

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MARK JAMES OLSON, Defendant.	4:21-CR-40129-KES FINAL INSTRUCTIONS TO THE JURY
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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

FINAL INSTRUCTION NO. 2 – POSSESSION OF A FIREARM OR AMMUNITION
BY A PROHIBITED PERSON

For you to find Mark James Olson guilty of the offense of possession of a firearm or ammunition by a prohibited person as charged in Count 1 of the Superseding Indictment, the prosecution must prove the following four essential elements beyond a reasonable doubt:

One, on or about June 28, 2021, Olson knowingly possessed a firearm or ammunition: namely, a Glock, Model 42 380 caliber handgun, bearing serial number AAPE867, or six rounds of .380 caliber ammunition, or three rounds of 9mm ammunition;

The government is not required to prove that the defendant knew that his acts or omissions were unlawful. An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all other evidence, in deciding whether the defendant acted knowingly.

There is one firearm and 9 rounds of ammunition identified in count 1. The government need not prove beyond a reasonable doubt that Olson possessed all of these firearms or ammunition. Instead, the government must prove beyond a reasonable doubt that Olson possessed at least one of these firearms or ammunition. You must unanimously agree as to which firearm or ammunition Olson possessed.

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

The term "ammunition" means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.

Two, that on or about June 28, 2021, Olson had been convicted of a crime punishable by more than one year imprisonment;

You are instructed that Unauthorized Ingestion of Controlled Drug/Substance and Possession of Controlled Drug/Substance are each crimes punishable by imprisonment for more than one year under the laws of South Dakota.

Three, at the time Olson knowingly possessed a firearm or ammunition, he knew that he had been convicted of a crime punishable by more than one year imprisonment;

And four, that the firearm or ammunition had been transported across a state line at some point during or before Olson's possession of it.

If you have found beyond a reasonable doubt that the firearm in question, the ammunition in question, or both, were manufactured in a state or country other than the State of South Dakota, and that the defendant possessed that firearm, ammunition, or both in the state of South Dakota, you may, but are not required to, find that the firearm, ammunition, or both, were transported across a state line.

The government is not required to prove that the defendant knew the firearm or ammunition had crossed a state line.

In the alternative, Olson can be found guilty of the offense of possession of a firearm or ammunition by a prohibited person as charged in Count 1 of the Superseding Indictment if the prosecution proves the following four essential elements beyond a reasonable doubt:

One, on or about June 28, 2021, Olson knowingly possessed a firearm or ammunition: namely, a Glock, Model 42 380 caliber handgun, bearing serial number AAPE867, or six rounds of .380 caliber ammunition, or three rounds of 9mm ammunition;

The same instructions described above for element one of Count 1 apply here.

Two, that on or about June 28, 2021, Olson was an unlawful user of a controlled substance;

Three, at the time Olson knowingly possessed a firearm or ammunition, he knew that he was an unlawful user of a controlled substance;

The phrase "unlawful user of a controlled substance" means a person who uses a controlled substance in a manner other than as prescribed by a licensed physician. The defendant must have been actively engaged in use of a controlled substance during the time he possessed the firearm or ammunition, but the law does not require that he used the controlled substance at the precise time he possessed the firearm or ammunition. 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.

An inference that a person was a user of a controlled substance may be drawn from evidence of a pattern of use or possession of a controlled substance that reasonably covers the time the firearm or ammunition was possessed.

You are instructed that methamphetamine and marijuana are controlled substances under federal law.

And four, that the firearm had been transported across a state line at some point during or before the defendant's possession of it.

The same instructions described above for element four of Count 1 apply.

For you to find the defendant guilty of possession of a firearm by a prohibited person as charged in Count 1 of the Superseding Indictment, the prosecution must prove all four of the essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of possession of a firearm by a prohibited person as charged in Count 1 of the Superseding Indictment.

FINAL INSTRUCTION NO. 3 – POSSESSION WITH INTENT TO DISTRIBUTE A
CONTROLLED SUBSTANCE

For you to find Mark James Olson guilty of possession with the intent to distribute a controlled substance, as charged in Count 2 of the Superseding Indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt:

One, that on or about June 28, 2021, Olson was in possession of methamphetamine;

You are instructed, as a matter of law, that methamphetamine is a controlled substance.

Two, that Olson knew that he was in possession of methamphetamine;

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.

A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Whenever the word “possession” has been used in these instructions it includes actual as well as constructive possession and also sole as well as joint possession.

And three, that Olson intended to distribute some or all of the methamphetamine to another person.

The term “distribute” means to deliver a controlled substance to the actual or constructive possession of another person. It is not necessary that money or anything of value change hands. The law prohibits the “possession with intent to distribute” a controlled substance; the

prosecution does not have to prove that there was, or was intended to be, a “sale” of a controlled substance to prove “possession with intent to distribute.”

Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of defendant’s knowledge or intent. You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

It is not necessary for the government to prove that Olson knew the precise nature of the controlled substance that he possessed with the intent to distribute.

The government must prove beyond a reasonable doubt, however, that Olson did know that some type of controlled substance was possessed with intent to distribute.

In attempting to determine the intent of any person, you may consider all the facts and circumstances shown by the evidence received in the case concerning that person. If you find beyond a reasonable doubt that the defendant possessed a large quantity of methamphetamine, that is evidence from which you may, but are not required to, find or infer that the defendant intended to distribute methamphetamine.

In determining a person’s “intent to distribute” a controlled substance, you may consider, among other things, the purity of the controlled substance, the quantity of the controlled substance, the presence of equipment used in the processing or sale of controlled substances, and large amounts of cash or weapons.

If all of these elements have been proved beyond a reasonable doubt as to Olson, then you must find Olson guilty of the crime charged in Count 2 of the Superseding Indictment; otherwise, you must find Olson not guilty of that crime.

