PATTERN

CRIMINAL JURY INSTRUCTIONS

FOR THE DISTRICT COURTS

OF THE FIRST CIRCUIT

PATTERN CRIMINAL JURY INSTRUCTIONS DRAFTING COMMITTEE

Professor Melvyn Zarr, Co-Chair
University of Maine School of Law
Portland, Maine

John A. Ciraldo, Esq., Co-Chair
Perkins, Thompson, Hinckley & Keddy
Portland, Maine

Neale A. Duffett, Esq.
Cloutier, Barrett, Cloutier & Conley
Portland, Maine

Hon. D. Brock Hornby
United States Chief District Judge
Portland, Maine

Jonathan A. Chapman, Esq.
Assistant United States Attorney
Portland, Maine

Margaret McGaughey, Esq.
Assistant United States Attorney
Portland, Maine

PATTERN CRIMINAL JURY INSTRUCTIONS
FOR THE FIRST CIRCUIT

Preface

Citations to Other Pattern Instructions

How to Use the Pattern Instructions

Part 1 Preliminary Instructions

1.01 Duties of the Jury
1.02 Nature of Indictment; Presumption of Innocence
1.03 Previous Trial
1.04 Preliminary Statement of Elements of Crime
1.05 Evidence; Objections; Rulings; Bench Conferences
1.06 Credibility of Witnesses
1.07 Conduct of the Jury
1.08 Notetaking
1.09 Outline of the Trial

Part 2 Instructions Concerning Certain Matters of Evidence

Introductory Comment
2.01 Stipulations
2.02 Impeachment by Prior Inconsistent Statement
2.03 Impeachment of Witness Testimony by Prior Conviction
2.04 Impeachment of Defendant's Testimony by Prior Conviction
2.05 Evidence of Defendant's Prior Similar Acts
2.06 Weighing the Testimony of an Expert Witness
2.07 Caution as to Cooperating Witness/Accomplice/Paid Informant
2.08 Use of Tapes and Transcripts
2.09 Flight After Accusation/Consciousness of Guilt
2.10 Statements by Defendant
2.11 Missing Witness
2.12 Witness (Not the Defendant) Who Takes the Fifth Amendment
2.13 Definition of "Knowingly"
2.14 "Willful Blindness" As a Way of Satisfying "Knowingly"

Part 3 Final Instructions: General Considerations

3.01 Duty of the Jury to Find Facts and Follow Law
3.02 Presumption of Innocence; Proof Beyond a Reasonable Doubt
3.03 Defendant's Constitutional Right Not to Testify
3.04 What Is Evidence; Inferences
3.05 Kinds of Evidence: Direct and Circumstantial
3.06 Credibility of Witnesses
3.07 Cautionary and Limiting Instructions as to Particular Kinds of Evidence
3.08 What Is Not Evidence

Part 4 Final Instructions: Elements of Specific Crimes

A. Offenses Under Title 18

4.01 Attempt
4.02 Aid and Abet, 18 U.S.C. § 2
4.03 Conspiracy, 18 U.S.C. § 371; 21 U.S.C. § 846
4.04 Escape from Custody, 18 U.S.C. § 751
4.05 Assisting Escape, 18 U.S.C. § 752
4.06 Possession of a Firearm or Ammunition in or Affecting Commerce by a Convicted Felon, 18 U.S.C. § 922(g)
4.07 Using or Carrying a Firearm During and in Relation to Drug Trafficking or Crime of Violence, 18 U.S.C. § 924(c)
4.08 Making a False Statement to a Federal Agency, 18 U.S.C. § 1001
4.09 Making a False Statement or Report, 18 U.S.C. § 1014
4.10 Access Device or Credit Card Fraud, 18 U.S.C. § 1029(a)(2)
4.11 Harboring or Concealing an Escaped Prisoner, 18 U.S.C. § 1072
4.12 Mail Fraud, 18 U.S.C. § 1341
4.13 Wire Fraud, 18 U.S.C. § 1343
4.14 Bank Fraud, 18 U.S.C. § 1344(1) & (2)
4.15 False Statement in Document Required by Immigration Law, 18 U.S.C. § 1546(a)
4.16 Interference with Commerce by Robbery or Extortion (Hobbs Act), 18 U.S.C. § 1951
4.17 Money Laundering—Illegal Structuring, 18 U.S.C. § 1956
4.18 Unarmed Bank Robbery, 18 U.S.C. § 2113(a)
4.19 Armed or Aggravated Bank Robbery, 18 U.S.C. § 2113(a), (d)
4.20 Interstate Transportation of Stolen Money or Property, 18 U.S.C. § 2314

B. Offenses Under Other Titles

4.21 Immigration Through Fraudulent Marriage, 8 U.S.C. § 1325(c)
4.22 Possession with Intent to Distribute a Controlled Substance, 21 U.S.C. § 841(a)(1)
4.23 Distribution of a Controlled Substance, 21 U.S.C. § 841(a)(1)
4.24 Manufacture of a Controlled Substance, 21 U.S.C. §§ 841(a)(1), 802(15)
4.25 Income Tax Evasion, 26 U.S.C. § 7201
4.26 Failure to File a Tax Return, 26 U.S.C. § 7203
4.27 False Statements on Income Tax Return, 26 U.S.C. § 7206(1)
4.28 Money Laundering—Illegal Structuring, 31 U.S.C. §§ 5322, 5324

Part 5 Final Instructions: Defenses and Theories of Defense

Introductory Comment
5.01 Alibi
5.02 Mental State That Is Inconsistent with the Requisite Culpable State of Mind
5.03 Intoxication
5.04 Self-Defense
5.05 Duress
5.06 Entrapment
5.07 Insanity

Part 6 Final Instructions: Deliberations and Verdict

6.01 Foreperson's Role; Unanimity
6.02 Consideration of Evidence
6.03 Reaching Agreement
6.04 Return of Verdict Form
6.05 Communication with the Court
6.06 Charge to a Hung Jury

Afterword: How to Draft a Charge

PREFACE

At the First Circuit Judicial Conference on October 1, 1997, the assembled federal judges voted to approve the publication of these pattern instructions. Although we believe that the pattern instructions and, in particular, the commentary that accompanies them will be helpful in crafting a jury charge in a particular case, it bears emphasis that no district judge is required to use the pattern instructions, and that the Court of Appeals has not in any way approved the use of a particular instruction.

It is our hope to keep these pattern instructions updated as the law develops. As a result, we welcome any suggested modifications or improvements. In addition, we invite the submission of pattern charges for any other commonly charged crimes in the First Circuit.

Particular thanks are due to Professor Melvyn Zarr of the University of Maine School of Law and John Ciraldo of Perkins, Thompson, Hinckley & Keddy who co-chaired the drafting committee, as well as to each of the members of that committee who worked diligently to produce these pattern instructions.

