



EIGHTH CIRCUIT
MODEL JURY INSTRUCTIONS

**MANUAL OF
MODEL CRIMINAL
JURY INSTRUCTIONS**
for the
**DISTRICT COURTS OF THE
EIGHTH CIRCUIT**

Prepared by Judicial Committee on Model
Jury Instructions
for the Eighth Circuit

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2.08 DEFENDANT'S PRIOR SIMILAR ACTS— WHERE INTRODUCED TO PROVE AN ISSUE OTHER THAN IDENTITY (FED. R. EVID. 404(B))

You [are about to hear] [have heard] [evidence] [testimony] that the defendant (describe evidence the jury is about to hear or has heard). You may consider this evidence only if you (unanimously) find it is more likely true than not true that the defendant committed the act. This is a lower standard than proof beyond a reasonable doubt. You decide that by considering all of the evidence relating to the alleged act, then deciding what evidence is more believable.

If you find that this evidence has not been proved, you must disregard it. If you find this evidence has been proved, then you may consider it only for the limited purpose of deciding whether [defendant] [had the state of mind or intent necessary to commit the crime charged in the indictment]; or [had a motive or opportunity to commit the acts described in the indictment]; or [acted according to a plan or in preparation for commission of a crime]; or [committed the acts [he] [she] is on trial for by accident or mistake]; or [describe other permissible purpose].¹ You should give it the weight and value you believe it is entitled to receive.

Remember, even if you find that the defendant may have committed [a] similar [act] [acts] in the past, this is not evidence that [he] [she] committed such an act in this case. You may not convict a person simply because you believe [he] [she] may have committed similar acts in the past. The defendant is on trial only for the crime[s] charged, and you may consider the evidence of prior acts only on the issue[s] stated above.²

Notes on Use

1. Use care in framing the language to be used in specifying the purpose for which the evidence can be used. *See United States v. Mothershed*, 859 F.2d 585, 588–89 (8th Cir. 1988) (court should specify to which component of Rule 404(b) the prior similar act evidence is relevant and explain the relationship between the prior acts and proof of that proper component). *See also United States v. Cotton*, 823 F.3d 430, 440 (8th Cir. 2016); *United States v. Johnson*, 439 F.3d 947, 953-54 (8th Cir. 2006).

2. This paragraph should be given only upon request of the defendant. This portion of the instruction explains that prior similar act evidence is not admissible to prove propensity to commit crime, and the defendant may want the jury so instructed. On the other hand, this portion of the instruction repeats reference to the prior act[s]. The trade-off between explanation and repetition should be made by the defendant in the first instance.

Committee Comments

See generally Fed. R. Evid. 404(b). *See also United States v. Felix*, 867 F.2d 1068, 1075 (8th Cir. 1989) (court satisfied that earlier, but nearly identical, version of this instruction was correct as given).

See also Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

The Supreme Court, in *Huddleston v. United States*, 485 U.S. 681, 691 (1988), acknowledged the unfair prejudice that can arise from the admission of similar act evidence and noted that such prejudice could be dealt with, in part, through a limiting instruction. Such an instruction should be given when requested.

Prior act evidence is admissible when it is relevant to a material issue in question other than the character of the defendant, the act is similar in kind and reasonably close in time to the crime charged, there is sufficient evidence to support a finding by the jury that the defendant committed the prior act and the potential unfair prejudice does not substantially outweigh the probative value of the evidence. *United States v. Winn*, 628 F.3d 432 (8th Cir. 2010). This circuit follows a rule of inclusion, wherein such evidence is admissible unless it tends to prove only the defendant's criminal disposition. *E.g.*, *United States v. Oaks*, 606 F.3d 530, 538 (8th Cir. 2010).

While other act evidence is generally admissible to prove intent, knowledge, motive, etc., it is only admissible where such an issue is material in the case. *United States v. Stroud*, 673 F.3d 854, 861 (8th Cir. 2012). In *United States v. Carroll*, 207 F.3d 465, 467 (8th Cir. 2000), the Court stated,

[i]n some circumstances, a defendant's prior bad acts are part of a broader plan or scheme relevant to the charged offense Evidence of past acts may also be admitted . . . *as direct proof of a charged crime that includes a plan or scheme element* In other circumstances . . . the “pattern and characteristics of the crimes [are] so unusual and distinctive as to be like a signature[.]” . . . In these cases, the evidence goes to identity These “plan” and “identity” uses of Rule 404(b) evidence are distinct from each other

Id. (emphasis added, citations omitted); *see also United States v. LeCompte*, 99 F.3d 274 (8th Cir. 1996). Where admission of other act evidence is sought, “the proponent of the evidence [must] articulate the basis for the relevancy of the prior act evidence and . . . the court [must] ‘specify which components of the rule form the basis of its ruling and why.’” *United States v. Harvey*, 845 F.2d 760, 762 (8th Cir. 1988) (emphasis added).” *United States v. Crenshaw*, 359 F.3d 977, 999-1009 (8th Cir. 2004). Other act evidence is admissible during the government's case-in-chief where the defendant plans to present a general denial defense, because the defendant, by pleading not guilty, puts the government to its proof on all elements of the charged crime. *United States v. Johnson*, 439 F.3d 947, 952 (8th Cir. 2006), *United States v. LeBeau*, 867 F.3d 960, 979 (8th Cir. 2017). For a discussion of the stringent test which the defendant must meet to remove a state-of-mind issue, *see United States v. Thomas*, 58 F.3d 1318, 1321–22 (8th Cir. 1995), and *United States v. Jenkins*, 7 F.3d 803, 806–07 (8th Cir. 1993) (Rule 404(b) evidence inadmissible to show intent during rebuttal when the defendant denied committing the criminal act).

This instruction is designed for use only in those situations where the prior acts are to be utilized for one or more purposes covered by Rule 404(b), “such as proof of motive, opportunity, intent, preparation, plan, knowledge, . . . or absence of mistake or accident . . .” but not for proof of identity or in sexual assault or child molestation cases.

This instruction should *not* be used when the theory for admitting the evidence is to show identity. When the evidence is to be used for this purpose, use Instruction 2.09, *infra*. This instruction is also not appropriate when evidence of similar crimes is introduced in sexual assault and child molestation cases. Those cases are covered by Federal Rules of Evidence 413 and 414, which allow evidence of similar crimes to show the defendant's propensity to commit such crimes as evidence that he or she did commit the crime for which the defendant is on trial. When Rules 413 and 414 are at issue, use Instruction 2.08.A, *infra*.

If the defendant's prior conviction has been admitted under Rule 609, a different limiting instruction should be given. *See* Instruction 2.16, *infra*.

5.06A-1 CONSPIRACY: ELEMENTS (18 U.S.C. § 371)

It is a crime for two or more people to agree to commit a crime. The crime of conspiracy,¹ as charged in [Count _____] of the indictment, has four² elements:

One, on or before (insert date), two [or more] people reached an agreement to commit the crime[s] of [(insert name of offense(s) alleged in the indictment being submitted to the jury, *e.g.*, mail fraud)];³

Two, the defendant voluntarily and intentionally joined in the agreement, either at the time it was first reached or at some later time while it was still in effect;

Three, at the time the defendant joined in the agreement, the defendant knew the purpose of the agreement; and

Four, while the agreement was in effect, a person or persons who had joined in the agreement knowingly did one or more acts for the purpose of carrying out or carrying forward the agreement.

Instruction Nos. (insert instruction numbers) further explain these elements.

[Insert paragraph describing [government's] [prosecution's] burden of proof, *see* Instruction 3.09, *supra*.]

Notes on Use

1. The general conspiracy statute is 18 U.S.C. § 371. At least 24 other conspiracy statutes are found in Titles 15, 18 and 21.

2. Conspiracies charged under 18 U.S.C. § 371 require an overt act, which is covered in Element Four. An overt act is not required in conspiracies charged under 15 U.S.C. § 1; 18 U.S.C. §§ 241, 286, 384, 1349, 1951, and 1956(h); and 21 U.S.C. § 846. When one of these conspiracies is charged, Element Four should be omitted. *See* Instruction 6.21.846A; *United States v. Shabani*, 513 U.S. 10, 11 (1994) (21 U.S.C. § 846 does not require proof of an overt act); *see also* Instruction 6.18.1956K; *Whitfield v. United States*, 543 U.S. 209, 219 (2005) (“Because the text of [18 U.S.C.]§ 1956(h) does not expressly make the commission of an overt act an element of the conspiracy offense, the Government need not prove an overt act to obtain a conviction.”).

3. Conspiring to defraud the United States is also a crime under 18 U.S.C. § 371. If such a conspiracy is alleged, Element One should be modified to state that persons reached an agreement

or came to an understanding to commit the crime of defrauding the United States by (describe means, e.g., impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes).