Quantity of Methamphetamine

If you find Olson guilty of possession with intent to distribute methamphetamine, as charged in Count 2 of the Superseding Indictment, you must also determine beyond a reasonable doubt the quantity of methamphetamine (actual) for which the defendant can be held responsible.

The government must prove beyond a reasonable doubt the quantity of methamphetamine (actual) actually involved in the offense for which Olson can be held responsible. Therefore, you must ascertain whether or not the controlled substance in question was in fact methamphetamine (actual), as charged in the Superseding Indictment, and you must determine beyond a reasonable doubt the amount of methamphetamine (actual) involved in the offense for which Olson can be held responsible. In so doing, you may consider all of the evidence in the case that may aid in the determination of these issues.

You must determine the *total quantity* of the controlled substance involved in the offense in which the defendant can be held responsible. You must indicate the *range* within which that *total quantity* falls. You must determine that *total quantity* in terms of grams of methamphetamine.

Again, you must determine *beyond a reasonable doubt* the quantity of methamphetamine involved in the offense in which the defendant can be held responsible.

FINAL INSTRUCTION NO. 4 – DEFENDANT’S PRIOR OFFENSES

You have heard testimony that the defendant may have committed other drug-related offenses or may have had other contact with the criminal justice system.

With regard to Count 1, you may consider this evidence to determine whether the defendant was previously convicted of a crime punishable by imprisonment for more than one year and whether the defendant knew he had been convicted of a crime punishable by imprisonment for more than one year. The government has the burden of proving these elements beyond a reasonable doubt.

With regard to Count 2, you may consider this evidence only if you unanimously find it is more likely true than not true that the defendant committed the act or acts. 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(s), 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 the defendant had knowledge to commit the crime charged in Count 2 of Superseding Indictment. You should give it the weight and value you believe it is entitled to receive.

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

FINAL INSTRUCTION NO. 5 – IMPEACHMENT

In Preliminary Instruction No. 6, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight, if any, you think it deserves.

Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party. You should consider all the facts and circumstances in evidence to determine which of the witnesses you choose to believe or not believe. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

FINAL INSTRUCTION NO. 6 – PRESUMPTION OF INNOCENCE AND BURDEN
OF PROOF

The presumption of innocence means that the defendant is presumed to be absolutely not guilty.

- This presumption means that you must put aside all suspicion that might arise from the defendant's arrest, the charge, or the fact that he is here in court.
- This presumption remains with the defendant throughout the trial.
- This presumption is enough, alone, for you to find the defendant not guilty, unless the prosecution proves, beyond a reasonable doubt, all of the elements of the offense charged against him.

The burden is always on the prosecution to prove guilt beyond a reasonable doubt.

- This burden never, ever shifts to the defendant to prove his innocence.
- This burden means that the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.
- This burden means that, if the defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict.

This burden means that you must find the defendant not guilty of the offense charged against him, unless the prosecution proves beyond a reasonable doubt that he has committed each and every element of that offense.

FINAL INSTRUCTION NO. 7 – REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense.

- A reasonable doubt may arise from evidence produced by the prosecution or the defendant, keeping in mind that the defendant never, ever has the burden or duty to call any witnesses or to produce any evidence.
- A reasonable doubt may arise from the prosecution's lack of evidence.

The prosecution must prove the defendant's guilt beyond a reasonable doubt.

- Proof beyond a reasonable doubt requires careful and impartial consideration of all the evidence in the case before making a decision.
- Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs.

The prosecution's burden is heavy, but it does not require proof beyond all possible doubt.

FINAL INSTRUCTION NO. 8 – DUTY TO DELIBERATE

A verdict must represent the careful and impartial judgment of each of you. Before you make that judgment, you must consult with one another and try to reach agreement if you can do so consistent with your individual judgment.

- If you are convinced that the prosecution has not proved beyond a reasonable doubt that the defendant is guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that the defendant is guilty, say so.
- Do not give up your honest beliefs just because others think differently or because you simply want to be finished with the case.
- On the other hand, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is wrong.
- You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others, and with a willingness to re-examine your own views.
- Remember that you are not advocates, but judges of the facts, so your sole interest is to seek the truth from the evidence.
- The question is never who wins or loses the case, because society always wins, whatever your verdict, when you return a just verdict based solely on the evidence, reason, your common sense, and these Instructions.
- You must consider all of the evidence bearing on each element before you.
- Take all the time that you feel is necessary.

Remember that this case is important to the parties and to the fair administration of justice, so do not be in a hurry to reach a verdict just to be finished with the case.

FINAL INSTRUCTION NO. 9 – DUTY DURING DELIBERATIONS

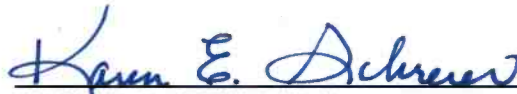
You must follow certain rules while conducting your deliberations and returning your verdict:

- Select a foreperson to preside over your discussions and to speak for you here in court.
- Do not consider punishment in any way in deciding whether the defendant is guilty or not guilty. If the defendant is guilty, I will decide what the sentence should be.
- Communicate with me by sending me a note through a Court Security Officer (CSO). The note must be signed by one or more of you. Remember that you should not tell anyone, including me, how your votes stand. I will respond as soon as possible, either in writing or orally in open court.
- Base your verdict solely on the evidence, reason, your common sense, and these Instructions. Again, nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.
- Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.
- Complete the Verdict Form. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise the CSO that you are ready to return to the courtroom.

Good luck with your deliberations.

Dated November 16, 2022

BY THE COURT:

A handwritten signature in blue ink, reading "Karen E. Schreier", is written over a horizontal line.

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE