

FIREARMS AND THE ART OF WAR:

The Basics of Defending A Firearms Case

Winning Strategies Seminar

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I. BASIC DEFINITIONS:

Most of the firearms cases we handle deal with a prohibited person in possession of a firearm 922(g), firearm in connection with drugs or crime of violence 922(c), and the Armed Career Criminal Act. The first part of this handout outlines firearms definitions and these three areas.

A. FIREARM 18 U.S.C. § 921(a)(3)

(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; or (D) any destructive device. Such term does not include an antique firearm.

B. DESTRUCTIVE DEVICE 18 U.S.C. § 921(a)(4)

(4) The term “destructive device” means—

(A) any explosive, incendiary, or poison gas—

(i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses;

C. AMMUNITION 18 U.S.C. § 921(a)(17)(A)

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

(B) The term “armor piercing ammunition” means—

(i) a projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium; or

(ii) a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile.

(C) The term “armor piercing ammunition” does not include shotgun shot required by Federal or State environmental or game regulations for hunting purposes, a frangible projectile designed for target shooting, a projectile which the Attorney General finds is primarily intended to be used for sporting purposes, or any other projectile or projectile core which the Attorney General finds is intended to be used for industrial purposes, including a charge used in an oil and gas well perforating device.

II. STATUTORY PROVISIONS:

A. 18 U.S.C. §922(g): Prohibited Person in Possession of a Firearm

(Max Penalty 10 years)

(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 nonimmigrant 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.

**B. 18 U.S.C. §924(c): Firearm in Connection With Drugs or A Crime of Violence
(Possession= 5-Year Mandatory Minimum; Brandished= 7-Year Mandatory
Minimum; Discharged= 10-Year Mandatory Minimum. Each additional Violation is
25-Year Mandatory Minimum. All are consecutive to all other sentences.**

(1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term “drug trafficking crime” means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

C. ARMED CAREER CRIMINAL ACT 18 U.S.C. 924(e)

(Mandatory Minimum 15 years)

(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).

(2) As used in this subsection—

(A) the term “serious drug offense” means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

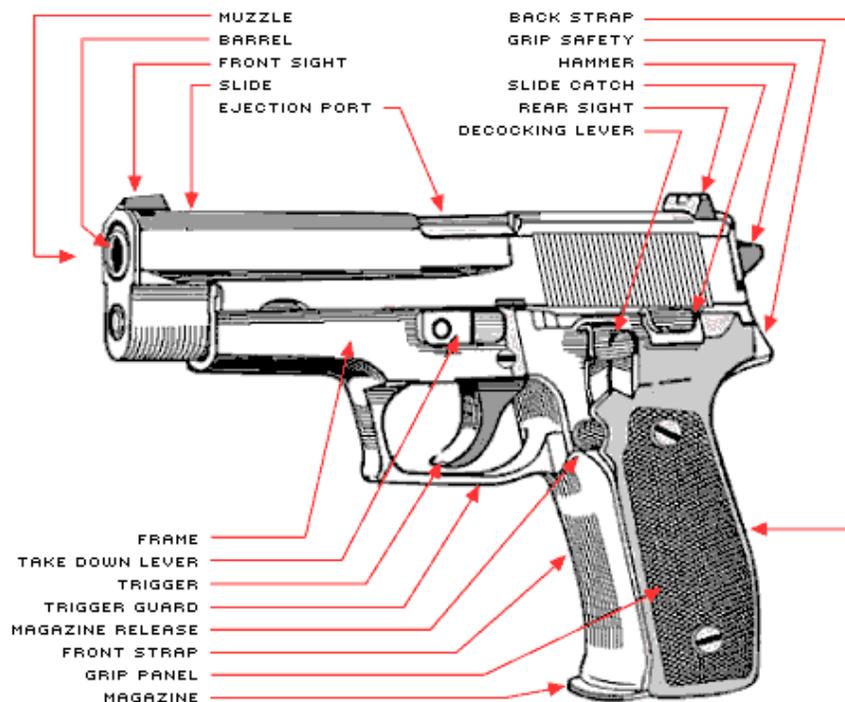
III. KNOWLEDGE OF A FIREARM

As defense attorneys, it is important that we have a basic knowledge of guns, their parts, and how they work. Take some time to research the firearm involved in your case. Similarly, review firearms etiquette so that you can safely and confidently handle a firearm in front of the jury. Firearm knowledge may give you additional credibility with the jurors. When handling a firearm in front of the jury, keep these basics in mind:

- Always keep the firearm pointed in a safe direction.
- Never point it towards the jurors or any other person in the court.
- Treat all firearms as if they are loaded. Even after the agent has testified that it is unloaded.
- Keep your trigger finger off of the trigger.

