IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ALEXANDER WESLEY LEDVINA, Defendant.	No. 23-CR-36-CJW-MAR **BENCH TRIAL ORDER, FINDINGS, AND CONCLUSIONS**

I. INTRODUCTION

In a Superseding Indictment, the grand jury charged defendant Alexander Wesley Ledvina with one count of possession of a firearm by a drug user, in violation of Title 18, United States Code Section 922(g)(3), and one count of making a false statement during purchase of a firearm in violation of Title 18, United States Code, Section 924(a)(1)(A). (Doc. 32). The parties waived jury trial (Docs. 47 & 62), and on November 16, 2023, the Court presided over a bench trial (Doc. 62). At that trial, defendant combined argument with his motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. Upon consideration of all the evidence, the Court **denies** defendant's motion for judgment of acquittal and finds defendant **guilty** of Counts 1 and 2 of the Superseding Indictment. The Court also **denies** defendant's as-applied challenges to dismiss the Superseding Indictment. (Doc. 37).

In compliance with Federal Rule of Criminal Procedure 23(c), the Court states here its specific findings in a written decision.

II. ELEMENTS

The crime of possession of a firearm by a drug user has three elements. Here, the government must prove:

> *One*, the defendant was an unlawful user of or addicted to controlled substances, that is, marijuana and cocaine;
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> *Two*, the defendant knowingly possessed a Smith & Wesson M&P 9 Shield Plus, 9x19 mm caliber pistol; an Arsenal Bulgarian P-MO1, 9x18 mm caliber pistol; a Ruger 10/22, .22 LR caliber rifle; a Zastava Arms ZPAP92, 7.62x39mm caliber pistol; and an IWI Tavor X95, 5.56 NATO caliber rifle while he was an unlawful user of or addicted to marijuana and cocaine; and
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> *Three*, these firearms were transported across a state line at some time during or before the defendant's possession of it.

EIGHTH CIRCUIT MODEL CRIMINAL INSTRUCTION 6.18.922B.

The crime of making a false statement during the purchase of a firearm, as charged in Count 2, contains the following four elements:

> *One*, the defendant knowingly made a statement or representation in an ATF Form 4473;
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> *Two*, the defendant made the statement or representation to a federally licensed firearms dealer;
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> *Three*, the statement or representation was false; and
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> *Four*, the defendant knew the statement or representation was untrue when he made it.

EIGHTH CIRCUIT MODEL CRIMINAL INSTRUCTION 6.18.924.

The parties provided 22 joint stipulations in lieu of evidence presented at the bench trial. (Doc. 52). Among other things, defendant stipulated that on August 11, 2022, he knowingly possessed all firearms detailed in Count 1 of the Superseding Indictment: a Smith & Wesson M&P 9 Shield Plus, 9x19 mm caliber pistol; an Arsenal Bulgarian P-

MO1, 9x18 mm caliber pistol; a Ruger 10/22, .22 LR caliber rifle; a Zastava Arms ZPAP92, 7.62x39mm caliber pistol; and an IWI Tavor X95, 5.56 NATO caliber rifle. (*Id.*, at 6). Each of these was stipulated as a weapon designed to expel a projectile by action of an explosive. (*Id.*). Defendant also stipulated that each firearm was manufactured outside the State of Iowa and necessarily transported in interstate commerce prior to or during defendant's possession of them. (*Id.*). Thus, at issue in Count 1 is whether, at this time, defendant was then knowingly an unlawful user of or addicted to marijuana or cocaine. Further, defendant stipulated that on July 29, 2022, he knowingly made a representation that he was not an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance on an ATF form 4473. (*Id.*, at 3). Defendant also stipulated this representation was made to a federally licensed firearms dealer. (*Id.*). Last, defendant stipulates that on July 29, 2022, he knew he had used controlled substances in March, April, May, June, and July of 2022. (*Id.*). As such, the only elements in Count 2 at issue during the trial were (1) whether the representation was false;[1] and (2) whether defendant knew the representation was untrue when he made it.