D. Brock Hornby
United States Chief District Judge
District of Maine

11/97

CITATIONS TO OTHER PATTERN INSTRUCTIONS

We have abbreviated our citations to other pattern instructions as follows:

Fifth Circuit Instruction	Fifth Circuit District Judges Association Pattern Jury Instructions Committee, Pattern Jury Instructions, Criminal Cases (1990)
Sixth Circuit Instruction	Sixth Circuit District Judges Association Pattern Criminal Jury Instructions Committee, Pattern Criminal Jury Instructions (1991)
Eighth Circuit Instruction	Eighth Circuit Committee on Model Criminal Jury Instructions, Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1996)
Ninth Circuit Instruction	Ninth Circuit Committee on Model Criminal Jury Instructions, Manual of Model Criminal Jury Instruction for the District Courts of the Ninth Circuit (1995)
Eleventh Circuit Instruction	Eleventh Circuit District Judges Association Pattern Jury Instructions Committee, Pattern Jury Instructions, Criminal Cases (1985)
Federal Judicial Center Instruction	Federal Judicial Center, Pattern Criminal Jury Instructions (1988)
Sand, et al., Instruction	Leonard B. Sand et al., Modern Federal Jury Instructions (Nov. 1996)

HOW TO USE THE PATTERN INSTRUCTIONS

These instructions will function best if specific references to the case being tried are inserted. For example, every time we have put the word "defendant" in brackets we intend the instructing judge to substitute the defendant's actual name. The same holds true when the word "witness" is bracketed. General studies of juror understanding suggest that juries understand better when actual names are used rather than terms like "defendant" or "witness." On the same rationale, we have used the term "I" rather than the third person "the court" when referring to the judge. Finally, where we have given alternatives, select the alternative(s) that best fit(s) the evidence in your case.

PART 1 PRELIMINARY INSTRUCTIONS

1.01 Duties of the Jury

1.02 Nature of Indictment; Presumption of Innocence

1.03 Previous Trial

1.04 Preliminary Statement of Elements of Crime

1.05 Evidence; Objections; Rulings; Bench Conferences

1.06 Credibility of Witnesses

1.07 Conduct of the Jury

1.08 Notetaking

1.09 Outline of the Trial

1.01 Duties of the Jury

Ladies and gentlemen: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some instructions. At the end of the trial I will give you more detailed instructions. Those instructions will control your deliberations.

It will be your duty to decide from the evidence what the facts are. You, and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law I give to you. That is how you will reach your verdict. In doing so you must follow that law whether you agree with it or not. The evidence will consist of the testimony of witnesses, documents and other things received into evidence as exhibits, and any facts on which the lawyers agree or which I may instruct you to accept.

You should not take anything I may say or do during the trial as indicating what I think of the believability or significance of the evidence or what your verdict should be.

Comment

(1) This instruction is derived from Ninth Circuit Instruction 1.01.

(2) "[J]urors may have the power to ignore the law, but their duty is to apply the law as interpreted by the court, and they should be so instructed." United States v. Boardman, 419 F.2d 110, 116 (1st Cir. 1969) (citing Sparf & Hansen v. United States, 156 U.S. 51 (1895)), cert. denied, 397 U.S. 991 (1970). Thus, while a jury may acquit an accused for any reason or no reason, see Horning v. District of Columbia, 254 U.S. 135, 138 (1920) ("[T]he jury has the power to bring in a verdict in the teeth of both law and facts."), trial judges may not instruct the jurors about this power of nullification. See United States v. Manning, 79 F.3d 212, 219 (1st Cir.), cert. denied, ___ U.S. ___, 117 S. Ct. 147 (1996); United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) (citing United States v. Desmarais, 938 F.2d 347, 350 (1st Cir. 1991) (collecting cases)), cert. denied, 512 U.S. 1223 (1994); see also United States v. Garcia-Rosa, 876 F.2d 209, 226 (1st Cir. 1989) (this position "is consistent with that of every other federal appellate court that has addressed this issue"), cert. denied, 493 U.S. 1030, and cert. granted, vacated on other grounds, 498 U.S. 954 (1990); United States v. Trujillo, 714 F.2d 102, 105-06 (11th Cir. 1983) (collecting cases). Furthermore, "[t]his proscription is invariant; it makes no difference that the jury inquired, or that an aggressive lawyer managed to pique a particular jury's curiosity by mentioning the subject in closing argument, or that a napping prosecutor failed to raise a timely objection to that allusion." Sepulveda, 15 F.3d at 1190.

During the closing arguments in Sepulveda one of the defendants' attorneys invited the jury to "send out a question" concerning jury nullification; the jury did so, requesting the trial judge to "[c]larify the law on jury nullification." Id. at 1189. The judge responded with the following, which was affirmed by the First Circuit:

> Federal trial judges are forbidden to instruct on jury nullification, because they are required to instruct only on the law which applies to a case. As I have indicated to you, the burden in each instance which is here placed upon the Government is to prove each element of the offenses . . . beyond a reasonable doubt, and in the event the Government fails to sustain its burden of proof beyond a reasonable doubt as to any essential element of any offense charged against each defendant, it has then failed in its burden of proof as to such defendant and that defendant is to be acquitted. In short, if the Government proves its case against any defendant, you *should* convict that defendant. If it fails to prove its case against any defendant you *must* acquit that defendant.

Id. at 1189-90 (emphases added). Judge Selya explained that the "contrast in directives" in the last two sentences, "together with the court's refusal to instruct in any detail about the doctrine of jury nullification, left pregnant the possibility that the jury could ignore the law if it so chose." Id. at 1190.

1.02 Nature of Indictment; Presumption of Innocence

This criminal case has been brought by the United States government. I will sometimes refer to the government as the prosecution. The government is represented at this trial by an assistant United States attorney, [_____]. The defendant, [_____], is represented by his/her lawyer, [_____]. [*Alternative:* The defendant, [_____], has decided to represent him/herself and not use the services of a lawyer. He/She has a perfect right to do this. His/Her decision has no bearing on whether he/she is guilty or not guilty, and it should have no effect on your consideration of the case.]

The defendant has been charged by the government with violation of a federal law. He/She is charged with [e.g., having intentionally distributed heroin]. The charge against the defendant is contained in the indictment. The indictment is simply the description of the charge against the defendant; it is not evidence of anything. The defendant pleaded not guilty to the charge and denies committing the crime. He/She is presumed innocent and may not be found guilty by you unless all of you unanimously find that the government has proven his/her guilt beyond a reasonable doubt.

[*Addition for multi-defendant cases:* The defendants are being tried together because the government has charged that they acted together in committing the crime of [_____]. But you will have to give separate consideration to the case against each defendant. Do not think of the defendants as a group.]

Comment

This instruction is derived from Federal Judicial Center Instruction 1.

1.03 Previous Trial

You may hear reference to a previous trial of this case. A previous trial did occur. But the defendant and the government are entitled to have you decide this case entirely on the evidence that has come before you in this trial. You should not consider the fact of a previous trial in any way when you decide whether the government has proven, beyond a reasonable doubt, that the defendant committed the crime.