6.18.924C-1 FIREARMS—POSSESSION IN FURTHERANCE OF A CRIME OF VIOLENCE/ DRUG TRAFFICKING OFFENSE (18 U.S.C.§ 924(C))

The crime of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime] as charged in [Count _____ of] the Indictment has [two][three][four] elements:

One, the defendant committed the crime[s]¹ of (describe crime[s]) as charged in count _____ of the Indictment; and

Two, the defendant knowingly² possessed³ a firearm^{4,5} in furtherance of⁶ [that] [those] crime[s]; [and]

[*Three*, the firearm was a[n] (describe firearm if an enhanced sentence is sought, *e.g.*, semi-automatic assault weapon, short-barreled rifle, short-barreled shotgun, machine gun, destructive device, or firearm equipped with a silencer or muffler).]⁷

[*Three/Four*, the defendant used the firearm to cause the death of (specify person killed).]⁸

The phrase “in furtherance of” means furthering, advancing, or helping forward. This means the government must prove that the defendant possessed the firearm with the intent that it advance, assist or help commit the crime, but the government need not prove that the firearm actually did so.⁹

[Insert paragraph describing [government's] [prosecution's] burden of proof; *see* Instruction 3.09, *supra*.]

Notes on Use

1. “Crime of violence” is defined at 18 U.S.C. § 924(c)(3). Drug trafficking crime is defined at 18 U.S.C. § 924(c)(2). The question of whether the underlying offense qualifies as a crime of violence or a drug trafficking crime is a question of law for the court. *United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994). The trial court should make its finding as to whether the predicate offense qualifies on the record. The question of what qualifies as a crime of violence in the context of § 924(c) may be in dispute in the wake of *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). In *Dimaya*, the Court considered a very similarly worded statute, 18 U.S.C. § 16, and held that part of the statute’s definition of crime of is unconstitutionally vague.

2. Section 924(c) as written does not specifically require that possession, use or carrying of a weapon be done “knowingly.” However, “the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *Staples v. United*

States, 511 U.S. 600, 605 (1994). Although the Eighth Circuit has not squarely addressed this, it has implied that a knowing mens rea is required for conviction under the statute. See *United States v. Ellis*, 817 F.3d 570, 578 (8th Cir. 2016); *Bradshaw v. United States*, 153 F.3d 704 (8th Cir. 1998). And other circuits considering the issue also require a knowing state of mind. See, e.g., *United States v. Silva*, 889 F.3d 704, 707–08 (10th Cir. 2018); *United States v. St. Hubert*, 883 F.3d 1319, 1321 (11th Cir. 2018); *United States v. Thurman*, 889 F.3d 356, 362 (7th Cir. 2018); *United States v. Smith*, 878 F.3d 498, 501 (5th Cir. 2017).

Pattern jury instructions from other jurisdictions also include a knowledge requirement. Pattern Criminal Jury Instructions for the District Courts of the First Circuit § 4.18.924 (2017); Model Criminal Jury Instructions Third Circuit § 6.18.924A (2018); Pattern Jury Instructions (Criminal Cases), Fifth Circuit Committee on Pattern Jury Instructions, § 2.44 (2015); Pattern Criminal Jury Instructions, Sixth Circuit Committee on Pattern Criminal Jury Instructions, § 12.03 (2017); Pattern Criminal Federal Jury Instructions for the Seventh Circuit, p. 235 (2012); Ninth Circuit Manual of Model Criminal Jury Instructions, § 8.71 (2010); Criminal Pattern Jury Instructions, Criminal Pattern Jury Instruction Committee of the United States Court of Appeals for the Tenth Circuit, § 2.45 (2018); Eleventh Circuit Pattern Jury Instructions (Criminal Cases), § O35.1 (2016). Thus, the Committee believes that “knowingly” is required even though section 924(c) itself does not expressly it.

3. This instruction does not define possession, but should be given in conjunction with Instruction 8.02, “Possession: Actual, Constructive, Sole, Joint.”

4. For the definition of firearm, see 18 U.S.C. § 921(a)(3). U.S.C. § 5845(b). “Firearm” normally will not require definition for the jury unless there is a dispute about whether the item possessed was in fact a firearm.

5. Where more than one firearm is charged in the same count, a special verdict form is necessary to insure unanimity regarding which gun was possessed. See Instruction 11.03. However, when a defendant is convicted of possession of more than one firearm during a single underlying offense, the additional convictions are not “second or subsequent convictions” triggering the mandatory consecutive 25 year sentence for additional 924(c) convictions. See *United States v. Freisinger*, 937 F.2d 383, 391 (8th Cir. 1991) (overruled on other grounds).

6. Section 924(c) criminalizes three different relationships between the firearm and the underlying crime of violence or qualifying drug crime. It prohibits possessing a firearm in furtherance of the underlying offense; using a firearm during and in relation to the qualifying offense; or carrying a firearm during and in relation to the offense. This instruction is drafted for an Indictment that alleges the first version of the offense. The crimes of use or carrying of a firearm during and in relation to a qualifying crime are addressed in Instruction 6.18.924C-1.

The Eighth Circuit has held that a jury can infer that a firearm is possessed in furtherance of a drug crime when it is kept in close proximity to the drugs, is quickly accessible, and there is expert testimony regarding the use of firearms in drug trafficking. See, e.g., *United States v. Kent*, 531 F.3d 642, 652–53 (8th Cir. 2008). The court has also observed that the “in furtherance of” offense “requires a slightly higher standard of participation than the language ‘during and in

relation to.” *Close v. United States*, 679 F.3d 714, 719 (8th Cir. 2012) (quoting *United States v. Gamboa*, 439 F.3d 796, 810 (8th Cir. 2006)).

7. Under 18 U.S.C. § 924(c)(1), the mandatory penalty for use of certain types of weapons is much greater than for ordinary firearms. For example, if a machine gun, destructive device or silencer is used, the mandatory penalty is 30 years. If a short-barreled rifle or shotgun is used, the mandatory penalty is ten years. This element is required when the government is seeking an enhanced penalty for possession of a certain type of weapon. The definitions of these weapons are rather technical and not necessarily intuitive. *See, e.g.*, 18 U.S.C. § 921(a)(3); 26 U.S.C. § 5845. The Committee believes that the jury should be instructed as to the statutory definitions of the weapon at issue at the request of either party.

There is burgeoning disagreement among the Circuits regarding whether actual knowledge of the specific characteristics of the firearm resulting in enhancement of the punishment is required in an 18 U.S.C. § 924(c)(1)(B) prosecution. The Eighth Circuit recently held *en banc* that knowledge of the characteristics of a firearm is required for conviction under 18 U.S.C. § 5861, which prohibits possession of unregistered weapons such as short-barreled shotguns. *United States v. White*, 863 F.3d 784, 790 (8th Cir. 2017) (*en banc*). However, the court has yet to consider the same question in the § 924(c)(1)(B) context. Although the Eighth Circuit once held that mens rea is not required as to this aspect of 18 U.S.C. § 924(c)’s enhanced penalties, the court has not addressed this question since 2006 in *United States v. Gamboa*, 439 F.3d 796 (8th Cir. 2006), and more recent Supreme Court decisions render the reasoning of *Gamboa* invalid. The *Gamboa* court found that actual knowledge of the specific characteristics of a firearm was not required under § 924(c) via two related lines of reasoning: 1) whether a firearm is a “machine gun” is a sentencing factor to be determined by a judge, not an element to be found by a jury; and 2) following *Harris v. United States*, 536 U.S. 545 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was inapplicable because § 924(c) only raised the statutory minimum, and not the maximum penalty. *Gamboa*, 439 F.3d at 811–812.

The Supreme Court has since invalidated both of these aspects of the Eighth Circuit’s reasoning. In *United States v. O’Brien*, 560 U.S. 218 (2010), the Court held that the question of whether a firearm is a machine gun is an element, not a sentencing factor, and must be determined beyond a reasonable doubt by a jury. *Id.* at 234. And in *Alleyne v. United States*, 570 U.S. 99, 103 (2013), the Court held that *Apprendi* applied to mandatory minimum sentences as well as mandatory maximum sentences, overruling *Harris*.

The Eighth Circuit has not specifically revisited whether a defendant must know of the characteristics of the weapon that trigger the enhancement in the § 924(c) context since these developments, but other circuits have. The D.C. Circuit recently reaffirmed its previous course in *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012), holding that, notwithstanding *O’Brien*, there is no mens rea requirement for a sentencing enhancement under § 924(c)(1)(B)(ii). The *Burwell* court acknowledged, however, that earlier precedent from other circuits, like *Gamboa*, was based on the erroneous conclusion that the provision was a sentencing factor and not an element. *Id.* at 511. Similarly, in *United States v. Haile*, 685 F.3d 1211 (11th Cir. 2012), the Eleventh Circuit concluded that *O’Brien* only made possession of a machine gun, and not the knowledge of its attribute, an element. *Id.* at 1281. The Fourth Circuit, on the other hand, strongly suggested that mens rea is an implicit requirement under § 924(c)(1)(B)(ii), even noting that

O'Brien and Staples v. United States, 511 U.S. 600 (1994) “arguably support [the] argument,” but found that the appellant in that case was not entitled to plain error relief because he could not establish that the error was “plain” at the time it was made. *Haile*, 551 Fed. Appx. 52, 54. The Eighth Circuit’s decision in *White* raises a substantial question about whether it would agree with the reasoning of the Fourth Circuit or the D.C. Circuit.