Below are a few sample websites that provide an introduction to firearms.

http://www.ballistics101.com/integral_parts_of_a_firearm.php



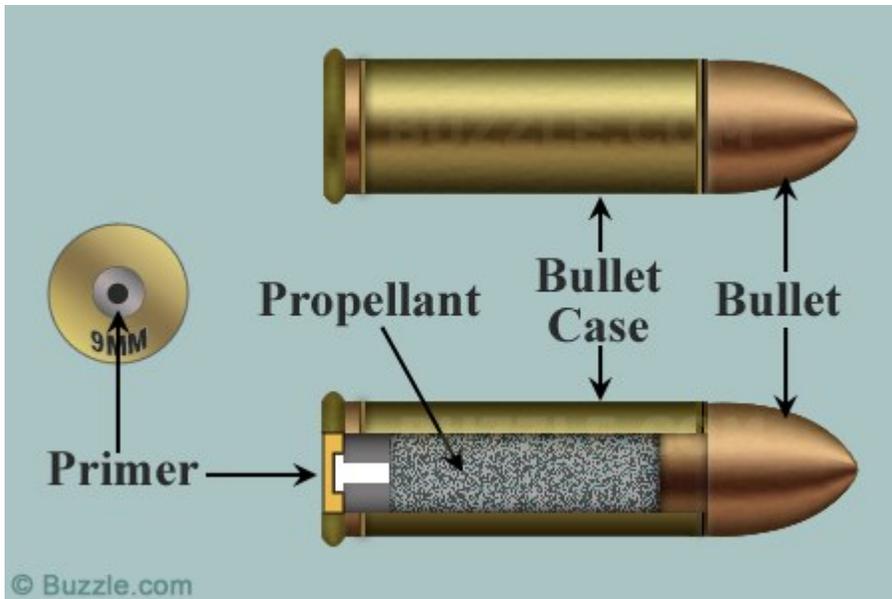
<http://offgridsurvival.com/basicpartsofagun/>

Parts of a Handgun

Pistol & Revolver



<http://www.ibuzzle.com/articles/how-does-a-bullet-work.html>



IV. FIRST LINE OF ATTACK (The Elements)

There are three areas to initially consider when defending a firearms case. 1) Whether your client is a prohibited person, 2) Whether it's a firearm/Whether your client knew it was a firearm, and 3) Whether the firearm was in or affecting commerce.

A. IS YOUR CLIENT A PROHIBITED PERSON?

Most of the prohibited persons cases that we will defend involve felons under 18 U.S.C. 922(g)(1). Often the felon status may be easy to determine. However, scrutinize your client's criminal record to determine if they are indeed a felon. Some states have misdemeanors that may appear to be felonies because they include a sentence of up to 2 years. However, these are not actually convictions that qualify a person as a felon for purposes of a firearms prosecution under 9229g)(1). (See 18 U.S.C. 921(a)(20).

Similarly, check to see if your client was a felon at the time of the possession. There are instances where your client may have had her felony conviction expunged or her rights restored. If either of the above has occurred prior to the possession of the firearm, then your client is not a felon in possession.

B. IS IT A FIREARM?

While this may seem like a given, make sure that the weapon is actually a "firearm." Certain antique guns (pre 1898) are not considered firearms for purposes of a federal prosecution.

Additionally, guns that are designed to use black powder for ignition do not qualify as a “firearm.”

C. DID YOUR CLIENT KNOW IT WAS A FIREARM?

While the government does not have to prove that your client knew she was a prohibited person, the government does have to prove that your client knew the mechanism was a firearm. For instance, your client may have thought the gun was a replica with no firing ability, an antique, or black powder ignited gun.

D. WAS THE FIREARM “IN” OR “AFFECTING” COMMERCE

The government will attempt to prove this element by presenting an ATF witness to testify that the gun was not made in this state, and therefore had to cross state lines to enter the stream of commerce. There are some instances where the agent may refer to a city or state that is actually the corporate headquarters and not necessarily where the gun was manufactured. You can attempt to keep out the agent’s testimony by objecting to hearsay, but that seldom works. However, if the gun was actually made in your state, then there may be an argument against the commerce element.

V. WHAT IF YOUR CLIENT POSSESSED A FIREARM?

A. SELF-DEFENSE

There are limited arguments that may justify your client’s possession of a firearm despite being a prohibited person. For example, self-defense has been upheld as a legitimate reason for a prohibited person to possess a firearm. (See *United States v. Gomez*, 92 F.3d 770 9th Cir. 1996, and *United States v. Newcomb*, 6 F.3d 1129 6th Cir. 1993).

