor crime of domestic violence” in Section I of this outline. Title 18 U.S.C. § 921(a)(32) defines “intimate partner” and applies only to prosecutions under 18 U.S.C. § 922(g)(8) (re: defendants under court restraining or protective orders).

an element of that offense. Although the government is required to prove the domestic relationship by beyond a reasonable doubt at trial in a § 922(g)(9) prosecution, the “as an element” language of § 921(a)(33)(A)’s predicate definition only appears in the “element of force” requirement, and not regarding the offender’s relationship. If Congress had intended to include both in this requirement, it could have easily used the term “elements.” Having closed one potential defense, still others remain when challenging firearms’ possession prosecutions under § 922(g)(9).

As mentioned earlier regarding *Heller* challenges, the Seventh Circuit’s decision in *Skoien*, *supra*, clearly opens the door to potential successful challenges to § 922(g)(9) prosecutions, especially if one’s possession implicates the “core” Second Amendment right of self-defense. Challenges raising which standard should apply to firearms’ regulations will clearly garner attention from the circuit courts of appeal, and possibly from the Supreme Court. Certainly under a strict, or even an intermediate level of scrutiny, a challenge to the scope of § 922(g)(9) would seem appropriate under *Skoien* (depending on your audience) as the comprehensive and lifetime prohibition to possessing a firearm (whether for hunting (intermediate scrutiny) or self-defense (possibly strict scrutiny)) may seem out of proportion to the interest served by the firearm regulation.

Separate from the Second Amendment challenge, or the Commerce Clause challenge discussed in the immediately preceding section, a challenge based on statutory construction grounds can be made when dissecting the definition of 18 U.S.C. § 921(a)(33)’s “misdemeanor crime of domestic violence.”

First, 18 U.S.C. § 921(a)(33)(A)(I) requires the misdemeanor be under either “Federal, State or Tribal law; . . .” This potentially excludes the majority of prior convictions that fall under the jurisdiction of municipal courts that don’t apply state law, but a uniform municipal code.

Second, 18 U.S.C. § 921(a)(33)(A)(ii) requires the predicate domestic violence conviction to have “as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, . . .” Possibly realizing that a large portion of domestic disputes might rise to the level of threatening physical force, Congress sought to limit the “threatened” portion of this definition to only where the threatened use of a deadly weapon was involved, seemingly requiring the physical ability to access a deadly weapon as in one’s home.

Thus, contrary to the more visible “crime of violence” definition of U.S.S.G. § 4B1.2(a)(1), or the ACCA’s definition of a “violent felony,” which includes an additional “threatened use of physical force,” such a threat must be with a deadly weapon for it to qualify as “domestic violence” under 18 U.S.C. § 922(g)(9). Therefore, where the circumstances of the prior domestic violence conviction only rise to the level of threats (without the use or attempted use of force), and where a deadly weapon is not implicated, the defendant does not have a predicate “misdemeanor crime of domestic violence.”

Third, 18 U.S.C. § 921(a)(33)(B)(i)(I) requires that the predicate conviction to have provided the defendant with representation of counsel, or a showing that the defendant waived his or her right to counsel. And subsection (B)(i)(II) requires the defendant to exercise or waive his or her right to a jury trial where the defendant was entitled to a jury

trial. This last section will have disparate application as some jurisdictions don't provide for a right to a jury trial.

See Blanton v. City of North Las Vegas, Nev., 489 U.S. 538 (1989) (presumption under Sixth Amendment's jury trial right that statutory maximum sentence of 6 months or less is a "petty" offense not entitling defendant to jury trial); *accord United States v. Nachtigal*, 507 U.S. 1 (1993) (*per curiam*).

Fourth, the domestic relationship defined at 18 U.S.C. § 921(a)(33)(A)(ii) limits the use of force element to be committed by a spouse, former spouse, parent or guardian of the victim, or where the victim shares a child in common, or where there was previous cohabitation by a person similarly situated as a spouse, parent or guardian of the victim. This definition appears to exclude any reverse domestic violence that could possibly come from the child in the domestic relationship, unless the child is caring for an elderly parent and would qualify as the victim's guardian. Thus, if the underlying domestic violence prior was for "child on parent" violence, it should not qualify.

