## 8.72 FIREARMS—POSSESSION IN FURTHERANCE OF CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME

## (18 U.S.C. § 924(c))

The defendant is charged in [Count \_\_\_\_\_\_ of] the indictment with possessing a firearm in furtherance of [specify applicable crime of violence or drug trafficking crime] in violation of Section 924(c) of Title 18 of the United States Code. In order 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];

Second, the defendant knowingly possessed the [specify firearm]; and

Third, the defendant possessed the firearm in furtherance of the crime of [specify crime].

A person “possesses” a firearm if the person knows of its presence and has physical control of it, or knows of its presence and has the power and intention to control it.

**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 possessing a firearm in furtherance of a crime. When the defendant is charged with using or carrying a firearm during and in relation to a crime, use Instruction 8.71 (Firearms—Using or Carrying in Commission of Crime of Violence or Drug Trafficking Crime).

The definition of possession is taken from Instruction 3.17 (Possession—Defined). *See also Thongsy*, 577 F.3d at 1041 (defining constructive possession). The joint possession language from Instruction 3.17 may be used if appropriate to the circumstances of the case.

A district court does not err in failing separately to define “in furtherance of” in its instruction to the jury on possession of a firearm in furtherance of a drug trafficking crime. *United States v. Lopez*, 477 F.3d 1110, 1115-16 (9th Cir.), *cert. denied*, 552 U.S. 855 (2007) (instruction that separately listed requirements of possession and possession in furtherance of the crime eliminated the possibility that rational juror would convict defendant upon finding mere possession). “The question whether possession of a firearm is ‘in furtherance of’ a crime is a ‘fact-based inquiry into the nexus between possession of the firearm and the drug crime.’” *Thongsy*, 577 F.3d at 1041 (citation omitted); *see* *United States v. Mahan*, 586 F.3d 1185, 1187-89 & n.3 (9th Cir. 2009) (holding that a defendant who receives guns in exchange for drugs possesses those guns “in furtherance of” his drug trafficking offense).

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.  *See United States v. Mendoza*, 11 F.3d 126 (9th Cir. 1993).

In appropriate cases, a special interrogatory may be used to determine the jury’s findings as to whether the defendant possessed the particular firearm types listed in 18 U.S.C. § 924(c)(1). *See Castillo v. United States*, 530 U.S. 120, 128 (2000); *United States v. O’Brien*, 560 U.S. 218, 231-33 (2010) (fact that firearm is machinegun is element of offense to be proved to jury beyond 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). 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”).

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) (defendant charged under Section 924(c)(1)(A) was not entitled to a “Second Amendment defense” instruction).

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