III. REASONABLE DOUBT STANDARD

The government bears the burden of proving each element of each charge beyond a reasonable doubt. It is useful to review and consider the standard explanation of "reasonable doubt" provided to jurors, a standard that is equally binding on the Court as a fact-finder:

> Reasonable doubt is doubt based upon reason and common sense, and not doubt based on speculation. A reasonable doubt may arise from careful and impartial consideration of all the evidence, or from a lack of evidence.

[1] The Court notes that because defendant's argument relies heavily on what, if anything, is the definition of "unlawful user" or "addicted to" that this element is arguably in debate because under defendant's argument that those definitions are unestablished, it would also be unestablished whether the representation that defendant was not an unlawful user was itself false. As such, the Court will for the sake of clarity evaluate this element, too.

> Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person, after careful consideration, would not hesitate to rely and act upon that proof in life's most important decisions. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

EIGHTH CIRCUIT MODEL CRIMINAL INSTRUCTION 3.11.

Defendant's motion for judgment of acquittal is governed by Federal Rule of Criminal Procedure 29, which provides: "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." FED. R. CRIM. P. 29(a). "Sufficient evidence exists to support a verdict if 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Jiminez-Perez*, 238 F.3d 970, 972 (8th Cir. 2001) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

IV. THE EVIDENCE

The parties submitted 22 joint stipulations[2] in lieu of evidence at trial, submitted a joint exhibit that was incorporated into those stipulations, and the government submitted an additional exhibit, all of which the Court incorporates and considers here. (Docs. 52 & 61).

V. ANALYSIS

This is not, by any means, a close case. Based on the totality of the evidence, the Court is firmly convinced of defendant's guilt as to both Counts 1 and 2 of the Superseding Indictment.

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[2] The Court notes the parties informed the Court both in briefing and at the trial that stipulation 10 incorrectly states the year as "2021" when it should state "2022" as the correct year associated with each date in the stipulation. (Docs. 55, at 7 n.1 & 62). The Court will, thus, refer to the year as 2022 when discussing this stipulation.

A. Count 1

The Court finds the evidence shows beyond a reasonable doubt that on or about August 11, 2022, defendant was a drug user in possession of a firearm as alleged in Count 1. The sole element at issue is whether on or about August 11, 2022, defendant was knowingly an unlawful user of or addicted to controlled substances, that is, marijuana and cocaine.

Defendant argues the government has not proven this element of the offense, in part because there "is no such thing as an 'unlawful user' of controlled substances." (Doc. 57, at 4-10). Specifically, defendant asserts that despite any other evidence or stipulation, defendant has not been shown to be, nor has he explicitly admitted that he is, an "unlawful user" or an "addict." (*Id.*, at 5). Citing Eighth Circuit precedent requiring a defendant to know he belonged to the category of persons barred from firearm possession in the relevant statute, defendant argues the government cannot prove his knowledge because no defendant could know their use is unlawful when no law specifically makes "use" of a controlled substance "unlawful." (*Id.*, at 5-6 & n.2). Defendant further asserts there is a difference in whether defendant knew he was a user of controlled substances and whether he knew he was an unlawful user. (*Id.*, at 5). Defendant also argues it is not relevant that defendant possessed controlled substances because "unlawful possession" is not synonymous with "unlawful use" under Section 922(g)(3). (*Id.*, at 6-7). Last, defendant asserts there is no evidence defendant is or ever was an "addict." (*Id.*, at 7-8).