Comment

(1) This instruction is derived from Ninth Circuit Instruction 2.09, Federal Judicial Center Instruction 14, and Sand, et al., Instruction 2-13. The commentary to the Ninth Circuit and Federal Judicial Center instructions both recommend that this instruction not be given unless specifically requested by the defense. See also United States v. Seals, 987 F.2d 1102, 1109-10 (5th Cir.) (finding it was not error to fail to instruct the jury when defense counsel refused trial court's offer to give instruction following inadvertent references to the defendant's previous trial), cert. denied, 510 U.S. 853 (1993).

(2) The District of Columbia Circuit has suggested that the following cautionary instruction be given at the *outset* of a retrial: "The defendant has been tried before. [If there has been a mistrial, so state.] You have no concern with that. The law charges you to render a verdict solely on the evidence in this trial." Carsey v. United States, 392 F.2d 810, 812 (D.C. Cir. 1967) (finding defense counsel's mention of "mistrials" did not substantially prejudice the prosecution and prevent a fair trial, so that the trial judge should have handled the matter through a cautionary instruction instead of declaring a mistrial). See also United States v. Hykel, 461 F.2d 721, 726 (3d Cir. 1972) (affirming instruction given after mention during jury selection of previous mistrial; instruction cautioning jury that "[T]he fact that this is the second trial of this case should mean nothing to you. Do you understand that? No inference of any kind should be drawn from that."); cf. United States v. Faulkner, 17 F.3d 745, 763-64 (5th Cir.) (affirming court's statement to jury about true reason for mistrial in context of newscasts erroneously reporting that previous trial ended in mistrial due to jury tampering), reh'g denied, 21 F.3d 1110 (5th Cir.), and cert. denied, 513 U.S. 870 (1994).

1.04 Preliminary Statement of Elements of Crime

In order to help you follow the evidence, I will now give you a brief summary of the elements of the crime[s] charged, each of which the government must prove beyond a reasonable doubt to make its case:

First, [_____];
Second, [_____];
Third, [_____];
etc.

[The description of the crime in this preliminary instruction should not simply track statutory language but should be stated in plain language as much as possible.]

You should understand, however, that what I have just given you is only a preliminary outline. At the end of the trial I will give you a final instruction on these matters. If there is any difference between what I just told you, and what I tell you in the instruction I give you at the end of the trial, the instructions given at the end of the trial govern.

Comment

This instruction is derived from Eighth Circuit Instruction 1.02 and Ninth Circuit Instruction 1.02.

1.05 Evidence; Objections; Rulings; Bench Conferences

I have mentioned the word "evidence." Evidence includes the testimony of witnesses, documents and other things received as exhibits, and any facts that have been stipulated—that is, formally agreed to by the parties.

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence, and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. This simply means that the lawyer is requesting that I make a decision on a particular rule of evidence.

Then it may be necessary for me to talk with the lawyers out of the hearing of the jury, either by having a bench conference here while the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

Certain things are not evidence. I will list those things for you now:

(1) Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.

(2) Objections are not evidence. Lawyers have a duty to their client to object when they believe something is improper under the rules of evidence. You should not be influenced by the objection. If I sustain an objection, you must ignore the question or exhibit and must not try to guess what the answer might have been or the exhibit might have contained. If I overrule the objection, the evidence will be admitted, but do not give it special attention because of the objection.

(3) Testimony that I strike from the record, or tell you to disregard, is not evidence and must not be considered.

(4) Anything you see or hear about this case outside the courtroom is not evidence, unless I specifically tell you otherwise during the trial.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for a particular purpose, and not for any other purpose. I will tell you when that occurs and instruct you on the purposes for which the item can and cannot be used.

Finally, some of you may have heard the terms "direct evidence" and "circumstantial evidence." Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find or infer another fact. You may consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Comment

This instruction is derived from Federal Judicial Center Instruction 1, Eighth Circuit Instructions 1.03, 1.07 and Ninth Circuit Instructions 1.05, 1.06.

1.06 Credibility of Witnesses

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe everything a witness says or only part of it or none of it.

In deciding what to believe, you may consider a number of factors, including the following: (1) the witness's ability to see or hear or know the things the witness testifies to; (2) the quality of the witness's memory; (3) the witness's manner while testifying; (4) whether the witness has an interest in the outcome of the case or any motive, bias or prejudice; (5) whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence; and (6) how reasonable the witness's testimony is when considered in the light of other evidence which you believe.

Comment

This instruction is derived from Eighth Circuit Instruction 1.05 and Ninth Circuit Instruction 1.07.

1.07 Conduct of the Jury

To insure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict;

Second, do not talk with anyone else about this case, or about anyone who has anything to do with it, until the trial has ended and you have been discharged as jurors. "Anyone else" includes members of your family and your friends. You may tell them that you are a juror, but do not tell them anything about the case until after you have been discharged by me;

Third, do not let anyone talk to you about the case or about anyone who has anything to do with it. If someone should try to talk to you, please report it to me immediately;

Fourth, during the trial do not talk with or speak to any of the parties, lawyers or witnesses involved in this case—you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the lawsuit sees you talking to a person from the other side—even if it is simply to pass the time of day—an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party or witness does not speak to you when you pass in the hall, ride the elevator or the like, it is because they are not supposed to talk or visit with you;

Fifth, do not read any news stories or articles about the case or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it;

Sixth, do not do any research, such as consulting dictionaries or other reference materials, and do not make any investigation about the case on your own;

Seventh, if you need to communicate with me simply give a signed note to the [court security officer] to give to me; and

Eighth, do not make up your mind about what the verdict should be until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

Comment

This instruction is derived from Eighth Circuit Instruction 1.08 and Ninth Circuit Instruction 1.08.

1.08 Notetaking

I am going to permit you to take notes in this case, and the courtroom deputy has distributed pencils and pads for your use. I want to give you a couple of warnings about taking notes, however. First of all, do not allow your note-taking to distract you from listening carefully to the testimony that is being presented. If you would prefer not to take notes at all but simply to listen, please feel free to do so. Please remember also from some of your grade-school experiences that not everything you write down is necessarily what was said. Thus, when you return to the jury room to discuss the case, do not assume simply because something appears in somebody's notes that it necessarily took place in court. Instead, it is your collective memory that must control as you deliberate upon the verdict. Please take your notes to the jury room at every recess. I will have the courtroom deputy collect them at the end of each day and place them in the vault. They will then be returned to you the next morning. When the case is over, your notes will be destroyed. These steps are in line with my earlier instruction to you that it is important that you not discuss the case with anyone or permit anyone to discuss it with you.

Comment

"The decision to allow the jury to take notes and use them during deliberations is a matter within the discretion of the trial court." United States v. Porter, 764 F.2d 1, 12 (1st Cir.), reh'g denied, 776 F.2d 370 (1st Cir. 1985), and appeal after remand on other grounds, 807 F.2d 21 (1st Cir. 1986), and cert. denied, 481 U.S. 1048 (1987). The trial judge, however, should explain to jurors that the notes should only be used to refresh their recollections of the evidence presented and "not prevent [them] from getting a full view of the case." United States v. Oppon, 863 F.2d 141, 148 n.12 (1st Cir. 1988).