8. Section 924(j) provides for additional significant punishment applicable when a § 924(c) offense results in death. Where the indictment charges a violation of section 924(c) which caused death of a person under section 924(j), the Court must instruct the jury, consistent with the facts of the case, on the elements of murder, voluntary manslaughter and involuntary manslaughter since the maximum sentence to be imposed is dependent on a determination of the nature of the crime committed which caused the death. See 18 U.S.C. §§ 924(j)(1), (2); Instructions 6.18.1111–6.18.1114D.

This Circuit has not decided whether a specific intent to kill is an element of the offense of murder in the first degree committed during a violation of section 924(c). *United States v. Allen*, 247 F.3d 741, 783–84 (8th Cir. 2001) (abrogated on other grounds) (addressing the requirement of “malice aforethought” and the theory of felony murder in the context of § 924(j)).

The *Allen* court also explored what it required for aiding and abetting a violation of 924(j). *Id.* at 784 n. 19. To establish accomplice liability in such a circumstance, the Court found that the government must prove: (1) the defendant must “have known the offense of using or carrying a firearm during and in relation to a bank robbery was being committed or going to be committed;” (2) the defendant “intentionally acted in some way for the purpose of causing, encouraging, or aiding the commission of using or carrying of a firearm during and in relation to a bank robbery and that . . . was murdered in the perpetration of that robbery;” and (3) the defendant “was aware of a serious risk of death attending his conduct. *Id.* at 784 n.19 (8th Cir. 2001). The Eighth Circuit has not revisited this question in detail since 2001.

9. See *United States v. Kent*, 531 F. 3d 642, 654–55 (8th Cir. 2008) (defining “in furtherance of” using the term’s plain meaning); *United States v. Rush-Richardson*, 574 F.3d 906, 910–12 (8th Cir. 2009) (noting that “in furtherance of” requires a “slightly higher level of participation than ‘during and in relation to’”).

Committee Comments

A defendant may be held liable under section 924(c) for the acts of others, if the defendant had advance knowledge that a firearm would be carried during the commission of the crime. *Rosemond v. United States*, 134 S.Ct. 1240, 1249 (2014). The advance knowledge requirement fulfills aiding and abetting’s intent requirement—the defendant must have intended to aid and abet an *armed* drug sale or crime of violence. *Id.* at 1248. However, the jury may infer advance knowledge “if a defendant continues to participate in a crime after a gun was displayed or used.” *Id.* at 1250 n.9. In *United States v. Daniel*, 887 F.3d 350, 357 (8th Cir. 2018), the jury was so instructed about the requirement of advance knowledge for accomplice liability. The *Daniel* court affirmed the 924(c) conviction, finding that the record supported an inference that the defendant had advance knowledge that his codefendant would use a gun, and the jury could properly base that inference in part on actions that occurred after the robbery. *Id.* at 359–60.

Section 924(c) provides for enhanced penalties if a firearm is brandished (seven years) or discharged (ten years). If an indictment alleges brandishing or discharge of a weapon, the instruction must be modified to add that as a separate element that must be proven beyond a reasonable doubt and found by a unanimous jury.

6.18.924C-2 FIREARMS—USE OR CARRY A FIREARM DURING A CRIME OF VIOLENCE/DRUG TRAFFICKING OFFENSE (18 U.S.C. § 924(C))

The crime of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime] as charged in [Count ___ of] the Indictment has [three][four] elements:

One, the defendant committed the crime[s]¹ of (describe crime[s]) as charged in count _____ of the Indictment; and

Two, the defendant knowingly² [used]³[carried]⁴ a firearm^{5,6} during and in relation to⁷ [that] [those] crime[s]; [and]

[*Three*, the firearm was a[n] (describe firearm if an enhanced sentence is sought, e.g., semi-automatic assault weapon, short-barreled rifle, short-barreled shotgun, machine gun, destructive device, or firearm equipped with a silencer or muffler).]^{8,9}

[*Three/Four*, the defendant used the firearm to cause the death of (specify person killed).]¹⁰

[Insert paragraph describing [government's] [prosecution's] burden of proof; see Instruction 3.09, *supra*.]

Notes on Use

1. “Crime of violence” is defined at 18 U.S.C. § 924(c)(3). Drug trafficking crime is defined at 18 U.S.C. § 924(c)(2). The question of whether the underlying offense qualifies as a crime of violence or a drug trafficking crime is a question of law for the court. *United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994). The trial court should make its finding as to whether the predicate offense qualifies on the record. The question of what qualifies as a crime of violence in the context of § 924(c) may be in dispute in the wake of *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). In *Dimaya*, the Court considered a very similarly worded statute, 18 U.S.C. § 16, and held that part of the statute’s definition of crime of violence is unconstitutionally vague.

2. Section 924(c) as written does not specifically require that possession, use or carrying of a weapon be done “knowingly.” However, “the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *Staples v. United States*, 511 U.S. 600, 605 (1994). Although the Eighth Circuit has not squarely addressed this, it has implied that a knowing mens rea is required for conviction under the statute. See *United States v. Ellis*, 817 F.3d 570, 578 (8th Cir. 2016); *Bradshaw v. United States*, 153 F.3d 704 (8th Cir. 1998). And other circuits considering the issue also require a knowing state of mind. See, e.g., *United States v. Silva*, 889 F.3d 704, 707–08 (10th Cir. 2018); *United States v. St. Hubert*, 883 F.3d 1319, 1321 (11th Cir. 2018); *United States v. Thurman*, 889 F.3d 356, 362 (7th Cir. 2018); *United States v. Smith*, 878 F.3d 498, 501 (5th Cir. 2017).

Pattern jury instructions from other jurisdictions also include a knowledge requirement. Pattern Criminal Jury Instructions for the District Courts of the First Circuit § 4.18.924 (2017); Model Criminal Jury Instructions Third Circuit § 6.18.924A (2018); Pattern Jury Instructions (Criminal Cases), Fifth Circuit Committee on Pattern Jury Instructions, § 2.44 (2015); Pattern Criminal Jury Instructions, Sixth Circuit Committee on Pattern Criminal Jury Instructions, § 12.03 (2017); Pattern Criminal Federal Jury Instructions for the Seventh Circuit, p. 235 (2012); Ninth Circuit Manual of Model Criminal Jury Instructions, § 8.71 (2010); Criminal Pattern Jury Instructions, Criminal Pattern Jury Instruction Committee of the United States Court of Appeals for the Tenth Circuit, § 2.45 (2018); Eleventh Circuit Pattern Jury Instructions (Criminal Cases), § O35.1 (2016). Thus, the Committee believes that “knowingly” is required even though section 924(c) itself does not expressly require it.

3. Section 924(c) criminalizes three different relationships between the firearm and the underlying crime of violence or qualifying drug crime. It prohibits possessing a firearm in furtherance of the underlying offense; using a firearm during and in relation to the qualifying offense; or carrying a firearm during and in relation to the offense. This instruction is drafted for an Indictment that alleges the second or third version of the offense. The crime of possession of a firearm in furtherance of a qualifying crime is addressed in Instruction 6.18.924C-1.

Where an indictment charges the “use” of a firearm, the following definition of that term should be included in the instruction:

[The phrase “used [a] firearm[s]” means that the firearm was actively employed in the course of the commission of the (insert crime[s]). You may find that a firearm was used during the commission of the crime[s] of (insert crime) if you find that (it was [brandished] [displayed] [bartered away] [used to strike someone] [fired]) (the defendant [attempted to fire the firearm] [traded or offered to trade a firearm without handling it] [made references to a firearm that was in the defendant's possession]) (describe other conduct consistent with the active-employment use of a firearm).]

The Supreme Court, in *Bailey v. United States*, 516 U.S. 137, 145 (1995), held that “the language, context, and history of section 924(c)(1) indicate that the Government must show active employment of the firearm” when the defendant is charged under the “use” prong of the statute. In order to meet this requirement, the firearm need not necessarily have an active role in the crime as a weapon. *See Smith v. United States*, 508 U.S. 223, 241 (1993) (holding that a criminal who trades his firearm for drugs “uses” it during and in relation to a drug trafficking offense within the meaning of section 924(c)); *but see Watson v. United States*, 552 U.S. 74, 83 (2007) (holding that a defendant who accepts a gun as payment for drugs does not use the gun during or in relation to the drug crime).