If you pursue a self-defense argument, then you must demonstrate 1) an immediate and unlawful threat of death or serious injury; 2) which was not recklessly caused by your client; 3) there was no lawful alternative to possession; and 4) there a was a direct causal connection between the firearm possession and the avoidance of the harm. (See *Gomez*)

B. INNOCENT POSSESSION

Another argument that could be made if your client possessed a firearm is innocent possession. Under this theory, your client may have found the weapon near an area where children play and picked it up with the intent to turn it over to the authorities. In *United States v. Mason*, 233 F.3d 619 D.C. Cir. 2001, the Court held that a defendant could innocently possess a firearm when “ (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 good basis to find the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible.”

VI. AVOIDING THE ARMED CAREER CRIMINAL ACT

As you know, the ACCA carries a harsh penalty including a mandatory minimum of 15 years in prison. While Johnson has given us opportunity to argue that some of the underlying convictions no longer qualify, we must still seek ways to avoid the penalty under 924(e). One method is to seek alternatives to a conviction under 922(g). use this cheat sheet to find alternatives crimes to which your client could plea instead of 922 (g).

SELECTED FIREARMS OFFENSES — “CHEAT SHEET”

<u>Offense Section</u>	<u>Description</u>	<u>Statutory Maximum</u>
18 U.S.C. § 922(a)(1)	Willful engagement in firearms business without a license (cf. 26 U.S.C. § 5861(a))	5 years (§ 924(a)(1)(D))
18 U.S.C. § 922(a)(2)	Willful shipment or transport of firearm to unlicensed recipient	5 years (§ 924(a)(1)(D))
18 U.S.C. § 922(a)(3)	Willful receipt of firearm from out of state by unlicensed person	5 years (§ 924(a)(1)(D))
18 U.S.C. § 922(a)(4)	Knowing interstate transport of certain weapons by unlicensed person	5 years (§ 924(a)(1)(B))
18 U.S.C. § 922(a)(5)	Willful transfer, sale, or transport of weapon by unlicensed person to another unlicensed, out-of-state person	5 years (§ 924(a)(1)(D))
18 U.S.C. § 922(a)(6)	Knowing making of false statement in connection with purchase of firearm (cf. § 924(a)(1)(A), 26 U.S.C. § 5861(l))	10 years (§ 924(a)(2))
18 U.S.C. § 922(a)(7)	Willful manufacture or importation of armor-piercing ammunition	5 years (§ 924(a)(1)(D))
18 U.S.C. § 922(a)(8)	Willful sale or delivery of armor-piercing ammunition	5 years (§ 924(a)(1)(D))
18 U.S.C. § 922(b)(1)	Willful sale by licensee to juvenile (cf. § 922(x)(1))	5 years (§ 924(a)(1)(D))
18 U.S.C. § 922(b)(2)	Willful sale by licensee to person in violation of state law	5 years (§ 924(a)(1)(D))
18 U.S.C. § 922(b)(3)	Willful sale by licensee to out-of-state recipient	5 years (§ 924(a)(1)(D))
18 U.S.C. § 922(b)(4)	Willful sale by licensee of certain prohibited weapons	5 years (§ 924(a)(1)(D))
18 U.S.C. § 922(b)(5)	Willful sale by licensee without proper record-keeping	5 years (§ 924(a)(1)(D))
18 U.S.C. § 922(d)	Knowing sale to prohibited person	10 years (§ 924(a)(2))
18 U.S.C. § 922(e)	Willful delivery of firearm to common carrier without written notice	5 years (§ 924(a)(1)(D))
18 U.S.C. § 922(g)	Knowing possession of firearm by prohibited person	10 years (§ 924(a)(2))
18 U.S.C. § 922(i)	Knowing shipment or transport of stolen firearm	10 years (§ 924(a)(2))
18 U.S.C. § 922(j)	Knowing possession, etc., of stolen firearm (cf. § 922(u), § 924(l), (m))	10 years (§ 924(a)(2))
18 U.S.C. § 922(k)	Knowing possession, receipt, shipment, or transport of firearm with altered or obliterated serial number (cf. 26 U.S.C. § 5861(g), (h), (i))	5 years (§ 924(a)(1)(B))
18 U.S.C. § 922(l)	Knowing importation or receipt of firearms (cf. 26 U.S.C. § 5861(k))	5 years (§ 924(a)(1)(C))
18 U.S.C. § 922(m)	Knowing falsification of records by licensee (cf. 26 U.S.C. § 5861(l))	1 year (§ 924(a)(3))
18 U.S.C. § 922(n)	Knowing shipment, transport, or receipt of firearm by person under felony indictment	5 years (§ 924(a)(1)(D))