The government asserts defendant was an unlawful user of controlled substances during the same time period he possessed firearms as alleged in the Superseding Indictment. (Doc. 55, at 6-10). First, the government argues there is a temporal nexus between defendant's controlled substance use and his possession of firearms, which the Eighth Circuit Court of Appeals has held is a requirement of the unlawful user element. (*Id.*, at 8-9). Specifically, the government points to the stipulations showing defendant

both possessed firearms and used marijuana and cocaine during the same, relevant period. (*Id.*, at 9). Second, the government asserts it has proven defendant knew his conduct fell within the relevant prohibited status. (*Id.*). To this point, the government emphasizes defendant's admission and agreement through stipulation that defendant knew he was using controlled substances, including marijuana, THC, and cocaine in March, April, May, June, July, and August 2022, and to the ATF 4733 form warning to show defendant's knowledge of his status. (*Id.* & 60, at 5). The government further cites to Eighth Circuit Model Jury Instruction Section 6.18.922B defining "unlawful user," which itself is based on the Treasury Department's definition of an unlawful user of a controlled substance provided in Title 27, Code of Federal Regulations, Section 478.11. (Doc. 60, at 3-4). This definition, the government argues, renders defendant an unlawful user on these facts. (*Id.*) Last, the government cites Fourth and Fifth Circuit Courts of Appeals' cases addressing the distinction between possession and use and finding that the term "use" is subsumed within the term "possession" under the current statutory scheme and advocates for this Court to find the same. (*Id.*, at 5).

The crime of possession of a firearm by a drug user requires proof that during the time alleged in the charging document, the defendant was an unlawful user of or addicted to a controlled substance. This "unlawful user" element contains two components: a temporal component and a knowledge component. *Rehaif v. United States*, 139 S.Ct. 2191, 2194, 2200 (2019); *United States v. Carnes*, 22 F.4th 743, 748, 749 (8th Cir. 2022). The temporal component does not require proof that defendant used a controlled substance contemporaneously with his possession of a firearm, but rather, it requires the government "to demonstrate use of a controlled substance 'during the period of time' that the defendant possessed firearms, not that there was actual use 'at the time that the officers discovered [the defendant] in possession of firearms.'" *Carnes*, 22 F.4th at 748 (quoting *United States v. Rodriguez*, 711 F.3d 928, 937 (8th Cir. 2013)) (alteration and quotation in original). The Eighth Circuit has expressly rejected the requirement that controlled

substance use must be proven through evidence of regular use over an extended period of time. *United States v. Boslau*, 632 F.3d 422, 429-31 (8th Cir. 2011). The second component, knowledge, requires proof that the defendant knew he or she fell within the relevant statute's category of persons prohibited from possessing firearms. *Rehaif*, 139 S.Ct. at 2200.

statutory instruction + unlawful user

Defendant's argument that possession is wholly irrelevant to the question of use is in error. Knowing possession of controlled substances alone, though not necessarily dispositive of knowing use, shows access to controlled substances and makes accusations of knowing use more likely than without knowing possession. In a similar vein, the government urges the Court to adopt the view of the Fourth and Fifth Circuit Courts of Appeals. In *United States v. Courtney*, the Fifth Circuit Court of Appeals found that under the current statutory scheme, which does not separately criminalize use from possession, "use is subsumed within possession." 979 F.2d 45, 48-49 (5th Cir. 1992). In other words, one cannot knowingly use a controlled substance without possessing a controlled substance. *Id.* at 49. Likewise, in *United States v. Clark*, the Fourth Circuit Court of Appeals found that culpable use—as opposed to passive inhalation—and possession bear no distinct meanings under Title 18, United States Code, Section 3583(g). 30 F.3d 23, 25-26 (4th Cir. 1994). Though it is not always the case that possession equates use, the Court agrees with the government's argument that culpable[3] knowing use always equates knowing possession. Because culpable use always also means possession, use is a type of possession or way of proving possession, and its inclusion in the explicit illegality of possession alone puts a defendant on notice that use of a controlled substance can be unlawful. *See United States v. Two Hearts*, 32 F.4th 659, 663 (8th Cir.

Clark & Courtney totally different statute, involved saying use proves possession in supervised release context

it does under 10 USC 912a for the ...

foreclosed by Colbaugh v. US (8th Cir. 1926)

[3] There are scenarios when an individual could experience passive inhalation or consume a substance that was tainted with or is a controlled substance without knowing they were consuming a controlled substance. The Court distinguishes these scenarios from culpable consumption whereby a person knows they are consuming some controlled substance.

