

commerce a firearm, being a ROHM, model 66, .22 caliber, revolver, serial number **I**B136619. CR

COUNT TWO

On or about June 11, 2010, in the District of Vermont, MICHAEL J. WELLS, the defendant, an addict or unlawful user of any controlled substances, did knowingly possess in and affecting commerce a firearm, being a ROHM, model 66, .22 caliber, revolver, serial number **I**B136619. CR

ROLE OF INDICTMENT

At this time, I would like to remind you of the function of an indictment. An indictment is merely a formal way to accuse a defendant of a crime preliminary to trial. An indictment is not evidence. The Indictment does not create any presumption of guilt or permit an inference of guilt. It should not influence your verdict in any way other than to inform you of the nature of the charges against the defendant. The defendant has pleaded not guilty to the count in the Indictment. You have been chosen and sworn as jurors in this case to determine the issues of fact that have been raised by the allegations of the Indictment and the denial made by the not guilty plea of the defendant. You are to perform this duty without bias or prejudice against the defendant, or the prosecution.

REASONABLE DOUBT AND PRESUMPTION OF INNOCENCE

The government must prove each defendant guilty beyond a reasonable doubt. The question is what is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable

person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. A reasonable doubt is not a whim, speculation, or suspicion. However, a reasonable doubt may arise from a lack of evidence. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy.

In a criminal case, the burden is at all times upon the government to prove guilt beyond a reasonable doubt. The law does not require the government to prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to a defendant, which means that it is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government.

If, after fair and impartial consideration of all the evidence against a defendant, you have a reasonable doubt, it is your duty to find ^{the} that defendant not guilty. On the other hand, if, after fair and impartial consideration of all the evidence, you are satisfied of the defendant's guilt beyond a reasonable doubt, you should vote to convict. CM

The law presumes that a defendant is innocent of the charges against him or her. The presumption of innocence lasts throughout the trial and during your deliberations. The presumption of innocence ends only if you, the jury, find beyond a reasonable doubt

that a defendant is guilty. Should the government fail to prove the guilt of a defendant beyond a reasonable doubt, you must find that defendant not guilty.

EVIDENCE

You have seen and heard the evidence produced in this trial and it is the sole province of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits that have been admitted into evidence, and all the facts which may have been admitted or stipulated. I would now like to call to your attention certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of her or his own senses—something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact, the existence or non-existence of some other fact. For example, if you were to see cow tracks in a pasture, that would be circumstantial evidence that there are or were cows in the pasture.

Circumstantial evidence is of no less value than direct evidence. Circumstantial evidence alone may be sufficient evidence of guilt.

You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of a defendant's guilt beyond a reasonable doubt, you must find him not guilty.

STRICKEN TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony or exhibit that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. By the rulings the court made in the course of the trial, I did not intend to indicate to you any of my own preferences, or to influence you in any manner regarding how you should decide the case. The attorneys have a duty to object to evidence they believe is not admissible. You must not hold it against either side if an attorney made an objection.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. It would be a violation of your oath as jurors to consider anything outside the courtroom in your deliberations. But in your consideration of the evidence, you do not leave behind your common sense and life experiences. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of the evidence. However, if any juror has specialized knowledge, expertise, or information with regard to the facts and circumstances of this case, he or she may not rely upon it in deliberations or communicate it to other jurors.

STIPULATION OF FACTS

When the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

ADMISSIONS BY A DEFENDANT

There has been evidence that the defendant made certain statements in which the government claims he admitted certain facts.

In deciding what weight to give the defendant's statements, you should first examine with great care whether each statement was made and whether, in fact, it was voluntarily and understandingly made. I instruct you that you are to give the statements such weight as you feel they deserve in light of all the evidence.

CREDIBILITY OF WITNESSES

You, as jurors, are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness, because you may accept or reject the testimony of any witness, in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger, if any, toward the defendant; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony

of each witness as you think proper. You may accept all of it, some of it, or reject it altogether.