18 U.S.C. § 922(o)	Knowing possession of machine gun	10 years (§ 924(a)(2))
18 U.S.C. § 922(p)	Knowing manufacture, importation, sale, shipment, or possession of firearms designed to avoid detection	5 years (§ 924(f))
18 U.S.C. § 922(q)(2), (3)	Knowing possession or knowing or reckless discharge of firearm in school zone	5 years <i>consecutive</i> (§ 924(a)(4))
18 U.S.C. § 922(r)	Knowing assembly of shotgun or semiautomatic rifle from imported parts	5 years (§ 924(a)(1)(B))
18 U.S.C. § 922(s)	Knowing sale or transfer of handgun without background check	1 year (§ 924(a)(5))

18 U.S.C. § 922(t)	Knowing transfer of firearm without background check	1 year (§ 924(a)(5))
18 U.S.C. § 922(u)	Knowing theft of firearms from licensee (cf. § 922(j), § 924(l), (m))	10 years (§ 924(i))
18 U.S.C. § 922(v)	Knowing possession, transfer, or manufacture of semiautomatic assault weapon	5 years (§ 924(a)(1)(B))
18 U.S.C. § 922(w)	Knowing possession or transfer of large capacity ammunition feeding device	5 years (§ 924(a)(1)(B))
18 U.S.C. § 922(x)(1)	Sale or transfer of handgun to juvenile (mens rea varies) (cf. § 922(b)(1))	1 or 10 years (§ 924(a)(6)(B))
18 U.S.C. § 922(x)(2)	Knowing possession of handgun by juvenile	1 year (§ 924(a)(6)(A))
18 U.S.C. § 924(a)(1)(A)	Knowing making of false statements (cf. § 922(a)(6), 26 U.S.C. § 5861(l))	5 years (§ 924(a)(1)(A))
18 U.S.C. § 924(a)(3)(A)	Knowing making of false statements by licensee (cf. § 922(m))	1 year (§ 924(a)(3))
18 U.S.C. § 924(b)	Shipping, transport, or receipt of firearm with intent to commit felony	10 years (§ 924(b))
18 U.S.C. § 924(c)	Carrying, using, or possessing firearm in connection with crime of violence or drug trafficking crime	5, 7, 10, 25, or 30 year <i>consecutive mandatory minimum</i>
18 U.S.C. § 924(e)	Armed Career Criminal Act: person convicted under § 922(g) who has three prior convictions for serious drug offenses or violent felonies	15 years <i>mandatory minimum</i> (§ 924(e))
18 U.S.C. § 924(g)	Interstate travel to acquire or transfer firearm with intent to commit specified offenses	10 years (§ 924(g))
18 U.S.C. § 924(h)	Transfer of firearm knowing it will be used to commit specified offenses	10 years (§ 924(h))
18 U.S.C. § 924(j)	Causing death during § 924(c) violation	Death, life, or any term of years (§ 924(j))
18 U.S.C. § 924(k)	Smuggling firearm into U.S. with intent to commit specified offenses	10 years (§ 924(k))
18 U.S.C. § 924(l)	Theft of firearm (cf. § 922(j), (u), § 924(m))	10 years (§ 924(l))
18 U.S.C. § 924(m)	Theft of firearm from licensee (cf. § 922(j), (u), § 924(l))	10 years (§ 924(m))
18 U.S.C. § 924(n)	Travel into or within U.S. with intent to violate § 922(a)(1)(A)	10 years (§ 924(n))
18 U.S.C. § 924(o)	Conspiracy to violate § 924(c)	20 years or more (§ 924(o))
18 U.S.C. § 929(a)	§ 924(c) violation while in possession of armor-piercing ammunition	5 years <i>consecutive mandatory minimum</i>
18 U.S.C. § 930(a)	Knowing possession of firearm in federal facility	1 year (§ 930(a))

26 U.S.C. § 5861(g)	Obliteration, alteration or removal of serial number (cf. 18 U.S.C. § 922(k))	10 years (§ 5871)
26 U.S.C. § 5861(h)	Receipt or possession of firearm with obliterated, removed, or altered serial number (cf. 18 U.S.C. § 922(k))	10 years (§ 5871)
26 U.S.C. § 5861(i)	Receipt or possession of firearm unidentified by serial number (cf. 18 U.S.C. § 922(k))	10 years (§ 5871)
26 U.S.C. § 5861(j)	Transport, delivery, or receipt of unregistered firearm	10 years (§ 5871)
26 U.S.C. § 5861(k)	Receipt or possession of unlawfully imported firearm (cf. 18 U.S.C. § 922(l))	10 years (§ 5871)
26 U.S.C. § 5861(l)	Knowingly making false entry on application or record (cf. 18 U.S.C. §§ 922(m), 924(a)(1)(A), 924(a)(3))	10 years (§ 5871)
26 U.S.C. § 5861(a)	Failure to register as dealer, manufacturer, or importer, or to pay required tax (cf. 18 U.S.C. § 922(a)(1))	10 years (§ 5871)
26 U.S.C. § 5861(b)	Receipt or possession of firearm transferred in violation of chapter	10 years (§ 5871)
26 U.S.C. § 5861(c)	Receipt or possession of firearm made in violation of chapter	10 years (§ 5871)
26 U.S.C. § 5861(d)	Receipt or possession of unregistered firearm	10 years (§ 5871)
26 U.S.C. § 5861(e)	Transfer of firearm in violation of chapter	10 years (§ 5871)
26 U.S.C. § 5861(f)	Making of firearm in violation of chapter	10 years (§ 5871)