1.09 Outline of the Trial

The first step in the trial will be the opening statements. The government in its opening statement will tell you about the evidence that it intends to put before you, so that you will have an idea of what the government's case is going to be.

Just as the indictment is not evidence, neither is the opening statement evidence. Its purpose is only to help you understand what the evidence will be and what the government will try to prove.

[After the government's opening statement, the defendant's attorney may, if he/she chooses, make an opening statement. At this point in the trial, no evidence has been offered by either side.]

Next the government will offer evidence that it says will support the charge[s] against the defendant. The government's evidence in this case will consist of the testimony of witnesses, and may include documents and other exhibits. In a moment I will say more about the nature of evidence.

After the government's evidence, the defendant's lawyer may [make an opening statement and] present evidence in the defendant's behalf, but he/she is not required to do so. I remind you that the defendant is presumed innocent, and the government must prove the guilt of the defendant beyond a reasonable doubt. The defendant does not have to prove his/her innocence.

After you have heard all the evidence on both sides, the government and the defense will each be given time for their final arguments. I just told you that the opening statements by the lawyers are not evidence. The same applies to the closing arguments. They are not evidence either. In their closing arguments the lawyers for the government and the defendant will attempt to summarize and help you understand the evidence that was presented.

The final part of the trial occurs when I instruct you about the rules of law that you are to use in reaching your verdict. After hearing my instructions, you will leave the courtroom together to make your decisions. Your deliberations will be secret. You will never have to explain your verdict to anyone.

Comment

(1) This instruction is derived from Federal Judicial Center Instruction 1.

(2) The third paragraph should be omitted if the defense reserves its opening statement until later. The judge should resolve this issue with the lawyers before giving the instruction.

PART 2 INSTRUCTIONS CONCERNING CERTAIN MATTERS OF EVIDENCE

Introductory Comment

2.01 Stipulations

2.02 Impeachment by Prior Inconsistent Statement

2.03 Impeachment of Witness Testimony by Prior Conviction

2.04 Impeachment of Defendant's Testimony by Prior Conviction

2.05 Evidence of Defendant's Prior Similar Acts

2.06 Weighing the Testimony of an Expert Witness

2.07 Caution as to Cooperating Witness/Accomplice/Paid Informant

2.08 Use of Tapes and Transcripts

2.09 Flight After Accusation/Consciousness of Guilt

2.10 Statements by Defendant

2.11 Missing Witness

2.12 Witness (Not the Defendant) Who Takes the Fifth Amendment

2.13 Definition of “Knowingly”

2.14 “Willful Blindness” As a Way of Satisfying “Knowingly”

Introductory Comment

Instructions concerning evidence may be used during the trial, or in the final instructions or at both times. They are collected here for easy reference.

2.01 Stipulations

The evidence in this case includes facts to which the lawyers have agreed or stipulated. A stipulation means simply that the government and the defendant accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. You must accept the stipulation as fact to be given whatever weight you choose.

2.02 Impeachment by Prior Inconsistent Statement

You have heard evidence that before testifying at this trial, [witness] made a statement concerning the same subject matter as his/her testimony in this trial. You may consider that earlier statement to help you decide how much of [witness's] testimony to believe. If you find that the prior statement was not consistent with [witness's] testimony at this trial, then you should decide whether that affects the believability of [witness's] testimony at this trial.

Comment

This instruction is for use where a witness's prior statement is admitted only for impeachment purposes. Where a prior statement is admitted substantively under Fed. R. Evid. 801(d)(1), this instruction is not appropriate. Once a prior statement is admitted substantively as non-hearsay under Rule 801(d)(1), it is actual evidence and may be used for whatever purpose the jury wishes. No instruction seems necessary in that event, but one may refer to Federal Judicial Center Instructions 33 and 34.

2.03 Impeachment of Witness Testimony by Prior Conviction

You have heard evidence that [witness] has been convicted of a crime. You may consider that evidence, together with other pertinent evidence, in deciding how much weight to give to that witness's testimony.

Comment

This instruction is adapted from Eighth Circuit Instruction 2.18, Ninth Circuit Instruction 4.08 and Federal Judicial Center Instruction 30, all of which are very similar.

2.04 Impeachment of Defendant's Testimony by Prior Conviction

You have heard evidence that [defendant] was convicted of a crime. You may consider that evidence in deciding, as you do with any witness, how much weight to give [defendant's] testimony. The fact that [defendant] was previously convicted of another crime does not mean that he/she committed the crime for which he/she is now on trial. You must not use that prior conviction as proof of the crime charged in this case.

Comment

This instruction is adapted from the Fifth Circuit Instruction 1.13 and Federal Judicial Center Instruction 41. It is intended for use when the defendant's prior conviction is admitted under Fed. R. Evid. 609. If the evidence of the prior act was admitted under Rule 404(b), see Instruction 2.05.

2.05 Evidence of Defendant's Prior Similar Acts

You have heard [will hear] evidence that [defendant] previously committed acts similar to those charged in this case. You may not use this evidence to infer that, because of his/her character, [defendant] carried out the acts charged in this case. You may consider this evidence only for the limited purpose of deciding:

(1) Whether [defendant] had the state of mind or intent necessary to commit the crime charged in the indictment;

or

(2) Whether [defendant] had a motive or the opportunity to commit the acts charged in the indictment;

or

(3) Whether [defendant] acted according to a plan or in preparation for commission of a crime;

or

(4) Whether [defendant] committed the acts he/she is on trial for by accident or mistake.

Remember, this is the only purpose for which you may consider evidence of [defendant's] prior similar acts. Even if you find that [defendant] may have committed similar acts in the past, this is not to be considered as evidence of character to support an inference that [defendant] committed the acts charged in this case.

Comment

(1) See Fed. R. Evid. 105; Huddleston v. United States, 485 U.S. 681, 691-92 (1988) ("[T]he trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted"). "Perhaps the safe course for a district court, whenever the matter is in doubt, is (where asked) to give a closing general instruction that bad character is not a permissible inference." United States v. Randazzo, 80 F.3d 623, 630 (1st Cir. 1996). Randazzo contains a discussion of the "distinction between 'direct evidence' and 'other crimes' or 'Rule 404(b)' evidence." Id.; see also United States v. Santagata, 924 F.2d 391, 393-95 (1st Cir. 1991).

(2) This instruction is based upon Fifth Circuit Instruction 1.30 and Eighth Circuit Instruction 2.08.

(3) Courts should encourage counsel to specify and limit the purpose or purposes for which prior act evidence is admitted. One or more of the above instructions should be given only for the corresponding specific purpose for which the evidence was admitted. Instructions for purposes other than that for which the specific evidence was admitted should not be given.