Fifth, apply the "categorical approach" to the predicate statute of conviction to see if the statutory elements contain "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A)(ii). In *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008),⁸ the Tenth Circuit overturned defendant's conviction because the underlying (Wyoming) battery statute did not require physical force, but could be accomplished merely by a rude or insolent touching (*i.e.*, a "Newtonian" touching) that the Tenth Circuit holds does not amount to "physical force." Although the Eighth Circuit holds "Newtonian" touching can qualify as force in the context of a "battery," it followed the analysis by the Tenth Circuit in *Hays* and found Missouri's third degree assault statute did not qualify as a "misdemeanor crime of domestic violence." *See United States v. Howell*, 531 F.3d 621 (8th Cir. 2008).

Read more on the "categorical approach" and the pending decision in *Johnson* (*cert. granted* at 129 S. Ct. 1315 (2009)) on whether the "element of force" means actual physical force, or merely "Newtonian" force; and specifically attend the plenary session entitled "Determining 'Crimes of Violence' & 'Violent Felonies'" where each of the three panel attorneys have argued the "categorical approach" before the Supreme Court in the recent decisions of *James*, *Begay*, and *Johnson*.

VII. 18 U.S.C. § 924(c) violations.

Although not part of the § 922(g) prosecutions, section 924(c) is so commonly applied by federal prosecutors that two quick points should be raised. In *Watson v. United States*, 552 U.S. 74 (2007), a unanimous Supreme Court held § 924(c)'s "use" of a firearm during and in relation to a

⁸ Not to be confused with the Supreme Court's case in *Hayes* discussed in this same section of the outline.

crime of violence or drug trafficking crime does not include the scenario where one trades drugs for a firearm as the one who receives the firearm isn't "using" it. The reverse scenario is not as kind. In *Smith v. United States*, 508 U.S. 223 (1993), when one trades a gun for drugs, he or she is "using" the gun as the term "use" is commonly understood.

In *Bailey v. United States*, 516 U.S. 137 (1995), mere possession of a firearm near the scene of drug trafficking does not equate to "use" for § 924(c) purposes, as the term "use" means "active employment" to give that term its ordinary meaning. This was under the "uses or carries" "during and in relation" prong of 18 U.S.C. § 924(c). In order to close this loophole, Congress amended § 924(c) in 1998 to criminalize mere "possession" that was "in furtherance of" a crime of violence or drug trafficking offense to avoid the defense of *Bailey*. It should be noted the 2007 decision in *Watson, supra*, was only charged under the "use" "during and in relation" prong that was applicable in *Bailey*. The government believes the amended "in furtherance" language will cover those scenarios where drugs are traded for a firearm, and that *Watson* was an error in charging. The Ninth Circuit has adopted this position in *United States v. Mahan*, 586 F.3d 1185 (9th Cir. 2009), holding one who trades drugs for a gun "possesses" the gun "in furtherance" of a drug trafficking offense. However, the Supreme Court has not yet revisited *Bailey* under the "in furtherance" prong. Sound contract principles would aid the potential argument that one who trades drugs for a gun only possesses the gun once the transaction (the drug trafficking crime) is completed, *i.e.*, once the gun possession is obtained, it is no longer in furtherance of the drug trafficking crime.

Another odd circuit split has arisen over § 924(c)'s "prefatory" or "except" clause found in subsection (c)(1)(A) which states "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, . . ." See 18 U.S.C. § 924(c)(1)(A). This issue arises when there is a larger mandatory minimum drug sentence that is also charged with a consecutive § 924(c) count. The Second Circuit has held the "prefatory" clause displaces the § 924(c) consecutive penalty or requires it run concurrently due to the "greater minimum sentence" of the drug offense. See *United States v. Williams*, 558 F.3d 166 (2nd Cir. 2009); *United States v. Whitley*, 529 F.3d 150 (2nd Cir. 2008) (interpreting "any other provision of law" to mean just that). Unfortunately, all other circuits to address this issue (nine of them to date) have held the prefatory clause to § 924(c) refers only to a minimum sentence provided by § 924(c) or any other statutory provision that proscribes the conduct set forth in § 924(c). See *United States v. Villa*, ___ F.3d ___, 2009 WL 5103113 (10th Cir. (Wyo.)) (for list of circuits contrary to Second Circuit's holding in *Williams*). The government has petitioned the Supreme Court to grant *certiorari* in the Second Circuit's *Williams*' case. *United States v. Williams*, No. 09-466, (filed October 20, 2009).

