

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS  
KANSAS CITY DOCKET**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
v.	)	<b>No. 10-20029-CM-JPO</b>
	)	
<b>KENNETH G. LAIN, JR.,</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

**DEFENDANT’S REQUESTED INSTRUCTIONS ON 1) GOOD FAITH;  
2) WILLFULLNESS; AND 3) ELEMENTS OF THE OFFENSE  
WITH SUGGESTIONS IN SUPPORT**

**COMES NOW** defendant and submits his request that the court submit the following verdict director and good faith and willfulness instructions to the jury:

**Verdict Director Elements:** Tenth Circuit Pattern Instruction 2.41 (modified):

The defendant is charged in count one with a violation of 18 U.S.C. section 922(a)(1)(D). This law makes it a crime for an individual to gift, transfer, sell or receive a handgun across state lines without going through and utilizing licensed federal firearms dealers. To find the defendant guilty of this crime you must be convinced that the government has proved each of the following elements

beyond a reasonable doubt:

**First:** the defendant resided in the State of Missouri on or about the date he is alleged to have given the .38 caliber revolver to Carroll Hill;

**Second:** Carroll Hill received and took possession of the .38 caliber revolver with intent to keep it;

**Third:** Carroll Hill resided in the State of Kansas on or about the date of sale, transfer or receipt of the handgun and was not a licensed federal firearms dealer.

**Fourth:** the defendant did so willfully, that is, that the defendant gifted, transferred to sold the .38 caliber handgun to Carroll Hill for bad purpose with knowledge that his conduct was unlawful.

The term “firearm” means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

Defendant prepared the above instruction using the 10<sup>th</sup> Circuit Pattern instruction 2.41. The latter pattern instruction does not specifically deal with section 922(a)(1)(D) but does reference other provisions of 18 USC, Section 922 and suggests that this instruction tailored for a 922(a)(1)(A) offense should be modified for use with other subsections such as sub-section (D), the charge in this case.

Unlike the majority of violations of the federal firearms laws that only

require proof of a knowing volitional act, the crime charged in this indictment is a specific intent offense that requires a willful act.

**Willfulness Defined:**

What would otherwise constitute a pattern instruction for “willfully to act” amounts only to commentary at Section 1.38 of the 10<sup>th</sup> Circuit pattern instructions.

That comment notes the difficulty in defining the term and suggests that no definitional instruction be given in most cases.

In *Bryan v. United States*, 524 U.S. 184 (1998) the Supreme Court was confronted with this very issue and held that the term “willfully” in Section 924(a)(1)(D) requires proof that the defendant knew his conduct was unlawful and that a willful act is generally undertaken with “bad purpose”, citing *Heikkinen v. United States*, 355 U.S. 273 at 279. The government must prove, according to *Bryan*, that the defendant acted with knowledge that his conduct was unlawful, citing *Ratzlaf v. United States*, 510 U.S. 135 at 137.

Based on the foregoing authority, defendant submits that he is entitled to the above instruction as a verdict director. Moreover, defendant submits that he is also entitled to an instruction on willfulness, under *Bryan*, notwithstanding the commentary suggesting such an instruction not be given in most cases. Defendant proposes that the Court use the instruction given and quoted in *United States v.*

*McClatchey*, 217 F.3d 823 at 829 (10<sup>th</sup> Cir. 2000) which was:

An act is done willfully if it is done voluntarily and purposely and with the specific intent to do something the law forbids, that is, with the bad purpose either to disobey or disregard the law. A person acts willfully if he or she acts unjustifiably and wrongly while knowing that his or her actions are unjustifiable and wrong. Thus, in order to act willfully as I have defined that term, a person must specifically intend to do something the law forbids, purposely intending to violate the law.

**Good Faith Instruction:**

Defendant has also prepared a good faith instruction using guidance from 10<sup>th</sup> Circuit case law:

If you find that the defendant did not have the legal right transfer the .38 caliber hand gun in the manner he did, then you must consider whether he had a good faith belief that he was engaged in a lawful transaction, and thus, that he was not acting with the mental state that the United States is required to prove beyond a reasonable doubt. The defendant's good faith constitutes a complete defense to the crime charged.

I want to remind you that a defendant does not have any obligation to prove anything in this case. It is the government's burden to prove to you, beyond a reasonable doubt, that the defendant committed the criminal act charged, and that his act was done willfully with bad purpose and intent to violate the law as I have explained it to you.

In *United States v. Hopkins*, 744 F.2d 716 (10<sup>th</sup> Cir. 1984) (*en banc*), the Circuit ruled that when properly injected into the case, a good faith defense requires an entirely separate instruction when requested by the defendant. This was reiterated in *United States v. Overholt*, 307 F.3d 1231 (10<sup>th</sup> Cir. 2002), citing *Hopkins* as the law, notwithstanding contrary rulings from other Circuits, and noting that the instruction is required even when a separate willfulness instruction has been given. A divided panel held in *United States v. Reed*, 114 F.3d 1053 (10<sup>th</sup> Cir. 1997) that such an instruction is not required in those cases where the firearms violation is a non-specific-intent crime requiring only a “knowing act” as opposed to a “willful” one. *Reed* notes that the instruction is required only where there is a viable defense based on the need for the government to prove willfulness such as is charged in this case.

WHEREFORE, defendant requests that the Court include the above three

instructions as part of the standard instruction packet using in this district.

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney Terra Morehead for the District of Kansas and other ECF listed counsel through use of the Electronic Court Document Filing System on April 21, 2010.

/s/

JOHN R. OSGOOD