2.06 Weighing the Testimony of an Expert Witness

You have heard testimony from persons described as experts. An expert witness has special knowledge or experience that allows the witness to give an opinion.

You may accept or reject such testimony. In weighing the testimony, you should consider the factors that generally bear upon the credibility of a witness as well as the expert witness's education and experience, the soundness of the reasons given for the opinion and all other evidence in the case.

Remember that you alone decide how much of a witness's testimony to believe, and how much weight it should be given.

Comment

This instruction is based upon Eighth Circuit Instruction 4.10.

2.07 Caution as to Cooperating Witness/Accomplice/Paid Informant

You have heard the testimony of [name of witness]. He/She

(1) provided evidence under agreements with the government;

[and/or]

(2) participated in the crime charged against [defendant];

[and/or]

(3) received money [or . . .] from the government in exchange for providing information.

Some people in this position are entirely truthful when testifying. Still, you should consider the testimony of these individuals with particular caution. They may have had reason to make up stories or exaggerate what others did because they wanted to help themselves.

Comment

"Though it is prudent for the court to give a cautionary instruction [for accomplice testimony], even when one is not requested, failure to do so is not automatic error especially where the testimony is not incredible or otherwise insubstantial on its face." United States v. Wright, 573 F.2d 681, 685 (1st Cir.), cert. denied, 436 U.S. 949 (1978); see also United States v. House, 471 F.2d 886, 888 (1st Cir. 1973) (same for paid-informant testimony). The language varies somewhat. See United States v. Hernandez, 109 F.3d 13, 17 (1st Cir. 1997) (approving "with greater caution" or "with caution"); United States v. Brown, 938 F.2d 1482, 1486 (1st Cir.) (referring to the standard accomplice instruction as "with caution and great care"), cert. denied, 502 U.S. 992 (1991); United States v. Skandier, 758 F.2d 43, 46 (1st Cir. 1985) ("scrutinized with particular care"); United States v. Hickey, 596 F.2d 1082, 1091 n.6 (1st Cir.) (approving "greater care" instruction), cert. denied, 444 U.S. 853 (1979). The standard is the same for witnesses granted immunity, see United States v. Newton, 891 F.2d 944, 950 (1st Cir. 1989) (jury should be instructed that such "testimony must be received with caution and weighed with care"), and for paid informants, see United States v. Cresta, 825 F.2d 538, 546 (1st Cir. 1987) ("the jury must be specifically instructed to weigh the witness' testimony with care"), cert. denied, 486 U.S. 1042 (1988).

2.08 Use of Tapes and Transcripts

At this time you are going hear conversations that were recorded. This is proper evidence for you to consider. In order to help you, I am going to allow you to have a transcript to read along as the tape is played. The transcript is merely to help you understand what is said on the tape. If you believe at any point that the transcript says something different from what you hear on the tape, remember it is the tape that is the evidence, not the transcript. Any time there is a variation between the tape and the transcript, you must be guided solely by what you hear on the tape and not by what you see in the transcript.

[In this case there are two transcripts because there is a difference of opinion as to what is said on the tape. You may disregard any portion of either or both transcripts if you believe they reflect something different from what you hear on the tape. It is what you hear on the tape that is evidence, not the transcripts.]

Comment

(1) This instruction is based upon a trial court instruction approved in United States v. Mazza, 792 F.2d 1210, 1227 (1st Cir. 1986), cert. denied, 479 U.S. 1086 (1987).

(2) The instruction for two transcripts is based upon United States v. Rengifo, 789 F.2d 975, 983 (1st Cir. 1986).

(3) There is abundant First Circuit caselaw concerning the admissibility of tapes, particularly when there is a dispute over their audibility and coherence. Basically the matter is left to the trial court's "broad discretion" to decide "whether 'the inaudible parts are so substantial as to make the rest [of the tape] more misleading than helpful.'" United States v. Jadusingh, 12 F.3d 1162, 1167 (1st Cir. 1994) (quoting United States v. Font-Ramirez, 944 F.2d 42, 47 (1st Cir. 1991), cert. denied, 502 U.S. 1065 (1992)); see also United States v. Saccoccia, 58 F.3d 754, 781 (1st Cir. 1995), cert. denied, 116 S. Ct. 1322 (1996); United States v. Carbone, 798 F.2d 21, 24 (1st Cir. 1986); United States v. DiSanto, 86 F.3d 1238, 1250-51 (1st Cir. 1996), cert. denied, 117 S. Ct. 1109 (1997). The decision whether to allow the transcripts to go the jury also is committed to the trial judge's discretion, as long as the judge makes clear that the tapes, not the transcripts, are the evidence. See United States v. Campbell, 874 F.2d 838, 849 (1st Cir. 1989) (citing Rengifo, 789 F.2d at 980).

2.09 Flight After Accusation/Consciousness of Guilt

Intentional flight by a defendant after he/she is accused of the crime for which he/she is now on trial, may be considered by you in the light of all the other evidence in the case. The burden is upon the government to prove intentional flight. Intentional flight after a defendant is accused of a crime is not alone sufficient to conclude that he/she is guilty. Flight does not create a presumption of guilt. At most, it may provide the basis for an inference of consciousness of guilt. But flight may not always reflect feelings of guilt. Moreover, feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt. In your consideration of the evidence of flight, you should consider that there may be reasons for [defendant]'s actions that are fully consistent with innocence.

It is up to you as members of the jury to determine whether or not evidence of intentional flight shows a consciousness of guilt and the weight or significance to be attached to any such evidence.

Comment

(1) This instruction is based on United States v. Hyson, 721 F.2d 856, 864 (1st Cir. 1983); accord United States v. Camilo Montoya, 917 F.2d 680, 683 (1st Cir. 1990); United States v. Hernandez-Bermudez, 857 F.2d 50, 54 (1st Cir. 1988); United States v. Grandmont, 680 F.2d 867, 869-70 (1st Cir. 1982). "Evidence of an accused's flight may be admitted at trial as indicative of a guilty mind, so long as there is an adequate factual predicate creating an inference of guilt of the crime charged." Hernandez-Bermudez, 857 F.2d at 52; see also United States v. Luciano-Mosquera, 63 F.3d 1142, 1156 (1st Cir. 1995), cert. denied, 116 S. Ct. 1879 (1996).

(2) A flight instruction also can be given when the flight in question was from the crime scene. See Luciano-Mosquera, 63 F.3d at 1153, 1156; United States v. Hernandez, 995 F.2d 307, 314-15 (1st Cir.), cert. denied, 510 U.S. 954 (1993);

(3) If there is more than one defendant, the instruction should clearly specify that the absence of a particular defendant from the trial cannot be attributed to the others and is not to be considered in determining whether the others are guilty or not guilty. See United States v. Rullan-Rivera, 60 F.3d 16, 20 (1st Cir. 1995); Hyson, 721 F.2d at 864-65.