As a general matter, in evaluating the credibility of each witness, you should take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

This is not to suggest that any witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness's interest has affected or colored his or her testimony.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may hear or see things differently, or may have a different point of view regarding various occurrences. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters

of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

In this case you have heard testimony from a number of witnesses. I am now going to give you some guidelines for your determinations regarding the testimony of the various types of witnesses presented in this case.

LAW ENFORCEMENT WITNESSES

You have heard the testimony of law enforcement officials in this case. The fact that a witness may be employed by the federal, state, or local government as a law enforcement official does not mean that his or her testimony is deserving of more or less consideration or greater or lesser weight than that of a civilian witness.

At the same time, it is proper for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

PRIOR INCONSISTENT STATEMENTS OF A NON-PARTY WITNESS

You may find that a witness has made statements outside of this trial that are inconsistent with the statements that the witness gave here. You may consider the out-of-court statements not made under oath only to determine the credibility of the witness and

not as evidence of any facts contained in the statements. As to out-of-court statements that were made under oath, such as statements made in prior testimony, you may consider them for all purposes, including for the truth of the facts contained therein.

RACE, RELIGION, NATIONAL ORIGIN, SEX, OR AGE

You may not consider the race, religion, national origin, sex, or age of the defendant or any of the witnesses in your deliberations over the verdict or in the weight given to any evidence.

BIAS, PREJUDICE, AND EQUALITY BEFORE THE COURT

You are to perform the duty of finding the facts without bias or prejudice toward any party. You are to perform this duty in an attitude of complete fairness and impartiality.

This case is important to the parties and the court. You must give it the fair and serious consideration which it deserves.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a case. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals before the court.

DEFENDANT NOT TESTIFYING

You may have observed that the defendant did not testify in this case. A defendant has a constitutional right not to do so. He does not have to testify, and the government may not call him as a witness. A defendant's decision not to testify raises no presumption of guilt and does not permit you to draw any unfavorable inference.

Therefore, in determining whether a defendant is guilty or not guilty of the crime charged, you are not to consider, in any manner, the fact that the defendant did not testify. Do not even discuss it in your deliberations.

INSTRUCTIONS ON THE SUBSTANTIVE LAW OF THE CASE

Having explained the general guidelines by which you will evaluate the evidence in this case, I will now instruct you with regard to the law that is applicable to your determinations in this case.

It is your duty as jurors to follow the law as stated to you in these instructions and to apply the rules of law to the facts that you find from the evidence. You will not be faithful to your oath as jurors if you find a verdict that is contrary to the law that I give to you.

However, it is the sole province of the jury to determine the facts in this case. I do not, by any instructions given to you, intend to persuade you in any way as to any question of fact.

The parties in this case have a right to expect that you will carefully and impartially consider all the evidence in the case, that you will follow the law as I state it to you, and that you will reach a just verdict.

THE ESSENTIAL ELEMENTS OF THE OFFENSES

COUNT 1: FELON IN POSSESSION OF A FIREARM

The government must prove each of the following elements beyond a reasonable doubt in order to sustain its burden of proving the defendant guilty:

First, that the defendant was convicted, in any court, of a crime punishable by imprisonment for a term exceeding one year, as charged;

Second, that the defendant knowingly possessed the firearm, as charged; and

Third, that the possession charged was in or affecting interstate or foreign commerce.

FIRST ELEMENT - DEFENDANT'S PRIOR CONVICTION

The first element the government must prove beyond a reasonable doubt before you can convict is that before the date the defendant is charged with possessing the firearm, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year.

The parties have stipulated that the defendant was convicted of a crime in state court and that this crime is punishable by imprisonment for a term exceeding one year. It has also been stipulated that this felony conviction occurred prior to the time that the defendant is alleged to have possessed the weapon charged in the indictment.

I instruct you, in this connection, that the prior conviction that is an element of the charge here and is not disputed is only to be considered by you for the fact that it exists, and for nothing else. You are not to consider it for any other purpose. You are not to speculate as to what it was for. You may not consider the prior conviction in deciding

whether it is more likely than not that the defendant was in knowing possession of the gun that is charged, which is a disputed element of the offense.