4. Where “carry” is charged in the indictment a court must decide whether that term needs to be defined for the jury. Although the Eighth Circuit has not definitively addressed whether “carrying” should be defined, it has found that failure to do so does not constitute plain error because it is a commonly understood term. *See United States v. Rhodenizer*, 106 F.3d 222, 225 (8th Cir. 1997); *United States v. Behler*, 100 F.3d 632 (8th Cir. 1996) (where the defendant fails to offer an instruction defining “carry,” the ordinary meaning of the word should apply). If a

definition of “carrying” is to be included in the instructions, the Committee recommends the following be inserted after element Three:

[You may find that a firearm was “carried” during the commission of the crime[s] of (insert crime) if you find that the defendant [had a firearm on his person] [was transporting a firearm in a vehicle] [(describe other included conduct consistent with carrying a firearm)].

For additional discussion of the scope of the term “carry,” see *Smith v. United States*, 508 U.S. 223 (1993); *United States v. White*, 81 F.3d 80 (8th Cir. 1996); *United States v. Willis*, 89 F.3d 1371, 1379 (8th Cir. 1996).

It should be noted that “carrying” does not require that the defendant had the weapon on his person, but includes carrying a weapon in a vehicle. See *Muscarello v. United States*, 524 U.S. 125 (1998) (holding that carrying a firearm in a vehicle, including in a glove compartment or trunk, satisfies the statute); *United States v. Nelson*, 109 F.3d 1323 (8th Cir. 1997) (transporting firearm in passenger compartment of vehicle constitutes carrying). It is also not necessary to show that the defendant used the weapon in any affirmative manner to prove that the defendant carried the weapon. *Bailey v. United States*, 516 U.S. at 145 (a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction).

5. For the definition of firearm, see 18 U.S.C. § 921(a)(3); 18 U.S.C. § 5845(b). “Firearm” normally will not require definition for the jury, unless there is a dispute about whether the item possessed was in fact a firearm.

6. Where more than one firearm is charged in the same count, a special verdict form is necessary to insure unanimity regarding which gun was possessed. See Instruction 11.03. However, when a defendant is convicted of possession of more than one firearm during a single underlying offense, the additional convictions are not “second or subsequent convictions” triggering the mandatory consecutive 25 year sentence for additional 924(c) convictions. See *United States v. Freisinger*, 937 F.2d 383, 391 (8th Cir. 1991) (overruled on other grounds).

7. The “during and in relation to” element must be included in the instructions in those instances where “use” or “carry” is charged. *Smith v. United States*, 508 U.S. 223, 237 (1993). In *Bradshaw v. United States*, 153 F.3d 704, 707 (8th Cir. 1998) the court implicitly approved the following language exploring the relationship between the firearm and the underlying offense:

In determining whether a defendant used or carried a firearm, you may consider all of the factors received in evidence in the case including the nature of the underlying drug trafficking crime alleged, the proximity of the defendant to the firearm in question, the usefulness of the firearm to the crime alleged, and the circumstances surrounding the presence of the firearm.

In *Bailey*, 516 U.S. 137, the Court enumerated various examples of conduct that would constitute the active employment of a firearm in relation to the predicate offense and also stated that a firearm could “be used without being carried, e.g., when an offender has a gun on display during a transaction or barter with a firearm without handling it.” *Id.* The Committee believes that other conduct can also constitute active employment of a firearm and that latitude should be accorded to

the trial court to fashion an appropriate instruction when the evidence supports submission on the issue of “use.”

8. Under 18 U.S.C. § 924(c)(1), the mandatory penalty for use of certain types of weapons is much greater than for ordinary firearms. For example, if a machine gun, destructive device or silencer is used, the mandatory penalty is 30 years. If a short-barreled rifle or shotgun is used, the mandatory penalty is ten years. This element is required when the government is seeking an enhanced penalty for possession of a certain type of weapon. The definitions of these weapons are rather technical and not necessarily intuitive. *See, e.g.*, 18 U.S.C. § 921(a); 26 U.S.C. § 5845. The Committee believes that the jury should be instructed as to the statutory definitions of the weapon at issue at the request of either party.

9. There is burgeoning disagreement among the Circuits regarding whether actual knowledge of the specific characteristics of the firearm resulting in enhancement of the punishment is required in an 18 U.S.C. § 924(c)(1)(B) prosecution. The Eighth Circuit recently held *en banc* that knowledge of the characteristics of a firearm is required for conviction under 18 U.S.C. § 5861, which prohibits possession of unregistered weapons such as short-barreled shotguns. *United States v. White*, 863 F.3d 784, 790 (8th Cir. 2017) (*en banc*). However, the court has yet to consider the same question in the § 924(c)(1)(B) context. Although the Eighth Circuit once held that mens rea is not required as to this aspect of 18 U.S.C. § 924(c)’s enhanced penalties, the court has not addressed this question since 2006 in *United States v. Gamboa*, 439 F.3d 796 (8th Cir. 2006), and more recent Supreme Court decisions render the reasoning of *Gamboa* invalid. The *Gamboa* court found that actual knowledge of the specific characteristics of a firearm was not required under § 924(c) via two related lines of reasoning: 1) whether a firearm is a “machine gun” is a sentencing factor to be determined by a judge, not an element to be found by a jury; and 2) following *Harris v. United States*, 536 U.S. 545 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was inapplicable because § 924(c) only raised the statutory minimum, and not the maximum penalty. *Gamboa*, 439 F.3d at 811–812.

The Supreme Court has since invalidated both of these aspects of the Eighth Circuit’s reasoning. In *United States v. O’Brien*, 560 U.S. 218 (2010), the Court held that the question of whether a firearm is a machine gun is an element, not a sentencing factor, and must be determined beyond a reasonable doubt by a jury. *Id.* at 234. And in *Alleyne v. United States*, 570 U.S. 99, 103 (2013), the Court held that *Apprendi* applied to mandatory minimum sentences as well as mandatory maximum sentences, overruling *Harris*.

The Eighth Circuit has not specifically revisited whether a defendant must know of the characteristics of the weapon that trigger the enhancement in the § 924(c) context since these developments, but other circuits have. The D.C. Circuit recently reaffirmed its previous course in *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012), holding that, notwithstanding *O’Brien*, there is no mens rea requirement for a sentencing enhancement under § 924(c)(1)(B)(ii). The *Burwell* court acknowledged, however, that earlier precedent from other circuits, like *Gamboa*, was based on the erroneous conclusion that the provision was a sentencing factor and not an element. *Id.* at 511. Similarly, in *United States v. Haile*, 685 F.3d 1211 (11th Cir. 2012), the Eleventh Circuit concluded that *O’Brien* only made possession of a machine gun, and not the knowledge of its attribute, an element. *Id.* at 1281. The Fourth Circuit, on the other hand, strongly suggested that mens rea is an implicit requirement under § 924(c)(1)(B)(ii), even noting that

O'Brien and Staples v. United States, 511 U.S. 600 (1994) “arguably support [the] argument,” but found that the appellant in that case was not entitled to plain error relief because he could not establish that the error was “plain” at the time it was made. *Haile*, 551 Fed. Appx. 52, 54. The Eighth Circuit’s decision in *White* raises a substantial question about whether it would agree with the reasoning of the Fourth Circuit or the D.C. Circuit.

10. Section 924(j) provides for additional significant punishment applicable when a § 924(c) offense results in death. Where the indictment charges a violation of section 924(c) which caused death of a person under section 924(j), the Court must instruct the jury, consistent with the facts of the case, on the elements of murder, voluntary manslaughter and involuntary manslaughter since the maximum sentence to be imposed is dependent on a determination of the nature of the crime committed which caused the death. See 18 U.S.C. §§ 924(j)(1), (2); Instructions 6.18.1111–6.18.1114D.

This Circuit has not decided whether a specific intent to kill is an element of the offense of murder in the first degree committed during a violation of section 924(c). *United States v. Allen*, 247 F.3d 741, 783–84 (8th Cir. 2001) (abrogated on other grounds) (addressing the requirement of “malice aforethought” and the theory of felony murder in the context of § 924(j)).

The *Allen* court also explored what it required for aiding and abetting a violation of 924(j). *Id.* at 784 n.19. To establish accomplice liability in such a circumstance, the Court found that the government must prove: (1) the defendant must “have known the offense of using or carrying a firearm during and in relation to a bank robbery was being committed or going to be committed;” (2) the defendant “intentionally acted in some way for the purpose of causing, encouraging, or aiding the commission of using or carrying of a firearm during and in relation to a bank robbery and that . . . was murdered in the perpetration of that robbery;” and (3) the defendant “was aware of a serious risk of death attending his conduct. *Id.* at 784 n.19 (8th Cir. 2001). The Eighth Circuit has not revisited this question in detail since 2001.

Committee Comments

A defendant may be held liable under section 924(c) for the acts of others, if the defendant had advance knowledge that a firearm would be carried during the commission of the crime. *Rosemond v. United States*, 134 S.Ct. 1240, 1249 (2014). The advance knowledge requirement fulfills aiding and abetting’s intent requirement—the defendant must have intended to aid and abet an *armed* drug sale or crime of violence. *Id.* at 1248. However, the jury may infer advance knowledge “if a defendant continues to participate in a crime after a gun was displayed or used.” *Id.* at 1250 n.9. In *United States v. Daniel*, 887 F.3d 350, 357 (8th Cir. 2018), the jury was so instructed about the requirement of advance knowledge for accomplice liability. The *Daniel* court affirmed the 924(c) conviction, finding that the record supported an inference that the defendant had advance knowledge that his codefendant would use a gun, and the jury could properly base that inference in part on actions that occurred after the robbery. *Id.* at 359–60.