2022) (finding evidence consisting of user quantity of controlled substances and items used to consume controlled substances were sufficient for a jury to find that defendant was an unlawful user of those substances). [Further support for finding possession relevant and important in establishing use lies in the Treasury Department's definition of unlawful user, which provides that "[a]n inference of current use may be drawn from evidence of a recent use *or possession* of a controlled substance or a pattern of use *or possession* that reasonably covers the present time[.]" 27 C.F.R. § 478.11 (emphasis added).] — Loper & Cargill foreclose

The Court is equally unpersuaded that "unlawful user" does not provide notice as to what conduct is illegal, and thus, that defendant and other defendants cannot know they fall into the category of prohibited persons under the statute. It is an unfair characterization of the law to state that unlawful user is so undefined that not even an omniscient being would be aware of the term's meaning. The Eighth Circuit Model Jury Instructions for the crime drug user in possession of a firearm note that the definition of an "unlawful user of a controlled substance" is based on the Treasury Department's definition. EIGHTH CIRCUIT MODEL CRIMINAL INSTRUCTION 6.18.922B; 27 C.F.R. § 478.11. That definition provides, in relevant part, that an unlawful user is:

> Any 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, 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 current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm.

27 C.F.R. § 478.11; *see also United States v. Turnbull*, 349 F.3d 558, 562 (8th Cir. 2003), *judgment vacated on other grounds*, 543 U.S. 1099 (2005) (finding appropriate and consistent this definition of unlawful user with standard). This definition of unlawful user directly contradicts defendant's argument that there is no such thing as an unlawful

user and that it was impossible for defendant to ever become aware of his status.

Defendant also argued at trial that "unlawful user of or addicted to" is a conjunctive phrase—meaning that a reasonable person would believe he had to be both an unlawful user and addicted to a controlled substance to satisfy this requirement, or in other words that "addicted to" defines "unlawful user." This is not so. Several courts, and now this Court, have held that "unlawful user of" and "addicted to" are joined disjunctively by way of "or," not conjunctively. *See, e.g.*, *Sobolewski v. United States*, 649 F. App'x 706, 710 (11th Cir. 2016); *United States v. Grover*, 364 F. Supp. 1298, 1300 (D. Utah 2005); *United States v. Bennett*, 329 F.3d 769, 776 (10th Cir. 2003); *United States v. Herrera*, 313 F.3d 882, 884 (5th Cir. 2002) (discussing "unlawful user" and "addicted to" as alternative requirements). The terms are not only separately definable, and a person can be an unlawful user without being addicted and vice versa, but most importantly, the term "or" is naturally disjunctive. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not."). The construction of the sentence and its use of "or" indicates a person need only be one of the two categories of persons to satisfy the element. It is not necessary, therefore, that the government prove defendant was or is addicted to a controlled substance if it proves defendant was an unlawful user as alleged.] end statutory construction

Here, the evidence shows that on or about August 11, 2022, defendant was an unlawful user of controlled substances, specifically cocaine and marijuana. On May 20, 2022, ATF agents collected defendant's trash and therein found cigar wrappers and loose tobacco, consistent with removing tobacco from a cigar to replace with marijuana to smoke. (Doc. 52, at 2); *see Two Hearts*, 32 F.4th at 663. On August 11, 2022, investigators obtained a urine sample from defendant, and that sample tested positive for two separate cocaine metabolites and a THC metabolite. (Doc. 52, at 5). And defendant tested positive for marijuana and cocaine metabolites because he used cocaine sometime

