## 8.71 FIREARMS—USING, CARRYING, OR BRANDISHING IN COMMISSION OF CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME

## (18 U.S.C. § 924(c))

The defendant is charged in [Count \_\_\_\_ of] the indictment with [using] [carrying] [brandishing] a firearm during and in relation to [*specify applicable crime of violence or drug trafficking crime*] in violation of Section 924(c) of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant committed the crime of [*specify crime*] as charged in [Count \_\_\_\_ of] the indictment, which I instruct you is a [crime of violence] [drug trafficking crime]; and

Second, the defendant knowingly [used] [carried] [brandished] the [*specify firearm*] during and in relation to that crime.

[A defendant “used” a firearm if [he] [she] actively employed the firearm during and in relation to [*specify crime*].]

[A defendant “carried” a firearm if [he] [she] knowingly possessed it and held, moved, conveyed or transported it in some manner on [his] [her] person or in a vehicle.]

[A defendant “brandished” a firearm if [he] [she] displayed all or part of the firearm, or otherwise made the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm was directly visible to that person.]

A defendant [used] [carried] [brandished] a firearm “during and in relation to” the crime if the firearm facilitated or played a role in the crime.

**Comment**

In *United States v. Thongsy*, 577 F.3d 1036, 1043 n.5 (9th Cir. 2009), the Ninth Circuit held that the former version of this instruction “should be revised to clarify there are two ways to prove an offense under § 924(c): the defendant either (1) used or carried a firearm ‘during and in relation to’ a crime or (2) possessed a firearm ‘in furtherance of’ a crime.” Use this instruction when the defendant is charged with using, carrying, or brandishing a firearm during and in relation to a crime. When the defendant is charged with possessing a firearm in furtherance of a crime, use Instruction 8.72 (Firearms—Possession in Furtherance of Crime of Violence or Drug Trafficking Crime).

The trial judge may want to consider having separate instructions regarding using and brandishing a firearm, depending on how the case is charged.

If the crime of violence or drug trafficking crime is not charged in the same indictment, the elements of the crime must also be listed and the jury must be instructed that each element must be proved beyond a reasonable doubt.

The Supreme Court has construed the term “use” to require proof that “the defendant actively employed the firearm during and in relation to the predicate crime.” *Bailey v. United States*, 516 U.S. 137, 150 (1995). “The active-employment understanding of ‘use’ certainly includes brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm.” *Id.* at 148. “[A] reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a ‘use,’ just as the silent but obvious and forceful presence of a gun on a table can be a ‘use.’” *Id.* Although a person uses a firearm when he or she trades it for drugs, *Smith v. United States*, 508 U.S. 223, 241 (1993), a person does not “use” a firearm when he or she receives it in trade for drugs, *Watson v. United States*, 552 U.S. 74, 83 (2007).

The Supreme Court has construed the term “carry” to include carrying on a person or vehicle. *Muscarello v. United States*, 524 U.S. 125, 130-33(1998). “‘Carry’ implies personal agency and some degree of possession . . . .” *Id.* at 134. However, the firearm need not be “immediately accessible.” *Id.* at 138; *see also id.* at 126-27 (carrying “applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies”); *United States v. Long*, 301 F.3d 1095, 1106 (9th Cir. 2002).

“[T]he 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.” 18 U.S.C. § 924(c)(4). The “brandishing” of a firearm is a type of “use”, but carries a greater penalty. *Compare id.* § 924(c)(1)(A)(i) (setting statutory minimum penalty for “use” at five years) *with* *id.* § 924(c)(1)(A)(ii) (setting statutory minimum penalty for “brandishing” at seven years). *See also United States v. Carter*, 560 F.3d 1107, 1114 (9th Cir. 2009) (remanding for re-sentencing when it was unclear whether court found the defendant “used” or “brandished” a firearm).

Discharging a firearm is another type of “use” that carries a penalty greater than that for brandishing. *See* 18 U.S.C. § 924(c)(1)(A)(iii) (setting statutory minimum penalty for “discharge” of a firearm at ten years).Therefore, when discharging is alleged, this instruction should be modified accordingly. The statute does not contain a definition of the term “discharge.” The Supreme Court has held that discharge of a firearm does not require proof of intent to discharge. *Dean v. United States*, 556 U.S. 568, 577 (2009) (discharge of firearm does not require separate proof of intent; “10-year mandatory minimum applies if a gun is discharged in the course of a violent or drug trafficking crime, whether on purpose or by accident”).

Whether the defendant brandished or discharged a firearm is a question that must be submitted to the jury and found beyond a reasonable doubt. *See Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) (holding that “any fact that increases the mandatory minimum [sentence] is an ‘element’ that must be submitted to the jury”).

A “crime of violence” is an offense that is a felony and “has an element the use, attempted use, or threatened use of physical force against the person or property of another.” *United States v. Davis*, 139 S.Ct. 2319 (2019) (quoting 18 U.S.C. § 924(c)(3)(A)). “Physical force” is “force capable of causing physical pain or injury,” and includes “the amount of force necessary to overcome a victim’s resistance.” *Stokeling v. United States*, 139 S.Ct. 544, 533-55 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)).

Similarly, whether the defendant used, carried, or brandished any of the firearm types listed in 18 U.S.C. § 924(c)(1)(B) is an element of a separate, aggravated crime to be proved to the jury beyond a reasonable doubt. *Castillo v. United States*, 530 U.S. 120, 131 (2000); *United States v. O’Brien*, 560 U.S. 218, 231-35 (2010) (fact that firearm is machinegun is element of offense to be proved to jury beyond a reasonable doubt); *United States v. Woodberry*, 987 F.3d 1231, 1236 (9th Cir. 2021) (stating that fact that firearm is short-barrel rifle is element of offense). In appropriate cases, a special interrogatory may be used to determine the jury’s findings as to whether the defendant used, carried, or brandished particular firearm types listed in 18 U.S.C. § 924(c)(1)(B). *See Castillo*, 530 U.S. at 128. With respect to 18 U.S.C. § 924(c)(1)(B)(i), there is no mens rea requirement that the defendant knew the rifle barrel’s length. *See* *Woodberry*, 987 F.3d at 1239 (holding “§ 924(c)(1)(B)(i) requires no showing of mens rea as to the rifle barrel’s length to sustain a conviction”).

A crime of violence for purposes of § 924(c)(3)(A) is one whose “commission requires proof of both the specific intent to complete a crime of violence, and a substantial step actually (not theoretically) taken toward its completion. *St. Hubert*, 909 F.3d at 351. It does not matter the substantial step . . . is not itself a violent act or even a crime.” *United States v. Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020). “The definition of ‘crime of violence’ in § 924(c)(3)(A) explicitly includes not just completed crimes, but those felonies that have the ‘attempted use’ of physical force as an element.” *Id.* Thus, “when a substantive offense would be a crime of violence under 18 U.S.C. § 924(c)(3)(A), an attempt to commit that offense is also a crime of violence.” *Id.* at 1261.

Whether a particular crime is a crime of violence is a question of law. *See United States v. Amparo*, 68 F.3d 1222, 1226 (9th Cir. 1995) (crime of violence); 18 U.S.C. § 924(c)(2) (drug trafficking crime).

*See United States v. Potter*, 630 F.3d 1260, 1261 (9th Cir. 2011) (holding that defendant charged under § 924(c)(1)(A) was not entitled to a “Second Amendment defense” instruction).

A conviction based on an accomplice theory of liability may serve as a predicate for a § 924(c) conviction. *See* *United States v. Henry*, 984 F.3d 1343, 1356 (9th Cir. 2021).

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