Section 924(c) provides for enhanced penalties if a firearm is brandished (seven years) or discharged (ten years). If an indictment alleges brandishing or discharge of a weapon, the instruction must be modified to add that as a separate element that must be proven beyond a reasonable doubt and found by a unanimous jury.

6.18.1956K CONSPIRACY TO LAUNDER MONEY (18 U.S.C. § 1956(H))

The crime of conspiracy to (specify offense, *e.g.* [launder money] [conduct a financial transaction to avoid reporting requirements] [conduct a financial transaction involving the proceeds of specified unlawful activity]),¹ as charged in [Count ____ of] the Indictment, has three elements:

One, on or before (insert date), two [or more] persons reached an agreement to (specify offense);

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect; and

Three, at the time the defendant joined in the agreement or understanding, [he] [she] knew the purpose of the agreement or understanding.^{2,3}

[Insert paragraph describing [government's][prosecution's] burden of proof; *see* Instruction 3.09, *supra*.]

Notes on Use

1. Specify object of the money laundering conspiracy. *See* 18 U.S.C. § 1956(a)(1)(A)(i) (conducting a financial transaction to promote specified unlawful activity) (*see* Instruction 6.18.1956A); 18 U.S.C. § 1956(a)(1)(B)(i) (conducting a financial transaction to conceal proceeds) (*see* Instruction 6.18.1956B); 18 U.S.C. § 1956(a)(1)(B)(ii) (conducting a financial transaction to avoid reporting requirements) (*see* Instruction 6.18.1956C); 18 U.S.C. § 1956(a)(2)(A) (movement of monetary instruments and funds to promote specified unlawful activity) (*see* Instruction 6.18.1956D); 18 U.S.C. § 1956(a)(2)(B)(i) (movement of monetary instruments and funds to conceal proceeds) (*see* Instruction 6.18.1956E); 18 U.S.C. § 1956(a)(2)(B)(ii) (movement of monetary instruments and funds to avoid reporting requirements) (*see* Instruction 6.18.1956F); 18 U.S.C. § 1956(a)(3)(A) (financial transaction with intent to promote specified unlawful activity) (*see* Instruction 6.18.1956G); 18 U.S.C. § 1956(a)(3)(B) (financial transaction with intent to conceal nature of property) (*see* Instruction 6.18.1956H); 18 U.S.C. § 1956(a)(3)(C) (financial transaction with intent to avoid transaction reporting requirement) (*see* Instruction 6.18.1956I); 18 U.S.C. § 1957 (engaging in monetary transactions in property derived from specified unlawful activity) (*see* Instruction 6.18.18.1957).

2. In addition to this instruction, the Court should also give Instruction 5.06A-2, *supra*, for further explanation of Elements One, Two, and Three; however, Instruction 5.06A-2 should be modified to omit the description of Element Four as Section 1956(h) does not require proof of an overt act. *See Whitfield v. United States*, 543 U.S. 209, 219 (2005) (“Because the text of § 1956(h) does not expressly make the commission of an overt act an element of the conspiracy offense, the

Government need not prove an overt act to obtain a conviction.”); *United States v. Huber*, 404 F.3d 1047, 1056 (8th Cir. 2005) (citing *Whitfield* and noting “[s]ection 1956(h) does not require any such act be charged or proven”); *but see United States v. Jarrett*, 684 F.3d 800, 802 (8th Cir. 2012) (without citing *Whitfield*, stating that “[a] conspiracy conviction requires proof that the defendant knowingly joined a conspiracy to launder money and that one of the conspirators committed an overt act in furtherance of that conspiracy”); *United States v. Delgado*, 653 F.3d 729, 737 (8th Cir. 2011) (without citing *Whitfield*, stating that a money laundering conspiracy conviction requires one of the conspirators to have committed an overt act in furtherance of the conspiracy).

3. To help the jury decide whether the defendant agreed to commit the object of the conspiracy, Instruction 5.06A-2 incorporates a list of elements of the substantive offense. In addition to the list of elements, the Court may wish to read relevant portions of Instruction 6.18.1956J tailored to explain the terms set forth in 18 U.S.C. § 1956 or 18 U.S.C. § 1957 as necessary.

Committee Comments

See United States v. Anwar, 880 F.3d 958, 968 (8th Cir. 2018) (listing elements); *United States v. Diaz-Pellegaud*, 666 F.3d 492, 499 (8th Cir. 2012) (holding evidence sufficient to sustain conspiracy to launder money conviction under Section 1956(h) where reasonable jury could find that defendant agreed with others that they would deposit drug sale proceeds into defendant’s bank account to pay defendant for the drugs and ensure continued supply of drugs); *United States v. Heid*, 651 F.3d 850, 856 (8th Cir. 2011) (finding no factual basis for a guilty plea to Section 1956(h) where there was no evidence defendant knew purpose of bail-posting transaction was to conceal or disguise money’s attributes because Section 1956(h) requires an agreement to violate substantive provisions of the money-laundering statute, which cannot be so broadly construed that it becomes a “money spending statute”).

6.18.2250 FAILURE TO REGISTER (18 U.S.C. § 2250)

The crime of failing to register as a sex offender, as charged in [Count ____] of the Indictment, has [three] elements:

One, the defendant was required to register as a sex offender [or update a registration] under federal law;¹

Two, the defendant traveled in interstate or foreign commerce [or entered, or left, or resided in Indian country] after August 1, 2008;² [or defendant has a federal sex offense conviction occurring in a federal or tribal court, or a qualifying military conviction] (18 U.S.C. § 2250(a)(2)(A));³

Three, the defendant knowingly failed to register or keep his registration current as a sex offender [residing] [working] or [attending school] as required by the Sex Offender Registration and Notification Act.^{4,5,6}

As to the first element, an individual must register under the Sex Offender Registration and Notification Act if he is classified as a “sex offender” under federal law. A “sex offender” is an individual convicted of a “sex offense” in a state or federal court. You are instructed that a conviction for [predicate offense] is a [federal] [state] sex offense requiring registration.

An individual travels in interstate or foreign commerce by moving from one state to another state or to a foreign country during the time he was classified as a “sex offender.”

Keeping a registration current includes [notifying] [updating] a change in residence, workplace, or school.⁷

Notes on Use

1. The Sex Offender Registration and Notification Act (SORNA) makes it a federal crime for a person who “(1) is required to register under SORNA, (2) travels in interstate or foreign commerce, and (3) knowingly fails to register or update a registration.” *Carr v. United States*, 560 U.S. 438, 441-442 (2010); 18 U.S.C. § 2250.

2. The majority of prosecutions will involve a state convicted sex offender charged with failing to register in the state or on the reservation in which he resides. A state-law convicted sex offender violates SORNA if he or she “travels in interstate or foreign commerce” while knowingly

failing to register or update his registration. *United States v. Knutson*, 680 F.3d 1021, 1023 (8th Cir. 2012). SORNA requires a sex offender to register and keep his registration current in each jurisdiction where he resides, works, or attends school. *United States v. Waddle*, 612 F.3d 1027, 1028 (8th Cir. 2010).

Liability under 18 U.S.C. § 2250 “cannot be predicated on pre-SORNA travel.” *Carr*, 560 U.S. at 441. The Eighth Circuit has held that “the Attorney General exercised his authority under § 16913(d) ‘to specify the applicability of [SORNA’s] requirements to sex offenders convicted before the enactment of this chapter’ no later than August 1, 2008, the effective date of the SMART Guidelines.” *United States v. Manning*, 786 F.3d 684, 687 (8th Cir. 2015) (cert granted). The Supreme Court has granted certiorari and heard arguments in *Gundy v. United States*, 138 S. Ct. 1260 (2018) to determine whether SORNA’s delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913 violates the non-delegation doctrine.

3. Federal law makes it a crime for a sex offender convicted under federal law and violations of the Uniform Code of Military Justice to fail to register or update his registration. *United States v. Kebodeaux*, 570 U.S. 387 (2013); *United States v. Coppock*, 765 F.3d 921 (8th Cir. 2014). Travel in interstate or foreign commerce is not required when the conviction necessitating registration is a federal, tribal, or qualifying violation of the United States Code of Military Justice.

4. Failure to register under SORNA is not a specific intent crime. *United States v. Voice*, 622 F.3d 870, 876 (8th Cir. 2010) (“However, 18 U.S.C. § 2250(a) does not require proof of specific intent to violate the law . . . The term ‘knowingly’ ‘merely requires proof of knowledge of the facts that constitute the offense.’” (internal quotations omitted)). A defendant must knowingly fail to register. The scienter requirement of SORNA is satisfied “by proof of a knowing violation of state or local registration requirements, even if the defendant had no notice of his SORNA obligations.” *United States v. Brewer*, 628 F.3d 975, 977 (8th Cir. 2010).