between August 8 and August 11, 2022, and had used marijuana sometime between July 21 and August 11, 2022. (*Id.*). Defendant also admitted that on July 29, 2022, an employee at Black Dog Guns smelled marijuana emanating from defendant because defendant had been smoking marijuana. (*Id.*, at 2-3). Further, defendant was using marijuana five to six times per week between March and July 2022, was consistently using marijuana in August 2022, and used cocaine during the March-August 2022 period. (*Id.*, at 5-6). At no point has defendant had a prescription from a licensed physician for cocaine, THC, or marijuana. (*Id.*). These instances of cocaine and marijuana use were performed knowing defendant was using controlled substances. (*Id.*, at 6). During that same March-August 2022 period, defendant possessed firearms. (*Id.*). Together, this evidence shows a pattern of repeated possession and use of marijuana and cocaine during the period alleged. That this use was done without a prescription establishes that this period of use of controlled substances was done "in a manner other than as prescribed by a licensed physician," *i.e.*, defendant had committed unlawful use of these substances. 27 C.F.R. § 478.11. The government has established, therefore, that defendant's unlawful use of controlled substances occurred during the same period as his firearm possession.

The evidence also shows that defendant knew he belonged to the category of persons barred from firearm possession under the relevant provision. Defendant's argument that the government has not shown defendant knew of his status under the statute is in conflict with the evidence. First, defendant used coded language in his messages with others attempting to conceal his drug use and possession, showing his knowledge that use and possession are unlawful; for example, defendant received a message from another individual saying to just give the person "what you gave me last time" to which defendant responded, "For the same amount of food?" followed by a debate in price. (Joint Exhibit 1, at 171-72); *see United States v. Wilson*, 484 F.3d 267, 276 (4th Cir. 2007) (stating "the primary purpose of coded drug language is to conceal

the meaning of the conversation from outsiders through deliberate obscurity"); *United States v. Campbell*, No. 17-CR-2045-LRR, 2018 WL 4517458, at *1 (N.D. Iowa Sept. 20, 2018) (discussing the use of coded language to communicate about drug business, including use of the term "food"). The record contains many more instances of coded language use between defendant and others, indicating defendant used and distributed controlled substances:

- A message to defendant stating, "Can I get a g?" (*Id.*, at 209).
- A message to defendant stating, "Me and my friend are just chilling. He got a lil blow from someone. You trying to chill we need some bud and he needs a contact. He's a close friend of mine. Wouldn't bring a stranger to you[.]" (*Id.*, at 240).
- Another's text message to defendant, "I'm ready to smoke," and defendant's reply of, "Ok I'll be over in a sec." (*Id.*, at 316).
- A text to defendant, "Did u roll one?" to which defendant replied, "I will ys[.]" (*Id.*, at 348).
- A text message to defendant asking, "U got one rolled?" to which defendant replied "Yup[.]" (*Id.*, at 366).
- A text from defendant asking, "Want to hang out in a little bit," a response from another individual of "[a]nd do what," and defendant's message back "[s]moke and talk then idk wing it like usual lol." (*Id.*, at 439).
- A text from defendant, "We could just watch something on Netflix and smoke[.]" (*Id.*, at 576).
- A message to defendant asking, "Could I buy some blow from ya sir," defendant's reply, "No wrong number," and the other person's reply "Hahahaha stfu[.]" (*Id.*, at 705).
- A message asking defendant,"Got any bud?" to which defendant stated,

"Not that I can sell[.]" (*Id.*, at 768).

- A text to defendant stating, "Landon just asked for my number so that Conner could score some snow lol[.]" (*Id.*, at 777).

The use of coded language shows that defendant knew that his conduct—both the use and distribution of drugs—was unlawful.

What is more, on 15 separate occasions defendant completed an ATF form 4473 during the purchase of various firearms, including less than two weeks prior to the events alleged in Count 1, stating that he was not an unlawful user of or addicted to or any depressant, stimulant, narcotic drug, or any other controlled substance. (Docs. 52, at 3 & 61). On that form, defendant had to answer the question, "Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug or any other controlled substance?" (Doc. 61, at 1). The sentence that follows says, "Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside." (*Id.*). Defendant knew his marijuana use was unlawful as specified in that question, if for no other reason, because the ATF form 4473 explicitly stated that marijuana use and possession are illegal under federal law. Thus, the government has proven defendant knew he fell within the category of persons prohibited from possession of a firearm as an unlawful user of marijuana.] End of mens rea sufficiency

In short, the Court finds beyond a reasonable doubt that defendant is guilty as charged in Count 1 of the Superseding Indictment.