(4) The First Circuit has highlighted the need to engage in a Fed. R. Evid. 403 evaluation before admitting evidence of flight. See Hernandez-Bermudez, 857 F.2d at 54 ("[I]t is a species of evidence that should be viewed with caution; it should not be admitted mechanically, but rather district courts should always determine whether it

serves a genuinely probative purpose that outweighs any tendency towards unfair prejudice.") (citation omitted).

(5) A similar instruction can be given when attempts to conceal or falsify identity might justify an inference of consciousness of guilt. See United States v. Tracy, 989 F.2d 1279, 1285 (1st Cir.), cert. denied, 508 U.S. 929 (1993).

2.10 Statements by Defendant

You have heard evidence that [defendant] made a statement in which the government claims he/she admitted certain facts.

It is for you to decide (1) whether [defendant] made the statement and (2) if so, how much weight to give it. In making those decisions, you should consider all of the evidence about the statement, including the circumstances under which the statement may have been made [and any facts or circumstances tending to corroborate or contradict the version of events described in the statement].

Comment

(1) The instruction uses the word "statement" to avoid the more pejorative term "confession."

(2) A judge is required to give this instruction if the defendant has raised "a genuine factual issue concerning the voluntariness of such statements . . ., whether through his own or the Government's witnesses[.]" United States v. Fera, 616 F.2d 590, 594 (1st Cir.), cert. denied, 446 U.S. 969 (1980). Under 18 U.S.C. § 3501(a), "[i]f the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." See also Crane v. Kentucky, 476 U.S. 683, 687-91 (1986) (holding exclusion of testimony about circumstances of confession deprived defendant of a fair opportunity to present a defense). The First Circuit has held that, "'[o]nce the judge makes the preliminary finding of voluntariness, the jury does not make another independent finding on that issue. Under this procedure, the jury only hears evidence on the circumstances surrounding the confession to aid it in determining the *weight or credibility* of the confession.'" United States v. Campusano, 947 F.2d 1, 6 (1st Cir. 1991) (emphasis in original) (quoting United States v. Nash, 910 F.2d 749, 756 (11th Cir. 1990) (quoting United States v. Robinson, 439 F.2d 553, 575 (D.C. Cir. 1970) (McGowan, J., dissenting))).

(3) In addition to determining whether a defendant's statement was voluntarily made, the court must "make[] a preliminary determination as to whether testimony about the confession is sufficiently trustworthy for the jury to consider the confession as evidence of guilt." United States v. Singleterry, 29 F.3d 733, 737 (1st Cir.) (citations omitted), cert. denied, 513 U.S. 1048 (1994). "The general rule is that a jury cannot rely on an extrajudicial, post-offense confession, even when voluntary, in the absence of 'substantial independent evidence which would tend to establish the

trustworthiness of [the] statement.'" Id. (alteration in original) (quoting Opper v. United States, 348 U.S. 84, 93 (1954)). If evidence of the statement is admitted, "the court has the discretion to determine that the question of trustworthiness is such a close one that it would be appropriate to instruct the jury to conduct its own corroboration analysis." Singleterry, 29 F.3d at 739. That is the purpose of the bracketed language in the instruction. "[A] judge has wide latitude to select appropriate, legally correct instructions to ensure that the jury weighs the evidence without thoughtlessly crediting an out-of-court confession." Id.

2.11 Missing Witness

If it is peculiarly within the power of the government to produce a witness who could give material testimony, or if the witness would be favorably disposed to the government, failure to call that witness may justify an inference that his/her testimony would be unfavorable to the government. No such inference is justified if the witness is equally available or favorably disposed to both parties or if the testimony would merely repeat other evidence.

Comment

(1) According to United States v. Lewis, 40 F.3d 1325, 1336 (1st Cir. 1994), and United States v. Welch, 15 F.3d 1202, 1214 (1st Cir. 1993), cert. denied, 511 U.S. 1076, and cert. denied, 511 U.S. 1096 (1994), the decision to give this instruction is a matter of court discretion. See also United States v. Arias-Santana, 964 F.2d 1262, 1268 (1st Cir. 1992); United States v. St. Michael's Credit Union, 880 F.2d 579, 597-99 (1st Cir. 1989). The proponent of such an instruction must demonstrate that the witness would have been "(1) 'favorably disposed' to testify in [its] behalf, (2) 'peculiarly available' to [the other party], or (3) in [the other party's] 'exclusive control.'" Lewis, 40 F.3d at 1336. "When deciding whether to issue a missing witness instruction, the judge should consider whether the witness could provide 'relevant, noncumulative testimony.'" Id. (quoting United States v. Ariza-Ibarra, 651 F.2d 2, 16 (1st Cir.), cert. denied, 454 U.S. 895 (1981)).

(2) Where it is a confidential informant who is undisclosed by the government, if he or she is a mere tipster—i.e., if the person was not in a position to amplify, contradict or clear up inconsistencies in the government witnesses' testimony—his or her identity need not be disclosed. Indeed, in that circumstance the witness instruction would be improper, and presumably an abuse of discretion, because the informant is unessential to the right to a fair trial and the government has an interest in maintaining the confidentiality of identity. See Lewis, 40 F.3d at 1336 (citing United States v. Martínez, 922 F.2d 914, 921, 925 (1st Cir. 1991).

(3) All the missing witness instruction cases in the First Circuit appear to have been missing *government* witnesses. The cases speak in terms of a "party," however, and this instruction might be revised accordingly. But a judge should exercise extreme caution in granting the government's request for such an instruction against a defendant. The Federal Judicial Center recommends that the instruction "not be used against the defendant who offers no evidence in his defense." Comment to Federal Judicial Center Instruction 39. Even if the defendant does put on a case and the instruction is given against the defendant, the following supplemental instruction may be warranted:

> You must, however, bear in mind that the law never compels a defendant in a criminal case to call any witnesses or produce any evidence in his behalf.

Sand, et al., Instruction 6-6.

2.12 Witness (Not the Defendant) Who Takes the Fifth Amendment

You heard [witness] refuse to answer certain questions on the ground that it might violate his/her right not to incriminate himself/herself. You may, if you choose, draw adverse inferences from this refusal to answer and may take the refusal into account in assessing this witness's credibility and motives, but you are not required to draw that inference.

Comment

(1) This instruction is based upon United States v. Berrio-Londono, 946 F.2d 158, 160-62 (1st Cir. 1991), cert. denied, 502 U.S. 1114 (1992), and United States v. Kaplan, 832 F.2d 676, 683-85 (1st Cir. 1987), cert. denied, 485 U.S. 907 (1988). The First Circuit seems to stand alone in explicitly permitting this type of instruction. Other Circuits seem to disagree. See, e.g., United States v. Lizza Indus., Inc., 775 F.2d 492, 496-97 n.2 (2d Cir. 1985), cert. denied, 475 U.S. 1082 (1986); United States v. Nunez, 668 F.2d 1116, 1123 (10th Cir. 1981).