5. The statute sets forth an affirmative defense. It is a defense to a prosecution for failure to register or update a registration when:

- (a) uncontrollable circumstances prevented the individual from complying;
- (b) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and
- (c) the individual complied as soon as such circumstances ceased to exist.

18 U.S.C. § 2250. When the affirmative defense is submitted, the government must then prove beyond a reasonable doubt that the defendant was not precluded from registering as a sex offender for reasons outside of his own control or making and did not register as soon as any impediments were removed. This must be included in the elements instruction. See Instruction 3.09.

6. A fourth element is required under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) when it is alleged that a crime of violence under federal law was committed by an individual who is required to register under SORNA. 18 U.S.C. § 2250(d)(1)

7. Federal law requires that no later than 3 business days after each change in address, workplace, or school, a sex offender must appear in the state where he resides, works or attends school and update the necessary changes. 42 U.S.C. § 16913(c). A person resides at his home or other place where the individual habitually lives. 42 U.S.C. § 16911 (13); *United States v. Voice*, 622 F.3d 870, 874 (8th Cir. 2010).

“Sex offenders who lack fixed abodes are nevertheless required to register in the jurisdiction in which they reside.” *Id.*

**6.21.841A CONTROLLED SUBSTANCES—POSSESSION WITH INTENT TO
DISTRIBUTE (21 U.S.C. § 841(A)(1))**

The crime of possession of (describe substance, e.g., cocaine) with intent to distribute, as charged in [Count _____ of] the Indictment, has three elements:

One, the defendant was in possession of (describe substance, e.g., cocaine);¹

Two, the defendant [knew that he was] [intended to be] in possession of [a controlled substance] [(describe substance, e.g., cocaine)];² and

Three, the defendant intended to distribute³ some or all⁴ of the (describe substance, e.g., cocaine) to another person.

[Insert paragraph describing [government's] [prosecution's] burden of proof; see Instruction 3.09, supra.]

Notes on Use

1. Any fact (other than a prior conviction) that increases either the maximum or minimum mandatory penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Alleyne v. United States*, 133 S. Ct. 2151 (2013). Under the Section 841(b) sentencing provisions, some of the facts that may raise the statutory maximum are the quantity of drugs involved in the offense, or whether death or serious bodily injury results from use of the drugs involved. The elements of the instruction will need to be modified to account for any such facts. For jury instructions involving such enhanced drug offenses, see 6.21.841A1–6.21.846A1.

2. The defendant need not know what the controlled substance is if he knows he has possession of some controlled substance. *United States v. Sheppard*, 219 F.3d 766, 769 (8th Cir. 2000). The alternative language that best fits the case should be used.

3. “Intent to distribute” typically is established through circumstantial evidence. *United States v. Shurn*, 849 F.2d 1090, 1093, 1095 (8th Cir. 1988) and cases cited therein. Circumstantial evidence alone can establish an intent to distribute. *United States v. Fang*, 844 F.3d 775, 779 (8th Cir. 2016) and cases cited therein. A large quantity of narcotics alone provides sufficient circumstantial evidence for a jury to infer an intent to distribute it. *United States v. Wright*, 739 F.3d 1160, 1169 (8th Cir. 2014). Other indicia of intent to distribute include drug quantity, packaging, drug paraphernalia, and presence of cash, firearms, or tools such as a scale as to support finding of intent to distribute. *United States v. McClellan*, 578 F.3d 846, 856 (8th Cir. 2009); *United States v. Lopez*, 42 F.3d 463, 467–68 (8th Cir. 1994) (recognizing “[drug] purity and presence of firearms, cash, packaging material, or other distribution paraphernalia” as indicative of intent to distribute).

In *United States v. Shores*, 700 F.3d 366, 375 (8th Cir. 2012), the court approved the following instruction on “intent to distribute”:

In determining a person’s intent to distribute a controlled substance, the jury may consider, among other things, the quantity of the controlled substance; the manner in which the controlled substance was packaged; the presence of items indicative of distribution including scales, grinders, packaging materials, cutting agents; the street value of the controlled substance; the presence of a firearm; and any cash discovered with the controlled substance. The government must prove beyond a reasonable doubt that the defendant intended to distribute the controlled substance alleged in the indictment.

See also United States v. Lopez, No. 16-4116, 2018 WL 522058 (8th Cir. Jan. 24, 2018) (approving instruction allowing jury to infer intent to distribute based on purity if it finds that the controlled substance was intended to be cut or diluted); *United States v. Thompson*, 686 F.3d 575, 579 (8th Cir. 2012) (approving the instruction “[p]ossession of a large quantity of cocaine base, marijuana, paraphernalia used to aid in the distribution of drugs, or large sums of unexplained cash can support an inference of an intent to distribute”); *United States v. Parish*, 606 F.3d 480, 488-89 (8th Cir. 2010) (approving the instruction, which read in part “[i]n determining a person’s ‘intent to distribute’ a controlled substance, the jury may consider, among other things, the quantity of the controlled substance, the ‘street value’ of the controlled substance, the lack of drug user paraphernalia, the presence of other controlled substances, the presence of a firearm, and the presence of an electronic scale.”); *United States v. Shurn*, 849 F.2d 1090 (8th Cir. 1988) (approving instruction allowing an inference of intent to distribute based on large quantity of heroin).

When such an instruction is given, care must be used that it not be phrased in a manner that indicates the jury must make an inference. Likewise, the word “specific” should not be used to modify intent. The Committee recommends that such an instruction be rephrased as suggested in Instruction 4.13, *supra*.

“Distribute” may be defined if the meaning is unclear in the context of the case. The statute also makes it unlawful to manufacture, dispense or possess with intent to manufacture, distribute or dispense. If one of these alternatives has been charged, this element should be changed accordingly.

4. It is uncertain whether, in Section 841(a)(1) possession with intent to distribute cases, drugs intended only for personal use are included in the drug quantity. The Eighth Circuit has not ruled on the precise issue; however, in *United States v. Fraser*, 243 F.3d 473, 476 (8th Cir. 2001), it concluded that in determining relevant conduct under the sentencing guidelines for a Section 841(a)(1) offense, drugs possessed for solely personal use should not be included. The phrase “some or all” therefore should be used with care.

Committee Comments

Whether something is a “controlled substance” under 21 U.S.C. § 802(6) or a “narcotic drug” within the meaning of Section 802(16) is a question of law. *United States v. Porter*, 544 F.2d 936, 940 (8th Cir. 1976).

The element of “possession” ordinarily does not need to be defined. *Johnson v. United States*, 506 F.2d 640, 643 (8th Cir. 1974). Where the government is relying on a joint possession or constructive possession theory, however, a definitional instruction may be warranted. See Instruction 8.02, *infra*; see also *United States v. Espinoza*, 684 F.3d 766, 783 (8th Cir. 2012) (rejecting defendant’s attack on Instruction 8.02 and finding it “fairly and adequately submitted the issue of possession to the jury”).

Possession of a controlled substance, 21 U.S.C. § 844, is a lesser-included offense of possession of a controlled substance with intent to distribute, 21 U.S.C. § 841(a)(1). See *United States v. Gentry*, 555 F.3d 659, 667 (8th Cir. 2009) (citing *United States v. Brischetto*, 538 F.2d 208, 209 (8th Cir. 1976) (holding that district court abused its discretion in refusing an instruction for the lesser included offense of simple possession where government’s evidence of intent to distribute was weak and “evidence in support of the simple possession charge was stronger than that on the intent to distribute charge”). See Instruction 3.10, *supra*, for a form of lesser included offense instruction.

An instruction for the lesser included offense of simple possession is appropriate only where intent to distribute is in dispute to the degree the jury could rationally convict the defendant of simple possession, but acquit him of possession with intent to distribute. *United States v. Milk*, 281 F.3d 762, 768-69 (8th Cir. 2002) (citing *Keeble v. United States*, 412 U.S. 205, 208 (1973)); see also *United States v. Jones*, 586 F.3d 573, 575 (8th Cir. 2009). Wholly exculpatory evidence does not entitle the defendant to have a lesser-included offense instruction given to the jury. See *United States v. Collins*, 652 F.2d 735, 742 (8th Cir. 1981) (holding no rational basis for instructing on a lesser included offense where defendant’s claim was “complete innocence” because the jury either believed defendant had nothing to do with the transaction or was guilty as charged).

When a physician is charged, special considerations apply. In *United States v. Moore*, 423 U.S. 122 (1975), the Supreme Court held that registered physicians may be prosecuted for violation of the Controlled Substances Act when their activities fall outside the usual course of professional practice. In *United States v. Smith*, 573 F.3d 639 (8th Cir. 2009), the court approved the following instruction in a case where defendant was charged with conspiracy to distribute controlled substances:

The [Act] is not violated if a person distributes or dispenses controlled substances pursuant to a lawful prescription issued for a legitimate medical purpose [] by an individual practitioner acting in the usual course of his or her professional practice....