B. Count 2

The Court finds beyond a reasonable doubt that defendant made a false statement during the purchase of a firearm as alleged in Count 2 of the Superseding Indictment. As noted earlier, at issue are the following elements: (1) whether the representation was false; and (2) whether defendant knew the representation was untrue when he made it.

1. Defendant's Representation was False

The evidence shows defendant's representation that he was not an unlawful user of a controlled substance was false. Defendant's assertion that "unlawful user" is undefined and that, consequently, no one could know whether they fall into that category implicates an argument that the representation was not false—something cannot be false if it bears no meaning and does not exist.

The government argues the representation was false. (Doc. 55, at 11). The government cites defendant's admissions that he knew he had used controlled substances throughout March-July 2022, specifically five to six times minimum each week, continuing his consistent use in August 2022. (*Id.*). To this point, the government also refers to defendant's admission of marijuana use on or about July 29, 2022, when a store employee smelled marijuana odor on defendant and that that same day, defendant denied being an unlawful user on an ATF Form 4473. (*Id.*).

Here, the record shows the representation was false. Defendant knew that he had used controlled substances in March, April, May, June, and July 2022 and that he was using marijuana five to six times per week during those months. (Doc. 52, at 3). When defendant made the July 29, 2022 firearm purchase, an employee at Black Dog Guns smelled marijuana emanating from defendant, and this was—by defendant's admission—because defendant had been smoking marijuana. (*Id.*, at 2-3). As discussed in the Court's analysis of Count 1, there is a plethora of evidence proving beyond reasonable doubt that defendant was an unlawful user during the period of events surrounding both Counts. By stating "No" in response to the inquiry whether defendant was an unlawful user of "marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance," defendant made a representation that was false.

The Court finds the government has proven this element of the offense.

2. Defendant Knew His Representation Was False When Making It

Last, the evidence shows defendant knew his representation was false when he

made it to the licensed firearms dealer. Defendant asserts once more that defendant could not know his statement was false when filling out the ATF form 4473 because he could not have reasonably understand the "or" in "unlawful user of, or addicted to," to be disjunctive—rather, he thought "addicted to" defined "unlawful user."[4] (Doc. 57, at 10). That "or addicted to" is set off by commas creates a difference in meaning equivalent to indicating "addicted to" is synonymous with "unlawful user of," in defendant's telling. (*Id.*, at 11-12). Defendant also asserts there is an additional component to knowledge here because a defendant must be shown to have known that the question to which he answered untruthfully was "information required to be kept by this chapter." (*Id.*, at 12).

The government argues defendant knew his representation was false when he made it. (Doc. 55, at 11). Defendant knew, the government asserts, that he had never been prescribed THC, cocaine, or marijuana by a licensed physician, was using controlled substances during that time, and that stating he was not an unlawful user on the form was untrue. (*Id.*, at 11-12). Second, the government argues defendant is incorrect that it need prove defendant knew the question to which he answered untruthfully was "information to be kept by this chapter" because it is not an element, but rather, it is a matter of law. (Doc. 60, at 8-9).

As a preliminary matter, defendant's assertion that the government must prove defendant knew the question to which he answered untruthfully was "information required to be kept by this chapter" is incorrect. That is not an element of the offense. *See* EIGHTH CIRCUIT MODEL CRIMINAL INSTRUCTION 6.18.924. Further, the question requires interpretation as a matter of law, not as a matter of fact. *See United States v. Bartucci*, No. 1:19-cr-00244-ADA-BAM, 2023 WL 2189530, at *2 (E.D.C.A. Feb. 23,

[4] The Court notes this use of "or" is slightly different than that use in Count 1 because the language in Count 1 is not set off by commas, whereas the language on the ATF form is.