(2) It is within the discretion of the court to refuse to allow a witness to take the stand where it appears that the witness intends to claim the privilege as to essentially all questions. See United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973); accord United States v. Gary, 74 F.3d 304, 311-12 (1st Cir.), cert. denied, 116 S. Ct. 2567 (1996); Kaplan, 832 F.2d at 684.

2.13 Definition of "Knowingly"

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

Comment

(1) In United States v. Tracy, 36 F.3d 187, 194-95 (1st Cir. 1994), cert. denied, 115 S. Ct. 1717 (1995), the First Circuit acknowledged a split of authority over how to define the term "knowingly." The Fifth and Eleventh circuits use the instruction stated above, emphasizing the voluntary and intentional nature of the act. Id. at 195. The Sixth, Seventh and Ninth circuits, on the other hand, embrace an instruction to the effect that "'knowingly' . . . means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident." Id. (quoting Seventh Circuit Instruction 6.04); see also Model Penal Code § 2.02(2)(b)(i).

Although the First Circuit in Tracy approved of the trial court's "voluntary and intentional" instruction under the circumstances of the case, it did not expressly adopt or reject either definition of "knowingly." Id. There may be cases when, given the evidence, the alternative instruction will be more helpful to the jury. But the term "nature" in the alternative instruction might incorrectly suggest to the jury that the actor must realize that the act was wrongful.

2.14 "Willful Blindness" As a Way of Satisfying "Knowingly"

In deciding whether [defendant] acted knowingly, you may infer that [defendant] had knowledge of a fact if you find that he/she deliberately closed his/her eyes to a fact that otherwise would have been obvious to him/her. In order to infer knowledge, you must find that two things have been established. First, that [defendant] was aware of a high probability of [the fact in question]. Second, that [defendant] consciously and deliberately avoided learning of that fact. That is to say, [defendant] willfully made himself/herself blind to that fact. It is entirely up to you to determine whether he/she deliberately closed his/her eyes to the fact and, if so, what inference, if any, should be drawn. However, it is important to bear in mind that mere negligence or mistake in failing to learn the fact is not sufficient. There must be a deliberate effort to remain ignorant of the fact.

Comment

(1) This instruction is drawn from the instructions approved in United States v. Gabriele, 63 F.3d 61, 66 n.6 (1st Cir. 1995), and United States v. Brandon, 17 F.3d 409, 451-52 n.72 (1st Cir.), cert. denied, 513 U.S. 820 (1994).

(2) The rule in the First Circuit is that:

> [A] willful blindness instruction is warranted if (1) the defendant claims lack of knowledge; (2) the evidence would support an inference that the defendant consciously engaged in a course of deliberate ignorance; and (3) the proposed instruction, as a whole, could not lead the jury to conclude that an inference of knowledge was mandatory.

Gabriele, 63 F.3d at 66 (citing Brandon, 17 F.3d at 452, and United States v. Richardson, 14 F.3d 666, 671 (1st Cir. 1994); accord United States v. Camuti, 78 F.3d 738, 744 (1st Cir. 1996). "The danger of an improper willful blindness instruction is 'the possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have known [an illegal act] was taking place.'" Brandon, 17 F.3d at 453 (quoting United States v. Littlefield, 840 F.2d 143, 148 n.3 (1st Cir.), cert. denied, 488 U.S. 860 (1988)).

PART 3 FINAL INSTRUCTIONS: GENERAL CONSIDERATIONS

3.01 Duty of the Jury to Find Facts and Follow Law

3.02 Presumption of Innocence; Proof Beyond a Reasonable Doubt

3.03 Defendant's Constitutional Right Not to Testify

3.04 What Is Evidence; Inferences

3.05 Kinds of Evidence: Direct and Circumstantial

3.06 Credibility of Witnesses

3.07 Cautionary and Limiting Instructions as to Particular Kinds of Evidence

3.08 What Is Not Evidence

3.01 Duty of the Jury to Find Facts and Follow Law

It is your duty to find the facts from all the evidence admitted in this case. To those facts you must apply the law as I give it to you. The determination of the law is my duty as the presiding judge in this court. It is your duty to apply the law exactly as I give it to you, whether you agree with it or not. You must not be influenced by any personal likes or dislikes, prejudices or sympathy. That means that you must decide the case solely on the evidence before you and according to the law. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions, or into anything I may have said or done, any suggestions by me as to what verdict you should return—that is a matter entirely for you to decide.

Comment

On jury nullification see Comment (2) to Instruction 1.01.

3.02 Presumption of Innocence; Proof Beyond a Reasonable Doubt

It is a cardinal principle of our system of justice that every person accused of a crime is presumed to be innocent unless and until his/her guilt is established beyond a reasonable doubt. The presumption is not a mere formality. It is a matter of the most important substance.

The presumption of innocence alone may be sufficient to raise a reasonable doubt and to require the acquittal of a defendant. The defendant before you, [_____], has the benefit of that presumption throughout the trial, and you are not to convict him/her of a particular charge unless you are persuaded of his/her guilt of that charge beyond a reasonable doubt.

The presumption of innocence until proven guilty means that the burden of proof is always on the government to satisfy you that [defendant] is guilty of the crime with which he/she is charged beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to [defendant]. It is always the government's burden to prove each of the elements of the crime[s] charged beyond a reasonable doubt by the evidence and the reasonable inferences to be drawn from that evidence. [Defendant] has the right to rely upon the failure or inability of the government to establish beyond a reasonable doubt any essential element of a crime charged against him/her.

If, after fair and impartial consideration of all the evidence, you have a reasonable doubt as to [defendant]'s guilt of a particular crime, it is your duty to acquit him/her of that crime. On the other hand, if after fair and impartial consideration of all the evidence, you are satisfied beyond a reasonable doubt of [defendant]'s guilt of a particular crime, you should vote to convict him/her.

Comment

(1) This instruction does not use a "'guilt or innocence' comparison" warned against by the First Circuit. United States v. Andujar, 49 F.3d 16, 24 (1st Cir. 1995).

(2) The First Circuit has repeatedly stated that "[r]easonable doubt is a fundamental concept that does not easily lend itself to refinement or definition." United States v. Vavlitis, 9 F.3d 206, 212 (1st Cir. 1993); see also United States v. Campbell, 874 F.2d 838, 843 (1st Cir. 1989). For that reason, the First Circuit has joined other circuits in advising that the meaning of "reasonable doubt" be left to the jury to discern. United States v. Cassiere, 4 F.3d 1006, 1024 (1st Cir. 1993) ("'[A]n instruction which uses the words reasonable doubt without further definition

adequately apprises the jury of the proper burden of proof.'") (quoting United States v. Olmstead, 832 F.2d 642, 646 (1st Cir. 1987), cert. denied, 486 U.S. 1009 (1988)); accord United States v. Taylor, 997 F.2d 1551, 1558 (D.C. Cir. 1993) ("[T]he greatest wisdom may lie with the Fourth Circuit's and Seventh Circuit's instruction to leave to juries the task of deliberating the meaning of reasonable doubt."). The constitutionality of this practice was reaffirmed recently by the Supreme Court in Victor v. Nebraska, 511 U.S. 1, 6 (1994). It is not reversible error to refuse further explanation, even when requested by the jury, so long as the reasonable doubt standard was "not 'buried as an aside' in the judge's charge." United States v. Littlefield, 840 F.2d 143, 146-47 (1st Cir.) (quoting Olmstead, 832 F.2d at 646), cert. denied, 488 U.S. 860 (1988).