SECOND ELEMENT- POSSESSION OF FIREARM

The second element which the government must prove beyond a reasonable doubt is that on or about the date set forth in the indictment the defendant knowingly possessed a firearm.

A "firearm" is any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive.

To "possess" means to have something within a persons control. This does not necessarily mean that the defendant must hold it physically, that is, have actual possession of it. As long as the firearm is within the defendant's control, he possesses it. If you find that the defendant either had actual possession of the firearm, or that he had the power and intention to exercise control over it, even though it was not in his physical possession, you may find that the government has proven possession.

The law also recognizes that possession may be sole or joint. If one person alone possesses it, that is sole possession. However, it is possible that more than one person may have the power and intention to exercise control over the firearm. This is called joint possession. If you find that the defendant had such power and intention on the date alleged, then he possessed the firearm under this element even if he possessed it jointly with another. Proof of ownership of the firearm is not required.

To satisfy this element, you must also find that the defendant knowingly possessed the firearm. This means that he possessed the firearm purposely and voluntarily, and not by accident or mistake. It also means that he knew that the weapon was a firearm, as we commonly use the word. However, the government is not required to prove that the defendant knew that he was breaking the law.

**THIRD ELEMENT - FIREARM IN OR AFFECTING INTERSTATE OR
FOREIGN COMMERCE**

The third element that the government must prove beyond a reasonable doubt is that the firearm the defendant is charged with possessing was in or affecting interstate or foreign commerce.

This means that the government must prove that at some time prior to the defendant's possession, the firearm had traveled in interstate or foreign commerce. It is sufficient for the government to satisfy this element by proving that at any time prior to the date charged in the indictment, the firearm crossed a state line or the United States border. It is not necessary that the government prove that the defendant himself carried it across a state line or international border, nor must the government prove who carried it across or how it was transported. It is also not necessary for the government to prove that the defendant knew that the firearm had previously traveled in interstate or foreign commerce.

In this regard, there has been evidence that the firearm in question was manufactured in a different state or country than the state where the defendant is charged

with possessing it. You are permitted to infer from this fact that the firearm traveled in interstate or foreign commerce; however, you are not required to do so.

**COUNT TWO: UNLAWFUL USER OF CONTROLLED SUBSTANCE IN
POSSESSION OF A FIREARM**

Count Two of the Indictment charges the defendant with being an addict or an unlawful user of or addicted to any controlled substances who possessed a weapon shipped in interstate or foreign commerce.

ELEMENTS OF THE OFFENSE

The government must prove each of the following elements beyond a reasonable doubt in order to sustain its burden of proving the defendant guilty:

First, that the defendant was an unlawful user of or addicted to any controlled substance, as charged;

Second, that the defendant knowingly possessed the firearm, as charged; and

Third, that the possession charged was in or affecting interstate or foreign commerce.

I charge you that as a matter of law, marijuana is a controlled substance.

However, it is for you to determine beyond a reasonable doubt if the defendant was an unlawful user of or addicted to that controlled substance.

**FIRST ELEMENT - ADDICT OR UNLAWFUL USER
OF CONTROLLED SUBSTANCE**

The first element the government must prove beyond a reasonable doubt is that at the time of the alleged offense, the defendant was an addict or unlawful user of a controlled substance.

An addict is defined as a person who habitually uses any controlled substance so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of a controlled substance that he has lost the power of self-control with reference to his addiction.

An unlawful user of a controlled substance is a person who uses a controlled substance and has lost the power of self-control with reference to the use of that controlled substance, or a person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before the events charged in the indictment, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct.

A person may be an unlawful user of a controlled substance even though the substance was not being used at the precise time that the individual possessed the firearm.

You may conclude that the defendant was an unlawful user of a controlled substance if you find that the defendant engaged in a pattern of use of a controlled substance that reasonably covers the time of the events charged in the indictment.