2023) (discussing interpretation of this issue as a matter of law); *see also United States v. Cabaccang*, 332 F.3d 622, 624-25 (9th Cir. 2003) (en banc) ("The construction or interpretation of a statute is a question of law"). Title 18, United States Code, Section 923(g)(1) requires licensed firearms dealers to "maintain such records of . . . sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulation prescribe." A regulation requires that same dealer obtain an ATF form 4473 that includes "certification by the transferee that the transferee is not prohibited by the Act from . . . receiving a firearm which has been shipped or transported in interstate or foreign commerce or possessing a firearm in or affecting commerce." 27 C.F.R. § 478.124(c)(1). By asking defendant whether he was an unlawful user of a controlled substance, this question was gathering information as to whether defendant could lawfully receive or possess a firearm in or affecting commerce. This Court finds that as a matter of law, this question was information required to be kept by the licensed firearms dealer. *See United States v. Johnson*, 680 F.3d 1140, 1146-47 (9th Cir. 2012) (affirming district court finding that, as a matter of law, ATF form 4473 was information to be kept).

Second, a reasonable person would not read the "or" to mean "unlawful user" and "addicted to" are synonyms because, if nothing else, of the utilization of commas surrounding "or." Further, people commonly understand the word "or" to be disjunctive. The language used in the ATF form 4473 tracks the language of Section 922(g)(3), and the terms are separately definable. *See* 27 C.F.R. § 478.11 (defining separately "unlawful user" and "addicted to"). A common sense, natural reading of the terms would be that, because one can be a user of drugs unlawfully without being addicted to those drugs, they are not interchangeable. *See Grover*, 364 F. Supp. at 1302-03 (discussing separately definable terms in Section 922(g)(3) consistent with everyday meaning of those terms). The commas here appear to be ungrammatical under any interpretation or at best, an attempt to separate "addicted to" from unlawful user and

avoid any argument one term modifies the other.

Here, the government has shown defendant knew his representation was false at the time he made it. First, defendant was smoking marijuana in July 2022. (Doc. 52, at 2-3). Defendant knew that he had used controlled substances in March, April, May, June, and July 2022. (*Id.*). He stipulated that on July 29, 2022, the owner of Black Dog Guns contacted the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to inform agents that defendant purchased an Arsenal Bulgarian P-MO1, 9x18 mm from the store that day. (*Id.*). An employee there smelled marijuana odor coming from defendant, and this was because defendant had been smoking marijuana. (*Id.*, at 3). During the transaction that day, defendant filled out an ATF form 4473. (*Id.*). On that form, defendant had to answer the question, "Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug or any other controlled substance?" (Doc. 61, at 1). He answered "No." (*Id.*). But as stated earlier, that question was followed by, "Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside." (*Id.*). Even had defendant lacked a scintilla of knowledge that using marijuana was unlawful prior to filling out that form, a plain reading of that question and warning would have put him on notice that his use was unlawful, meaning he was an unlawful user, and given him the knowledge that saying "no" was false. In the aggregate, this evidence shows defendant knew he was an unlawful user of marijuana as alleged in Count 2.

Thus, the Court finds the government has proven beyond a reasonable doubt that defendant is guilty of Count 2 of the Superseding Indictment.

C. Defendant's As-Applied Challenges

Last, defendant challenges his indictment on a motion to dismiss, stating that Sections 922(g)(3) and 924(a)(1)(A) are unconstitutional as applied to him. This Court has previously ruled on a facial challenge to Section 922(g)(3) in this case and

incorporates all finding and analysis here. (Doc. 41).

An as-applied void for vagueness challenge to a statute looks to "whether the statute gave adequate warning, under a specific set of facts, that the defendant's behavior was a criminal offense." *United States v. Washam*, 312 F.3d 926, 931 (8th Cir. 2002).

