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8 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
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10 UNITED STATES OF AMERICA,

11 Plaintiffs,

12 v.

13 RYAN MCGOWAN, ROBERT SNELLING,
14 ULYSSES SIMPSON GRANT EARLY IV,
and THOMAS LU,

15 Defendants
16
17

Case No.: 2:12-CR-00207 TLN

**DEFENDANT ULYSSES GRANT
[Proposed] JURY INSTRUCTIONS**

SUPPLEMENTAL Set #2

(PREPARED IN WORD FORMAT)

Count #6

Before: Honorable Troy L. Nunley

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19 To the United States Attorneys for the Eastern District of California and this
20 Honorable Court:

21 Defendant ULYSSES SIMPSON GRANT EARLY, IV hereby submits these
22 Supplemental Jury Instructions (Set #2) for Count #6 of the Indictment. This
23 supplement adds instructions for: (1) the definition of possession, and (2) provides an
24 alternate version of the offense of making a false statement in connection with a
25 firearm purchase.
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27 Respectfully submitted, October 18, 2014

/s/ Donald Kilmer

28 Attorney for Defendant EARLY

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3.17 POSSESSION—DEFINED

A person has possession of something 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.

[More than one person can be in possession of something if each knows of its presence and has the power and intention to control it.]

[Proposed Modified Instruction]

You heard evidence that Christopher Kjellberg bought an LCP on April 29, 2010 and was eligible to take possession of the firearm on May 10, 2010. He testified that he did not remember if he took possession of the firearm. You may consider the fact that he knew he had the right to take possession of the firearm and that he had the power to do so as establishing his possession of that firearm.

Comment

The Committee believes this instruction is all-inclusive, and there is no need to attempt to distinguish further between actual and constructive possession and sole and joint possession.

The Ninth Circuit has approved language similar to that contained in this instruction. *United States v. Cain*, 130 F.3d 381, 382-84 (9th Cir.1997).

In the event the case involves use or possession of a firearm under 18 U.S.C. § 924(c), *see* Instructions 8.71 (Firearms—Using, Carrying, or Brandishing in Commission of Crime of Violence or Drug Trafficking Crime) and 8.72 (Firearms—Possession in Furtherance of Crime of Violence or Drug Trafficking Crime). *See also United States v. Johnson*, 459 F.3d 990, 998 (9th Cir.2006) (citing with approval an out-of-circuit case rejecting premise that “passing control” of a firearm does not constitute possession).

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**8.58 FIREARMS—FALSE STATEMENT OR
IDENTIFICATION IN ACQUISITION OR ATTEMPTED ACQUISITION
(18 U.S.C. § 922(a)(6))**

[Modified]

The defendant EARLY is charged in Count #6 of the indictment with conspiracy to make a false statement in the acquisition of a firearm in violation of Section 922(a)(6) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove the conspiracy and then must also prove each of the following elements beyond a reasonable doubt:

First, that Robert Snellings was a licensed firearms dealer;

Second, that in connection with acquiring the LCP from Snellings, which Kjellberg later resold to Defendant EARLY in a private party transfer, Christopher Kjellberg made a false statement on the ATF Form 4473, this is the overt act alleged for the conspiracy;

Third, that all of the co-conspirators: Kjellberg, Snellings and EARLY knew the statement was false; and

Fourth, that the false statement was material; that is, that the false statement had a natural tendency to influence, or was capable of influencing Snellings (the FFL) into believing that the Ruger LCP could be lawfully sold to unindicted Co-Conspirator Kjellberg.

Defendant's Argument for this Instruction

The Government's proposed instruction under 18 USC § 924(a)(1)(A) is improper. That statute describes the penalties for violations of federal gun law. That is why there is no model instruction in the Ninth Circuit for a violation of 18 USC § 924(a)(1)(A). It is only because Federal Pleadings Practice, even in criminal cases, tolerates "notice" pleading, that the indictment is not fatally defective for that reason. The appropriate section that should have been cited in the indictment and as a guide for jury instructions is 18 USC § 922(a)(6).

Defendant Early's Proposed Instruction correctly sets forth the facts of the case using the Ninth Circuit model instruction 8.58.