VII. MOTIONS PRACTICE

Often, we are presented with gun cases that seem to have no chance of winning at a jury trial. However, that is when we need to dig in and out work the government with motions. Drafting and filing reasonable motions can serve two functions; 1) increase the odds of an acquittal at trial by limiting evidence; 2) create a path for a favorable plea. Below are some basic motions that we should be aware of when handling firearms cases:

A. MOTION TO SUPPRESS STATEMENTS

This is classic Miranda territory. If your client has made statements, thoroughly review the circumstances under which the statements are given. Was your client under the influence of an intoxicant? What is her education level? Does she have a mental illness? What type of pressure and scare tactics were used by the police? How many police were present? How were they armed?

B. MOTION TO SUPPRESS (TERRY STOPS)

Officers in the field have expanded their use of the Terry Pat Down. In New York, we saw a clear abuse of the Terry principle. Don't hesitate to challenge the pat downs of your clients. Keep in mind that there is a difference between the stop and the frisk. In *United States v. Williams*, 731 F.3d 678 7th Cir. 2013, police received a report that there were persons with guns out in a high crime area. When officers arrived, they found no actual disturbance, but conducted a pat down anyway. The Court held that the stop was legit, but the pat down was not justified. Follow this line of thinking as the 2nd Amendment concealed carry evolves. Scrutinize the very reason that the officers claim the need to conduct a frisk was warranted in the first place.

Similarly, the 7th Circuit recently rejected the government's argument that the defendant may have had a gun in his backpack, which posed a threat. In *United States v. Leo* 792 F.3d 742 7th Cir. 2015 the Court noted that Wisconsin law permits a concealed carry license when age and criminal history requirements are met. As such, officers had no right to search his bag for less than probable cause when they did not know his age, criminal history, or whether he possessed a valid carry license.

Open carry has also changed the posture for searches in certain circumstances. For example, in *United States v. Black*, 707 F.3d 531 4th Cir. 2013 the Court rejected the government's argument that a lawful open carry in a high

crime area with a companion who has a record does not justify a Terry pat down. The Court went on address the erosion of the 4th Amendment particularly how law enforcement uses the high crime area argument, which has been overly used to abuse minority neighborhoods.

C. MOTION TO SUPPRESS (BAD WARRANT)

Attacking the legitimacy of the search warrant is another effective tactic. Initially, review the warrant to determine if it was actually signed by a neutral and detached magistrate. Next, scrutinize the affidavit and circumstances to challenge the existence of probable cause. If you determine that the cops are lying, then you can pursue a Franks Hearing (Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674). For a Franks Hearing, you must first show that the affidavit contains a false statement made by the officer intentionally, knowingly, or with reckless disregard for the truth. The judge can strike the false statements and then determine if the remainder of the warrant actually rises to the level of probable cause.

Another area to challenge is the good faith exception that allows an officer to act in good faith even if the warrant is determined to be defective. Challenge the officers and show they have a pattern of this behavior or that they should have known and willfully overlooked the defect.

D. MOTION TO SUPPRESS BASED ON UNREASONABLE ENTRY

There are two areas where this issue may arise. One is the knock and talk tactic where police consensually knock on a door and ask the occupant to talk or permission to enter. A close review of the facts will generally show that the police had intent to get into the house and will show a level of intimidation to achieve that goal. If permission is denied, one can bet that officers will claim that they smelled marijuana to justify entry. If permission is given to enter or even to search an area, scrutinize the facts to determine if the cops exceeded the scope of consent.

Another area to challenge is the method of entry on a knock and announce. This is where officers have a search warrant and are required to knock and announce their presence and identity for safety of all parties and to prevent unnecessary destruction of property. More and more we are seeing cases where the officers' actions did not meet the standard of a knock and announce. Unfortunately, a violation of the knock and announce rule does not necessarily require the judge to suppress the evidence found. (See Hudson v. Michigan, 547

U.S. 586, 126 S.Ct. 2159 (2006)). However, if the violation is egregious you may be able to argue that it violates due process and should therefore lead to suppression.