The court further defined “usual course of professional practice” as requiring:

that the practitioner [have] acted in accordance with a standard of medical practice generally recognized and accepted in the United States. In issuing prescriptions, practitioners are not free to disregard prevailing standards of treatment.

Smith, 573 F.3d at 647. It was not improper to measure the “usual course of professional practice” under 21 U.S.C. § 841(a)(1) and 21 C.F.R. § 1306.04 with an objective generally recognized and accepted medical practice as opposed to a doctor’s self-defined, subjective, particular practice. *Id.* at 648. Any finding otherwise would “allow an individual doctor to define the parameters of his

or her practice and effectively shield the practitioner from criminal liability despite the fact that the practitioner may be acting as nothing more than a “large-scale ‘pusher.’” *Id.* (quoting *Moore*, 423 U.S. at 143).

The *Smith* court also concluded that the above-quoted instruction did not confuse medical malpractice and § 841 standards because it required: a dual showing of failing to adhere to prevailing medical standards *and* a lack of legitimate medical purpose; proof beyond a reasonable doubt; distinguished negligence and included a good-faith instruction. *Id.*

A good faith instruction may be appropriate. *See* Instructions 9.05 and 9.08. In *Smith*, the court approved the following good faith instruction:

A person who works with or for a pharmacy or a physician may not be convicted when he or she distributes or dispenses controlled substances in good faith for a legitimate medical purpose and in the usual course of professional practice....

....

A controlled substance is distributed or dispensed by a physician or pharmacist in the usual course of his or her professional practice and, therefore, lawfully, if the substance is distributed or dispensed by him or her in good faith in medically treating a patient.

When you consider the good faith defense, it is the defendant's belief that is important. It is the sincerity of his belief that determines if he acted in good faith.

If the defendant's belief is unreasonable, you may consider that in determining his sincerity of belief, but an unreasonable belief sincerely held is good faith.

Smith, 573 F.3d at 650.

6.26.5861 FIREARMS—POSSESSION OF UNREGISTERED FIREARMS (26 U.S.C. § 5861(D))

The crime of [possession¹ of] [receiving] an unregistered firearm, as charged in Count _____ of the Indictment, has five elements:

One, on or about [date], the defendant knowingly possessed a [firearm][destructive device];

Two, the weapon was [describe the type of firearm as one defined in 26 U.S.C. § 5845(a) for which registration is required]²;

Three, the defendant knew the firearm was a [describe the type of firearm, e.g. short-barreled shotgun or machine gun]³;

Four, the firearm [was capable of operating as designed] [could readily be put in operating condition]⁴; and

Five, the firearm was not registered to the defendant in the National Firearms Registration and Transfer Record.⁵

Notes on Use

1. In *United States v. Smith*, the court considered the element of possession in a § 5861 context and found that “[m]ere physical proximity to a firearm is not enough to show constructive possession, but knowledge of a firearm’s presence, combined with control is constructive possession.” 508 F.3d 861, 866 (8th Cir. 2007) (quoting *United States v. Stevens*, 439 F.3d 983, 990 (8th Cir. 2006)). The element of possession in cases charged under § 5861(d) is satisfied if the defendant has knowledge of the firearm’s presence and control. See Instruction 8.02, *infra*, for an instruction on actual or constructive possession.

2. “Firearm” as used in the National Firearms Act will require definition for the jury. The eight categories of weapons for which registration is required are specifically described at 26 U.S.C. § 5845(a). The legal definition of the type of weapon at issue should be included at element two. For instance, in a case involving possession of an unregistered short-barreled shotgun, this element would read “the weapon was a shotgun with an overall length of less than twenty-six inches or a barrel length of less than eighteen inches.” See, e.g., *United States v. Klanecky*, 393 F. App’x 409, 410–11 (8th Cir. 2010) (grenade components); *Smith*, 508 F.3d at 866 (machine gun); *United States v. Dukes*, 432 F.3d 910, 915 (8th Cir. 2006) (silencer).

3. 26 U.S.C. § 5861 requires proof that a defendant knew of the characteristics of the weapon that made it a “firearm.” *Staples v. United States*, 511 U.S. 600, 619 (1994); *United States v. White*, 863 F.3d 784, 790 (8th Cir. 2017) (en banc) (holding that “in all cases in which a

defendant is prosecuted under the National Firearms Act for unlawful possession of an unregistered firearm, the government must prove beyond a reasonable doubt that the defendant knew of the physical characteristics of the weapon bringing the weapon within the ambit of the Act”). Eighth Circuit jurisprudence once made a distinction between “quasi-suspect” weapons and non-quasi-suspect weapons, and did not require the government to prove a particular mens rea for the first category because their very nature might put a person on notice that they were subject to greater regulations. *See, e.g., United States v. Barr*, 32 F.3d 1320 (8th Cir. 1994) *overruled by White*, 863 F.3d at 787–90. However, in *White*, the en banc court overruled *Barr* and its progeny as being inconsistent with *Staples*. *See White*, 863 F.3d at 787–790.

For example, to prove the defendant’s knowledge regarding a short-barreled shotgun, for example, the government must show that the defendant knew of the shortened barrel that triggered the registration requirement, though it need not prove the defendant knew the firearm had the exact numerical dimensions that render the firearm unlawful. *See White*, 863 F.3d at 790. Although the government must prove that the defendant knew of the characteristics of the weapon that triggered the registration requirement, the government need not prove that the defendant knew that registration was actually required. *See, e.g., United States v. Freed*, 401 U.S. 601, 607 (1971) (holding that the National Firearms Act does not require specific intent through proof that the defendant was aware of the registration requirement); *White*, 863 F.3d at 788 (citing *Freed* for the proposition that the government need not prove that the defendant knew a firearm was unregistered).

4. The government must prove that the firearm can be operated or readily assembled to operating condition. *Dukes*, 432 F.3d at 915 (noting that one element of the offense as to a silencer is proving that “the silencer was capable of operating as designed”).

This element of the instruction is not required in cases involving destructive devices because it is not necessary that the device function as intended. *United States v. Ragusa*, 664 F.2d 696, 700 (8th Cir. 1981).

5. Whether registration of the firearm was required and whether it was actually registered are both questions for the jury. *United States v. Henderson*, 482 F.2d 558, 559 (8th Cir. 1973) (rejecting defendant’s claim that the government’s proof that the firearm was not registered was insufficient due to an improper name search and stating, “[a]t most, a jury question was posed by this argument”); *see also Bryan v. United States*, 373 F.2d 403, 407 (5th Cir. 1967) (finding question of whether registration was required was properly submitted to the jury).

Committee Comments

Destructive devices are considered firearms within the meaning of the statute. 26 U.S.C. § 5845(a)(8). The term “destructive device” is defined in detail at 26 U.S.C. § 5845(f). Items deemed destructive devices have been as diverse as

- ten sticks of dynamite, a length of slow fuse, and a blasting cap, combined with an alarm clock and a 6-volt battery. *United States v. Harflinger*, 436 F.2d 928, 929, 931 (8th Cir. 1970).

- six trash bags, each holding a 5-gallon container of gasoline, connected by overlapping paper towels with a trigger consisting of matchbooks fashioned to cigarettes adjacent to a bottle of flammable liquid. *Ragusa*, 664 F.2d at 697–98.
- a metal pipe with two end caps and bullets taped to it, but with neither powder nor a fuse; a metal pipe filled with powder, with one end cap and one end wrapped in cellophane, but without a detonator; and a metal shoe-polish can wrapped in tape, containing a bottle rocket, powder, and a shotgun shell. *United States v. Kendall*, 138 F.3d 1235, 1236–38 (8th Cir 1998).
- unassembled components of a hand grenade. *Klanecky*, 393 F. App'x. at 410.
- an MK66 model 1 rocket with an inert warhead. *United States v. Teeter*, 561 F.3d 768, 769, 771 (8th Cir. 2009)

The individual components must be designed or intended for use as a destructive device. 26 U.S.C. § 5845(f)(3). For example, when the individual components are commercial explosives (“sticks of ammonium dynamite and nitroglycerin, equipped with fuses and percussion caps”), proof of the intended use of the components to assemble a destructive device is required in the Eighth Circuit. *Langel v. United States*, 451 F.2d 957, 960, 962 (8th Cir. 1971).