VIII. Cert. granted in *O'Brien & Burgess*.

In *United States v. O'Brien*, 542 F.3d 921 (1st Cir. 2008), the defendants (O'Brien and Burgess) were charged under 18 U.S.C. § 924(c) in with using a machinegun in furtherance of a crime of violence (Hobbs Act robbery of an armored car) which carried a mandatory 30 year minimum consecutive sentence. They were also charged with using or carrying three firearms in furtherance of a crime of violence, but where the machinegun was not referenced. The government conceded that if required by the trial court, it could not prove by beyond a reasonable doubt that the

defendants **knew** the one firearm they possessed had been modified into a fully automatic firearm. The trial court held that it must, so the government dropped the machinegun count. It still sought the 30 year consecutive sentence under the other § 924(c) charge the defendants were convicted under, asking the court to find the fact that the machinegun was possessed by a preponderance of the evidence, despite being unable to prove they had knowledge of the particular characteristics of the firearm. Consistent with its earlier ruling, the court refused.

Joining the Sixth Circuit as the only other circuit to so find, the First Circuit affirmed, although admitting it a close question. The Supreme Court granted *certiorari* to resolve the 6-2 circuit split. The question presented is: In a federal firearms case, does the judge decide whether the gun was a machinegun by a preponderance of the evidence, or must a jury find that by beyond a reasonable doubt? In other words, is the machinegun finding of § 924(c)(1)(B)(ii) a sentencing factor as was the case with the brandishing or discharging enhancements of § 924(c)(1)(A)(ii) and (iii) pursuant to *Harris v. United States*, 536 U.S. 545 (2002) and *Dean v. United States*, 129 S. Ct. 1849 (2009), respectively, or is it an element of the offense that needs to be proven to a jury by beyond a reasonable doubt?

The Supreme Court had held the previous version of 18 U.S.C. § 924(c), which included the term firearm and machinegun in the same sentence, was an element that was required to be proven to a jury by beyond a reasonable doubt. *See Castillo v. United States*, 530 U.S. 120 (2000). However, in the wake of *Bailey* (*supra*, regarding § 924(c) “use” requires “active employment” and not simply proximate possession), Congress amended the § 924(c) statute in 1998, and reworked the penalty enhancements into separate subsections from the purported elements of the offense. The Supreme Court in *Castillo* acknowledged in *dicta* the new language and structure of § 924(c) (that was inapplicable in *Castillo*) supported reading the machinegun provision as a sentencing factor, and no longer as an element of the offense, but acknowledged that the type of firearm has traditionally been an element of the offense. *Castillo*, 530 U.S. at 125.

Two years after *Castillo*, and addressing the amended version of 18 U.S.C. § 924(c), the Supreme Court in *Harris*, *supra*, found the “brandishing” enhancement of § 924(c)(1)(A)(ii) was a sentencing factor. In 2009, the Supreme Court held the “discharge” enhancement of § 924(c)(1)(A)(iii), even if the discharge was by accident, did not require any intent on the part of the defendant. The *Harris* rule of statutory structure was firmly in place:

Federal laws usually list all offense elements “in a single sentence” and separate the sentencing factors “into subsections.” . . . When a statute has this sort of structure, we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors.

Harris, 536 U.S. at 552-553 (citation omitted).