E. 404(b) MOTION

Be aware of the government when they try to introduce prior bad acts of gun possession to demonstrate knowledge of the firearm. There are numerous circumstances where we are arguing outright that our client did not possess a gun. In those instances a prior conviction for gun possession is inappropriate to demonstrate knowledge of the firearm. Below is language that may be used in a motion to prevent 404(b) evidence based on knowledge:

“The Accused moves the Court to deny the admissibility of a prior gun possession under the knowledge component of Rule 404(b) in light of United States v. Jobson, 102 F.3d 214 (6th Cir. 1996). “Knowledge” is not an issue in this case. That is so because Adams’s defense is that he simply did not possess the gun. His defense is not that he did not knowingly possess the gun. That is, Adams is not asserting that, although he possessed the jacket, he didn’t know there was a gun in the pocket. See, e.g., United States v. Chesney, 86 F.3d 564, 572 (6th Cir. 1996) (raising such a defense). In this circumstance, where the defense is not a lack of knowledge, it is improper to admit 404(b) evidence based on a “knowledge” rationale. United States v. Jobson, 102 F.3d 214, 221 (6th Cir. 1996).

In Jobson, the defendant was chased by police officers into a house. The officers swore that during the chase Jobson threw down a gun that they retrieved in the street, and thus he, as a felon, violated 18 U.S.C. § 922(g)(1) by knowingly possessing a firearm. Jobson, however, claimed that the gun was not his and he did not possess it, although he did not claim that he unknowingly or unwittingly possessed the gun. The distinction between these two defenses made all of the difference as the Sixth Circuit held it was error to rely on “knowledge” as a basis for admitting bad-acts evidence in the circumstances:

Defendant’s knowledge that what he was carrying in his arms was a gun was scarcely in issue. Defendant’s theory of defense was that the gun was not his and that he did not have possession of it on July 2, 1994. He did not claim nor could there be any possible basis for his claiming that he did not know that a gun was in his possession.

Id. at 221; see also *United States v. Merriweather*, 78 F.3d 1070, 1077 (6th Cir. 1996) (rejecting “knowledge” as a valid 404(b) rationale where the defendant “never claimed he was unknowingly dealing in cocaine or was unwittingly engaging in unlawful activity”); *United States v. Johnson*, 27 F.3d 1186, 1194 (6th Cir. 1994).

This same distinction makes the difference in this case. Like the defendants in Jobson, Merriweather and Johnson, the Accused is not asserting that his engagement in criminal activity was unknowing or unwitting. Rather, he asserts that he did not engage in criminal activity at all: that he did not possess a firearm period. Accordingly, the “knowledge” rationale cannot justify the admission of the 404(b) evidence.

VIII. JURY INSTRUCTIONS:

Drafting the appropriate jury instructions can be an effective means to advance your theory of the case. Look beyond pattern jury instructions. Research positive law that supports your theory and convert them into jury instructions. Below are some examples.

A. Jury Instruction Regarding Uncorroborated Statement

The Accused submits the following supplemental jury instruction:

Evidence has been presented that the accused admitted that he possessed the firearm and controlled substances as described in the Indictment. You must decide whether the defendant did in fact make the statement. If you find he did make the statement, then you must decide what weight, if any, you feel the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning the defendant himself and the totality of the circumstances under which the statement was allegedly made.

You may not convict the accused solely upon his own uncorroborated statement or admission.

United States v. Adams, 583 F.3d 457, 469-70 (6th Cir. 2009); *United States v. Marshall*, 863 F.2d 1285, 1288 (6th Cir. 1988).

B. Jury Instruction Regarding Missing Evidence

The Accused submits the following supplemental jury instruction.

The trial evidence indicates that physical evidence is missing in this case. Consequently, the Court should give a standard missing-evidence instruction, as follows:

Physical evidence is missing in this case. If you believe its absence was caused by the carelessness actions or inactions of police, then you may infer, but are not required to infer, that such evidence, if available now, would have been favorable to The Accused and would have been adverse to the Government.

Rogers v. T.J. Samson Community Hospital, 276 F.3d 228, 232 (6th Cir. 2002)(remanding for new trial due to failure to give this missing evidence instruction as to careless party); *see United States v. West*, 393 F.3d 1302, 1309 (D.C. Cir. 2005) (“A missing-evidence instruction is appropriate if it is peculiarly within the power of one party to produce the evidence and the evidence would elucidate the disputed transaction”), *abrogated on other grounds by Burgess v. United States*, 553 U.S. 124, 128 (2008); *United States v. Blakemore*, 489 F.2d 193, 195-96 (6th Cir. 1973) (stating standard for missing witness instruction); 1-6 Modern Federal Jury Instructions – Criminal ¶ 6.04; *see generally Graves v. United States*, 150 U.S. 118, 1221 (1893) (“[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.”)