9.08B GOOD FAITH (TAX CASES)

One of the issues in this case is whether the defendant acted in good faith. Good faith is a complete defense to the crime of [attempting to evade and defeat any tax] [failing to [collect] [account truthfully for] [or] [pay over] an employment tax] [failing to file the required tax return on or before the time required by law] [making and subscribing to a false tax return], if the defendant did not act willfully, which is an element of the charge.¹ The essence of the good-faith defense is that one who acts with honest intentions cannot be convicted of a crime requiring proof that the defendant acted willfully, that is, voluntarily and intentionally violating a known legal duty.²

The phrase “good faith” includes, among other things, an opinion or belief that is honestly held - - even if the opinion is in error or the belief is mistaken - - and the intent to perform all lawful obligations.³ Proof of willfulness requires more than proof that a defendant only misunderstood the requirements of the law, made a mistake in judgment, or was careless.⁴ [For example, if a person in good faith believes that an income tax return, as prepared by [him] [her], truthfully reports the taxable income and allowable deductions of the taxpayer under the Internal Revenue laws, that person cannot be guilty of willfully making and subscribing to a false tax return.⁵] [For example, if a person in good faith believes that [he] [she] is not required to file an income tax return, then that person cannot be guilty of willfully failing to file a tax return.⁶]

Mere disagreement with the law in and of itself, however, does not constitute a good-faith misunderstanding of the requirements of the law. That is because it is the duty of all persons to obey the law whether or not they agree with it.⁷ A person’s belief that the tax laws violate [his] [her] constitutional rights does not constitute a good-faith misunderstanding of the requirements of the law. Also, a person’s disagreement with the government’s monetary system and policies does not constitute a good-faith misunderstanding of the requirements of the law.⁸

It is for you to decide whether the defendant acted in good faith - - that is, whether [he] [she] sincerely misunderstood the requirements of the law - - or whether the defendant knew the requirements of the law and chose not to comply with those requirements.⁹ The [government] [prosecution] has the burden of proving beyond a reasonable doubt that the defendant acted

willfully.¹⁰ Evidence that the defendant acted in good faith may be considered by you, together with all the other evidence, in determining whether or not [he] [she] acted willfully.¹¹

Notes on Use

1. See Instructions 6.26.7201, 6.26.7202, 6.26.7206, all of which state: “To act ‘willfully’ means to voluntarily and intentionally violate a known legal duty.” No separate definition of willfully is recommended because the definition has been incorporated into the instruction itself.

2. See *United States v. Renner*, 648 F.3d 680, 687 (8th Cir. 2011) (tax evasion).

3. See *United States v. DeRosier*, 501 F.3d 888, 893 n.5 (8th Cir. 2007) (wire fraud) (quoting *United States v. Ammons*, 464 F.2d 414, 417 (8th Cir. 1972)). See also *Renner*, 648 F.3d at 687.

4. *United States v. Kouba*, 822 F.2d 768, 771 (8th Cir. 1987) (false tax returns and failure to file); *Honey v. United States*, 963 F.2d 1083, 1089 (8th Cir. 1992) (tax evasion); *United States v. Hern*, 926 F.2d 764, 767 (8th Cir. 1991) (tax evasion).

5. *Id.*

6. See *United States v. Jerde*, 841 F.2d 818 822 (8th Cir. 1988) (failure to file tax return).

7. See *Cheek v. United States*, 498 U.S. 192, 202-03 (1991) (tax evasion and failure to file); *United States v. Miller*, 634 F.2d 1134, 1135 (8th Cir. 1980) (failure to file); *United States v. Marston*, 517 F.3d 996, 999 (8th Cir. 2008) (tax evasion).

8. *Id.*

9. *Id.*

10. See *United States v. Cegelka*, 853 F.2d 627, 628 (8th Cir. 1988) (false representation on Medicare form); see also *Bryan v. United States*, 524 U.S. 184, 195 n.17 (1998) (firearms dealing without a license); *United States v. Brooks*, 174 F.3d 950, 954 (8th Cir. 1999) (tax evasion); *United States v. Morse*, 613 F.3d 787, 794 (8th Cir. 2010) (false tax returns); *United States v. Gustafson*, 528 F.3d 587, 592 (8th Cir. 2008) (tax evasion).

11. See *United States v. Beale*, 574 F.3d 512, 518 (8th Cir. 2009) (tax evasion); *United States v. Robertson*, 709 F.3d 741, 746 (8th Cir. 2013) (misapplication of tribal funds).

Committee Comments

Good faith is a theory of defense in tax evasion, failure to file a tax return, employment tax, and false return cases. Where the defendant has presented evidence of good faith, he or she is entitled to a good-faith jury instruction. See instruction 9.08A, *infra*; *Kouba*, 822 F.2d at 771, *United States v. Ervasti*, 201 F.3d 1021, 1040 - 41 (8th Cir. 2000) (impeding the IRS).

Tax cases in which good-faith instructions have been found proper include *Kouba*, 822 F.2d at 771 and *Jerde*, 841 F.2d at 822. *See also Renner*, 648 F.3d at 683.

For additional points, *see* Committee Comments to Instruction 9.08A, *infra*.

9.09 ADVICE OF COUNSEL

One of the issues in this case is whether the defendant in good faith followed the advice of [his] [her] counsel, that is, [his] [her] attorney. [Advice of counsel is not a defense to the crime.¹] Advice of counsel is a circumstance that may be considered by you in determining whether the defendant acted in good faith and lacked (insert mental state required by statute, e.g., intent to defraud or willfulness).

The defendant does not act (insert mental state required by statute, e.g., with intent to defraud or willfully) if (1) before taking action with regard to the alleged offense, the defendant in good faith consulted an attorney whom the defendant considered competent; (2) the defendant's consultation with the attorney was for the purpose of securing advice on the lawfulness of the defendant's possible future conduct; (3) the defendant made a full and accurate report to the attorney of all material facts known to the defendant; and (4) the defendant then acted strictly in accordance with the advice the attorney gave [him] [her].²

Whether the defendant in good faith followed the advice of counsel by meeting all four of these requirements is for you to determine.³

Notes on Use

1. Advice of counsel is not a defense, but rather a more specific form of the good-faith defense and is only a circumstance that may be considered in determining whether the defendant acted in good faith and lacked specific intent to violate the law. *See United States v. Poludniak*, 657 F.2d 948, 958-59 (8th Cir. 1981) (extortion case). As the Supreme Court has held, "no man can willfully and knowingly violate the law, and excuse himself from the consequences thereof by pleading that he followed the advice of counsel." *Williamson v. United States*, 207 U.S. 425, 453 (1908) (subornation of perjury) (citing *Poludniak*, 657 F.2d at 959); *see also Tarvestad v. United States*, 418 F.2d 1043, 1047 (8th Cir. 1969) (securities fraud).

2. The advice of counsel instruction should not be given in cases that do not require specific intent or willfulness as an element. *See, e.g., United States v. Powell*, 513 F.2d 1249, 1251 (8th Cir. 1975) (illegal firearms case) (holding the defendant is not entitled to a reliance on advice of counsel instruction in a case that charged unlawful firearms dealing under 18 U.S.C. § 922(a) (1) because specific intent or knowledge of the defendant that he or she is violating the law is not an essential element of that crime).

3. In appropriate cases, where the prerequisites are met, the jury may be instructed as to good-faith reliance on the advice of an accountant or tax return preparer. *United States v. Renner*, 648 F.3d 680, 687 (8th Cir. 2011) (tax evasion); *United States v. Meyer*, 808 F.2d 1304, 1306 (8th

Cir. 1987) (false tax returns and tax evasion); *McGraw v. C.I.R.*, 384 F.3d 965, 973 (8th Cir. 2004) (fraudulent tax returns). In such cases, the instruction should be revised accordingly.

Committee Comments

A defendant who cannot meet the requirements for an advice of counsel instruction, such as a defendant who cannot show that he fully informed his counsel of his actions and then relied upon counsel's advice that his actions were legal, is not entitled to an advice of counsel instruction. *See, e.g., United States v. Petters*, 663 F.3d 375, 384-85 (8th Cir. 2011) (mail/wire fraud and money laundering) (citing *United States v. Rice*, 449 F.3d 887, 896-97 (8th Cir. 2006)) (false statements and conversion) (“[A] defendant is not immunized from criminal prosecution merely because he consulted an attorney in connection with a particular transaction.”). Stated another way, the defendant must come forward with a showing of facts that support the advice of counsel defense before the court should give the instruction. *Rice*, 449 F.3d at 897 (citing *United States v. Parker*, 364 F.3d 934, 945-46 (8th Cir. 2004) (mail fraud and money laundering)); *see also United States v. Washburn*, 444 F.3d 1007, 1013 (8th Cir. 2006) (wire fraud and money laundering). In *Rice*, a case charging false statements in violation of 18 U.S.C. § 1001 and conversion of property to the Farm Services Agency in violation of 18 U.S.C. § 658, the Eighth Circuit found there was no error where the district court declined to give a reliance on advice of counsel instruction because the defendant had failed to establish the basis necessary to support such an instruction. *Id.* The court held that “a defendant is not immunized from criminal prosecution merely because he consulted an attorney in connection with a particular transaction. Rather, to rely upon the advice of counsel in his defense, a defendant must show that he: (i) fully disclosed all material facts to his attorney before seeking advice; and (ii) actually relied on his counsel's advice in the good faith belief that his conduct was legal.” *Id.*