In their brief in support of their petition for *certiorari*, the Solicitor General relied almost exclusively on the language and structure of the newly amended statute in support of a “sentencing factor” finding, and requiring the sentencing court to impose the 30 year consecutive sentence if a machinegun is proven by a preponderance of the evidence at sentencing, regardless of any

knowledge on the part of the defendants. In doing so, the Solicitor General all but avoided discussing the elephant in the room, *i.e.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Solicitor General's brief reference to *Apprendi* came in a footnote of their petition for *certiorari* stating that *Harris, supra*, had upheld the previous holding by the Supreme Court in *McMillan, infra*, that mandatory minimums were constitutional. See Petition for a Writ of *Certiorari, United States v. O'Brien and Burgess*, 2009 WL 1786468, at *18, fn 6 (U.S.) ("But a fact that increases a statutory minimum sentence within the range already authorized may be found by the sentencing judge by a preponderance of the evidence."), quoting *Harris*, 536 U.S. at 568, and citing to *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88 (1986).

Countering the government's position is the *Apprendi* jurisprudence grounded in the Sixth Amendment jury trial right if the machinegun finding is deemed an "element of the offense." Can Congress's act of exiling "machinegun" to a subsection of § 924(c) insulate it from the Sixth Amendment? We discussed in an earlier section of this outline how there is a presumption that the "knowledge" or "knowingly" *mens rea* requirement applies to all elements of an offense. Many justices since *Apprendi* have said it doesn't matter whether the legislature may label it a sentencing factor, any fact (other than a prior conviction) that is essential to the level of punishment imposed must be found by a jury by beyond a reasonable doubt. See *e.g.*, *Ring v. Arizona*, 536 U.S. 584, 602, (2002); *id.* at 610 (Scalia, J., concurring); *Rita v. United States*, 551 U.S. 338 (2007) (Scalia, J., concurring). Certainly a finding that the person knowingly possessed a machinegun, as opposed to simply a firearm, given the increased level of punishment, is a "fact" that must be proven and remain protected by the Sixth Amendment. Preserve the Sixth Amendment/*Apprendi* issues of *O'Brien* and *Burgess* at both the trial (when applicable) and sentencing stages to preclude judicial factfinding by a preponderance of the evidence standard.

Conclusion:

There are many emerging areas to challenge the common gun prosecutions we face. Some, like the Commerce Clause challenges have been unsuccessful to date, even with the promising decision of *Lopez* in 1995. As the Tenth Circuit *Patton* decision showed, the argument is there for *Scarborough* to be overturned. However, there is bound to be a number of cases over the coming Supreme Court terms further delving into the Second Amendment challenges under *Heller*, and the balancing of whether the governmental interest supports the level of firearm regulation being challenged. It would appear the permanent and comprehensive domestic violence misdemeanor prohibition to possessing a firearm may be the most vulnerable in light of the in-depth analysis by the Seventh Circuit in *Skoien*.

Not only was the Second Amendment holding in *Heller* grounded in the common law defense of self defense, the use of other common law defenses are likely to grow and find acceptance by appellate courts in light of the Supreme Court's finding in *Dixon* that "Congress' silence" has permitted "the federal courts to effectuate the affirmative defense[s.]" *Dixon*, 548 U.S. at 17. These defenses traditionally don't attack an element of the offense, but if they do as in the cases challenging one's intent or *mens rea*, not only will the burden be on the government after an initial showing by the defense, but the recent decision in *Flores-Figueroa* will aid defendants in requiring the government to prove, and the courts to instruct on a *mens rea* knowledge component of all elements.

As discussed in the section challenging the domestic violence misdemeanor statute of 18 U.S.C. § 922(g)(9), there are numerous statutory construction attacks that can be made to the definition section of 18 U.S.C. § 921(a)(33). Although §§ 921, 922 and 924 of Title 18 of the United States Code continue to grow in complexity, some loopholes open while others close. What constitutes an element, as opposed to a sentencing factor, may be the next window that opens for our clients. Preserve those issues pre-trial, during trial, in the instructional phase on any common law defenses, and at sentencing. This is especially true where there may be a question on whether there is a fact that the government must prove to a jury, rather than letting the court simply make a finding upon a lower preponderance of the evidence standard. If *Staples* requires the characteristics of a machinegun be proven to the jury beyond a reasonable doubt because it is deemed an element under the machinegun statute, why isn't it also required to be similarly proven when it is used to enhance one's sentence to a 30 year consecutive sentence? Other than a prior conviction, if it is a fact that increases one's level of punishment, it is worth preserving in light of the decision pending in *O'Brien and Burgess*.