1. 922(g)(3)

The Court finds Section 922(g)(3) is constitutional as-applied to defendant. As stated in its analysis of Count 1, the Court finds the government has proven all elements of Count 1, including that defendant was then an unlawful user. Defendant argues Section 922(g)(3) is unconstitutionally vague as-applied to him because "unlawful user" is vague and does not provide notice. (Doc. 57, at 4-6). Citing *United States v. Bramer*, 832 F.3d 908 (8th Cir 2016), defendant asserts that the government cannot simply prove he knew he was a user of a controlled substance but instead must prove he was an unlawful user, a fact to which he has not stipulated. (*Id.*, at 4-7).

The government asserts that though defendant has not stipulated to being an "unlawful user," he has stipulated to facts that in the aggregate show he was an unlawful user of controlled substances. (Doc. 60, at 1-3).

The application of this statute is not unconstitutional as applied to this defendant. In *Bramer*, the court found Section 922(g)(3) was not void for vagueness as-applied to the defendant's conduct. 832 F.3d at 909-10. There, defendant had stipulated that he was an unlawful user when also in knowing possession of firearms, meaning there was no basis to conclude the term was vague as applied to him. *Id.* But here, defendant stipulated to facts showing that at the time he possessed the firearms referenced in Count 1 of the Superseding Indictment, he was an "unlawful user" of controlled substances, specifically marijuana and cocaine. His conduct was clearly proscribed.[5] Nothing in the

[5] Defendant argues again that nothing would have put him on notice as to what unlawful use was, but again, not only are both "unlawful user" and "addicted to" defined in the Code of Federal Regulations, but defendant also was given warnings 15 separate times when filling out the ATF

application of Section 922(g)(3) to defendant is arbitrary or outside the scope of the conduct the statute covers; defendant's possession of the firearms as an "unlawful user" of drugs is the exact conduct proscribed in the statute. 18 U.S.C. § 922(g)(3) ("It shall be unlawful for any person . . . who is an unlawful user of . . . any controlled substance[.]"). Thus, Section 922(g)(3) is not unconstitutional as-applied to this defendant.

Thus, the Court **denies** defendant's motion on this ground.

2. 924(a)(1)(A)

The Court finds Section 924(a)(1)(A) is constitutional as-applied to defendant. Defendant challenges Section 924(a)(1)(A) as-applied to him because he could not have possibly known he was an unlawful user and thus that the statement that he was not an unlawful user was a false statement. (Doc. 57, at 8-10).

The Court finds that this statute is not vague as-applied to defendant. Again, defendant stipulated to facts showing that he knew he was using controlled substances in a way that was unlawful and was thus an unlawful user. The ATF form 4473 even told him this was the case. His conduct was clearly proscribed by Section 924(a)(1)(A), and he had sufficient notice that his conduct fell within that statute. Its application to defendant is neither arbitrary nor outside the statute's scope of conduct. Thus, Section 924(a)(1)(A) is not unconstitutional as applied to defendant.

Thus, the Court **denies** defendant's motion on this ground.

VI. CONCLUSION

Considering the evidence in the light most favorable to the government, the Court **denies** defendant's motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. Based on the totality of the evidence, the Court finds beyond a

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form 4473 what it meant under the law to be an unlawful user and that his conduct fell into that status.

reasonable doubt that defendant is guilty of the crime of possession of a firearm by a drug user, in violation of Title 18, United States Code, Sections 922(g)(3) and 924(a)(8), as charged in Count 1 of the Superseding Indictment and guilty of the crime of false statement during purchase of a firearm, in violation of Title 18, United States Code, Section 924(a)(1)(A), as charged in Count 2 of the Superseding Indictment. Defendant's as-applied motions to dismiss the Superseding Indictment are **denied**. (Doc. 37).

The Court will set this case for sentencing on a later date by separate order. The Court orders the preparation of a presentence investigation report. Defendant will remain in custody of the United States Marshal pending sentencing.

IT IS SO ORDERED this 1st day of December, 2023.

C.J. Williams
United States District Judge
Northern District of Iowa