C. Jury Instruction Regarding Police Procedure

The Accused submits the following supplemental jury instruction.

The trial evidence indicates that police failed to follow standard investigative procedures with respect to the preservation of items of evidence that may have tended to exculpate The Accused, e.g., the jacket. It also indicates police failed to test for fingerprints on the crack pipe and baggies. Consequently, the Court should instruct the jury as follows:

The fact that certain tests were not conducted or certain police procedures not followed could raise a reasonable doubt as to guilt.

Commonwealth v. Bowden, 379 Mass. 472, 485 (1980).

In the alternative, this Court should give a more detailed, pattern instruction on this point:

A failure on the part of the Government to follow standard or normal investigative procedures during the police investigation is a factor that you may consider in evaluating the evidence presented in this case. With respect to this factor, you should consider three questions:

1. Whether the omitted actions were standard procedures or steps that would otherwise normally be taken under the circumstances;
2. Whether the omitted actions could reasonably have been expected to lead to significant evidence of The Accused's guilt or innocence; and
3. Whether the evidence provides a reasonable and adequate explanation for the omitted actions.

If you find that any omissions in the investigation were significant and not adequately explained, you may consider whether the omissions tend to effect the quality and reliability of the evidence presented by the Government. Alternatively, you may consider whether the omissions tend to show the existence of police bias against The Accused in conducting the investigation.

All of these considerations involve factual determinations that are entirely up to you, and you are free to give this matter whatever weight, if any, you deem appropriate based on all the circumstances. 1-2 Mass. Jury Instructions – Criminal No. 2-21.

IX. CONSTRUCTIVE POSSESSION & MERE PRESENCE

We often encounter a situation where the government has charged our client with constructive possession. Constructive Possession is the power and intent to exercise dominion and control over the object. Mere proximity is not enough. Focus on the surrounding circumstances and expose the weakness in the government's theory. Here are some cases that may guide you in your analysis:

- *United States v. Hooks*, 551 F.3d 1205, 1213-14 (10th Cir. 2009) (no constructive possession where defendant was 1 of 3 passengers, no fingerprints, no showing of knowledge or control)

- *United States v. Cunningham*, 517 F.3d 175 (3d Cir. 2008) (holding that defendant – who simply walked down street with co-defendant who was carrying gun in a backpack – did not constructively possess gun in backpack)
- *United States v. Perez*, 661 F.3d 568, 578 (11th Cir. 2011)(mere awareness of the presence of guns is insufficient for constructive possession. Need intention or ability to exercise dominion or control over weapons).
- *United States v. Mills*, 29 F.3d 545 (10th Cir. 1994) (Living in a house with guns where the housemate claimed ownership and that the defendant had no knowledge that they were in the house did not constitute constructive possession.)
- *United States v. Mergerson*, F.3d 337(5th Cir.1993) (where gun was found between box spring and mattress of bed where defendant slept with girlfriend after moving in a month earlier, and weapon purchased by girlfriend at earlier date, evidence insufficient to establish constructive possession.)

X. CSI

In gun cases, the government often flip flops on the significance of fingerprints and DNA depending on whether they have such evidence or not. Do not be afraid of such. On the one hand, you can challenge the evidence as not being scientific. On the other hand, the evidence may not be as bad as you imagine. For example, there are several cases have been reversed because there was no evidence as to when the DNA or fingerprints were placed on the gun. In *United States v. Katz*, 582 F.3d 749 (7th Cir. 2009), the Court found “absolutely no evidence” that Katz was in possession of the gun on February 15 because the technician could not say when the prints were placed on the gun. (See also *Miller v. State*, 107 So.3d 498 Fla. Ct. App. 2013).

When there is no fingerprints, the government goes through this presentation of how the police department is not like CSI on TV and blah, blah, blah. Yet look how effective this cross-examination was to show that it is like CSI and that the lack of testing can help the client.

1 **THE COURT:** Go ahead.

2 **MR. GERMANY:** Thank you.

3 **BY MR. GERMANY:**

4 **Q.** All right. I just handed you the report that
5 you prepared for crime -- for crime -- for this
6 crime scene, is that right?

7 **A.** Right.

8 **Q.** Okay. And so some of the things that your
9 office -- the reason you are preserving this
10 evidence, there are various tests that can be run.
11 Can you just read those out to the ladies and
12 gentlemen of the jury, what can be done by crime
13 scene?

14 **A.** Do you want me to read every tests on here?