ELEMENTS TWO AND THREE ARE THE SAME FOR BOTH COUNTS

You will note that the elements of the crime of being an unlawful user of or addicted to any controlled substance who possessed a weapon shipped in interstate or foreign commerce are similar to those for being a person convicted of a crime who possessed a weapon shipped in interstate or foreign commerce, the crime I just finished instructing you on. Indeed, the only difference between the elements of both offenses

involves the first element, the status of the person who possessed the weapon. Therefore, in your deliberations on Count Two of the Indictment, you should apply the instructions I gave you respecting the second two elements of Count One, that is, whether the Government has proven beyond a reasonable doubt that the defendant knowingly possessed the firearm, and whether the Government has proven beyond a reasonable doubt that the firearm traveled in interstate or foreign commerce.

KNOWINGLY

You have been instructed that in order to sustain its burden of proof on the charge in the Indictment, the government must prove that the defendant acted knowingly. A person acts knowingly if that person acts intentionally and with knowledge, and not because of ignorance or carelessness. Whether a defendant acted knowingly may be proven by the defendant's words and conduct and by all the facts and circumstances surrounding this case.

RE: POSSESSION

In order to satisfy the essential element of "possession" beyond a reasonable doubt the government can prove either "actual possession" or "constructive possession." Actual possession requires the government to show the defendant physically possessed the firearm. Constructive possession exists when a person knowingly has the power and intention to exercise dominion and control over an object, which may be shown by direct or circumstantial evidence.

Mere presence in the vicinity of the firearm is not enough to satisfy the element of possession. Mere dominion and control over the place in which the firearm is found, by

itself, is not enough to establish constructive possession when there is joint occupancy of a place. Instead, some evidence of “possession” is required besides mere joint occupancy before constructive possession is established.

The defendant’s knowledge and intent are crucial to determining whether he exercised constructive possession of the firearm. Constructive possession exists only when a person knowingly has both the power and the intention at a given time to exercise dominion and control over an object.

You must also unanimously agree that the possession, as defined above, occurred on June 11, 2010.

RE: INTERSTATE OR FOREIGN COMMERCE

In order to convict the Defendant of being a felon in possession of a firearm you must find beyond a reasonable doubt that the firearm travelled in foreign or interstate commerce. Not every firearm has travelled in interstate or foreign commerce. If you do not find beyond a reasonable doubt that the firearm travelled in interstate or foreign commerce then you must find the defendant not guilty.

CONCLUSION

I caution you, members of the jury, that you are here to determine whether the defendant before you today is not guilty or guilty solely from the evidence in this case. I remind you that the mere fact that a defendant has been indicted is not evidence against him. Also, a defendant is not on trial for any act or conduct or offense not alleged in the Indictment. Nor are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a defendant in this case.

You should not consider the consequences of a guilty or not guilty determination. The punishment provided by law for the offenses charged in the Indictment is a matter exclusively within the responsibility of the judge, and should never be considered by the jury in any way in arriving at an impartial verdict.

It is your duty as jurors to consult with one another and to deliberate. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. Do not hesitate to re-examine your own views and change your opinion if you think that you were wrong. Do not, however, surrender your honest convictions about the case solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

To return a verdict, it is necessary that every juror agree to the verdict. In other words, your verdict must be unanimous regarding each element of the offense.

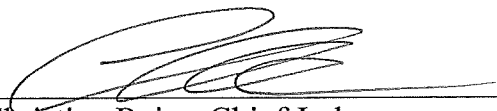
Upon retiring to the jury room, your foreperson will preside over your deliberations and will be your spokesperson here in court. If a vote is to be taken, your foreperson will ensure that it is done. A special verdict form has been prepared for your conclusions. After you have reached an agreement, the foreperson will record a verdict of guilty or not guilty as to the defendant on each count. Your foreperson will then sign and date the verdict form and you will return to the courtroom. In all other respects, a foreperson is the same as any other juror. His or her votes do not count more than any other member of the jury.

If, during your deliberations you should desire to communicate with the court, please put your message or question in writing signed by the foreperson, and pass the

note to the marshal who will bring it to my attention. I will then confer with the attorneys and I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I can speak with you. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time. You should also never communicate the subject matter of your note or your deliberations to any member of the court's staff.

I appoint _____ as your foreperson.

Dated at Rutland, in the District of Vermont this 29th day of September, 2011.


Christina Reiss, Chief Judge
United States District Judge