15 **Q.** Paragraph 19, all of the tests that are
16 possible?

17 **A.** Oh, okay.

18 We could process with black powder, magnetic
19 powder.

20 **Q.** Hold on.

21 Black powder, what is that?

22 **A.** Black powder is like a dust you can use that
23 will print out a print.

24 **Q.** So black powder is to get latent prints,
25 right?

1 A. Yes.

2 Q. So that's what they do on the CSI show, isn't

3 it --

4 A. Yes.

5 Q. -- sometimes?

6 Okay. What else?

7 A. Forensic dye, hexene.

8 Q. Okay. Do you know what that is?

9 A. Yes.

10 Q. Do they do that on that show CSI sometimes?

11 A. Yes.

12 Q. Okay. What else?

13 A. You have ninhydrin.

14 Q. Okay. What's that?

15 A. That's a chemical you use to bring out

16 prints.

17 Q. And do they do that on that show sometimes,

18 CSI?

19 A. Yes.

20 Q. Okay. Keep going.

21 A. Okay. We've got gunshot residue.

22 Q. All right. And what is gunshot residue?

23 A. Gunshot residue is someone fired a weapon,

24 you can use an alternative light source and you can

25 get the gunshot residue on his clothing, hands or

1 face.

2 Q. So if someone fires a gun, that gun -- that
3 powder kind of shoots out from the gun -- and it's
4 invisible to the naked eye, right?

5 A. That's correct.

6 Q. So when the CSI puts it under a certain
7 light, if they put like your hand under a certain
8 light, and you shot a gun, they'll have that, right?

9 A. Yes.

10 Q. What else?

11 A. Dental stone.

12 Q. What's that?

13 A. A dental stone is to make a cast of a
14 footprint.

15 Q. Okay. That wasn't really needed in this
16 case, right?

17 A. No.

18 Q. There are a lot of different tests, you would
19 agree that your office has the capability of doing?

20 A. Yes.

21 Q. Just like that TV show?

22 A. Yes.

23 Q. So when you say that it's not like CSI, it's
24 actually your office does do CSI work similar to the
25 show. Your job isn't necessarily -- you don't do

1 everything, right?

2 A. That's correct.

3 Q. You just do -- you are just part of the team?

4 A. Yes.

5 Q. All right. Now the reason you wear gloves,
6 you would agree with me, is because not only are you
7 protecting any evidence because guns may have
8 fingerprints on them, right --

9 A. Yes.

10 Q. -- that's one of the reasons that you wear
11 gloves?

12 A. Yes.

13 Q. But also, have you ever heard of something
14 called touch DNA?

15 A. Yes.

16 Q. Okay. Touch DNA, you would agree with me
17 touch DNA is if I'm touching this object, I can
18 leave these little tiny skin cells behind, right?

19 A. Yes.

20 Q. And these skin cells, that's what touch DNA
21 is, isn't it?

22 A. Yes.

23 Q. And sometimes it can be used to convict
24 people and sometimes it can be used to exonerate
25 people, is that right?

1 A. Yes.

2 Q. We hear about cases all the time where DNA
3 clears -- clears people, that's what I mean --

4 A. Yes.

5 Q. -- by clearing.

6 You've heard of that, right?

7 A. Yes.

8 Q. All right. And so your job is to simply
9 preserve it.

10 You don't do the DNA testing yourself, right?

11 A. That's correct.

12 Q. But you preserve it?

13 A. Yes.

14 Q. And you put it in that box.

15 Isn't it true that a gun can have touch DNA.

16 A. Yes.

17 Q. And shells can have DNA -- touch DNA?

18 A. Yes.

19 Q. Anything anybody can touch physically, it can
20 leave that behind, right?

21 A. Yes.

22 Q. And that's very valuable, correct?

23 A. Yes.

24 Q. It can be valuable to your office, but it can
25 also be very valuable to the defendant if he is

1 innocent, right?

2 A. Yes.

3 Q. Okay. And you did your job in this case?

4 A. Yes.

5 Q. You did your job as a member of this team,
6 and you preserved the evidence in this case, they
7 called you out special --

8 A. Yes.

9 Q. -- and did your job?

10 A. Yes.

11 MR. GERMANY: Can I have one second, Your
12 Honor?

13 THE COURT: Sure.

14 MR. GERMANY: That's all I have, Judge.
15 Thank you.

16 THE COURT: All right.

17 MR. YOUNG: No further questions.

18 THE COURT: Hold on just a -- I'm sorry.

19 MR. YOUNG: No redirect.

20 THE COURT: Okay, thank you.

21 Officer Morgan, thank you very much.

22 You can step down. You are excused.

23 Why don't you just sit it right there on
24 the table, yeah.

25 (Witness excused.)