(3) Those judges who nevertheless undertake to define the term should consider the following. Some circuits have defined reasonable doubt as that which would cause a juror to "hesitate to act in the most important of one's own affairs." Federal Judicial Center, Commentary to Instruction 21. The First Circuit has criticized this formulation, see Gilday v. Callahan, 59 F.3d 257, 264 (1st Cir. 1995), cert. denied, 116 S. Ct. 1269 (1996); Vavlitis, 9 F.3d at 212; Campbell, 874 F.2d at 841, as has the Federal Judicial Center. See Federal Judicial Center, Commentary to Instruction 21 ("[D]ecisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike decisions jurors ought to make in criminal cases."). The First Circuit has also criticized "[e]quating the concept of reasonable doubt to 'moral certainty,'" Gilday, 59 F.3d at 262, or "fair doubt," Campbell, 874 F.2d at 843, stating that "[m]ost efforts at clarification result in further obfuscation of the concept." Id. The Federal Judicial Center has attempted to clarify the meaning of reasonable doubt by the following language:

> If, based on your consideration of the evidence, you are *firmly convinced* that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a *real possibility* that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Federal Judicial Center Instruction 21 (emphasis added). However, the First Circuit has joined other circuits in criticizing this pattern instruction for "possibly engender[ing] some confusion as to the burden of proof" if used without other clarifying language. United States v. Gibson, 726 F.2d 869, 874 (1st Cir.), cert. denied, 466 U.S. 960 (1984); see also Taylor, 997 F.2d at 1556; United States v. Porter, 821 F.2d 968, 973 (4th Cir. 1987) (instruction introduces "unnecessary concepts"), cert. denied 485 U.S. 934 (1988); United States v. McBride, 786 F.2d 45, 52 (2d Cir. 1986). In short, the words "'reasonable doubt' do not lend themselves to accurate definition," and "any attempt to define 'reasonable doubt' will probably trigger a constitutional challenge." Gibson, 726 F.2d at 874.

(4) The First Circuit has approved the following formulation by Judge Keeton:

> As I have said, the burden is upon the Government to prove beyond a reasonable doubt that a defendant is guilty of the charge made against the defendant. It is a strict and heavy burden, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning a defendant's guilt.
>
> A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors cannot say that they have a settled conviction of the truth of the charge.
>
> Of course, a defendant is never to be convicted on suspicion or conjecture. If, for example, you view the evidence in the case as reasonably permitting either of two conclusions—one that a defendant is guilty as charged, the other that the defendant is not guilty— you will find the defendant not guilty.
>
> It is not sufficient for the Government to establish a probability, though a strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond reasonable doubt. On the other hand, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.
>
> Concluding my instructions on the burden, then, I instruct you that what the Government must do to meet its heavy burden is to establish the truth of each part of each offense charged by proof that convinces you and leaves you with no reasonable doubt, and thus satisfies you that you can, consistently with your oath as jurors, base your verdict upon it. If you so find as to a particular charge against a defendant, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable doubt about whether the defendant is guilty of a particular offense, you must

> give the defendant the benefit of the doubt and find the defendant not guilty of that offense.

United States v. Cleveland, 106 F.3d 1056, 1062-63 (1st Cir. 1997).

3.03 Defendant's Constitutional Right Not to Testify

[Defendant] has a constitutional right not to testify and no inference of guilt, or of anything else, may be drawn from the fact that [defendant] did not testify. For any of you to draw such an inference would be wrong; indeed, it would be a violation of your oath as a juror.

Comment

An instruction like this must be given if it is requested. See Carter v. Kentucky, 450 U.S. 288, 299-303 (1981); Bruno v. United States, 308 U.S. 287, 293-94 (1939). See also United States v. Ladd, 877 F.2d 1083, 1089 (1st Cir. 1989) ("We do not, however, read Carter as requiring any exact wording for such an instruction."). It must contain the statement that no adverse inference may be drawn from the fact that the defendant did not testify, or that it cannot be considered in arriving at a verdict. See United States v. Brand, 80 F.3d 560, 567 (1st Cir. 1996), cert. denied, 117 S. Ct. 737 (1997). It is not reversible error to give the instruction even over the defendant's objection. See Lakeside v. Oregon, 435 U.S. 333, 340-41 (1978). However, "[i]t may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection." Id. at 340.

3.04 What Is Evidence; Inferences

The evidence from which you are to decide what the facts are consists of sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness; the exhibits that have been received into evidence; and any facts to which the lawyers have agreed or stipulated. A stipulation means simply that the government and the defendant accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. You must accept the stipulation as fact even though nothing more was said about it one way or the other.

Although you may consider only the evidence presented in the case, you are not limited in considering that evidence to the bald statements made by the witnesses or contained in the documents. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw from facts that you find to have been proven such reasonable inferences as you believe are justified in the light of common sense and personal experience.

3.05 Kinds of Evidence: Direct and Circumstantial

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness that the witness saw something. Circumstantial evidence is indirect evidence, that is proof of a fact or facts from which you could draw the inference, by reason and common sense, that another fact exists, even though it has not been proven directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Comment

See Ninth Circuit Instruction 1.05.

3.06 Credibility of Witnesses

Whether the government has sustained its burden of proof does not depend upon the number of witnesses it has called or upon the number of exhibits it has offered, but instead upon the nature and quality of the evidence presented. You do not have to accept the testimony of any witness if you find the witness not credible. You must decide which witnesses to believe and which facts are true. To do this, you must look at all the evidence, drawing upon your common sense and personal experience.

You may want to take into consideration such factors as the witnesses' conduct and demeanor while testifying; their apparent fairness or any bias they may have displayed; any interest you may discern that they may have in the outcome of the case; any prejudice they may have shown; their opportunities for seeing and knowing the things about which they have testified; the reasonableness or unreasonableness of the events that they have related to you in their testimony; and any other facts or circumstances disclosed by the evidence that tend to corroborate or contradict their versions of the events.

3.07 Cautionary and Limiting Instructions as to Particular Kinds of Evidence

A particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I have told you when that occurred, and instructed you on the purposes for which the item can and cannot be used.

Comment

(1) See Eighth Circuit Instruction 1.03.

(2) Cautionary and limiting instructions as to particular kinds of evidence have been collected in Part 2 for easy reference. They may be used during the trial or in the final instructions or in both places.

3.08 What Is Not Evidence

Certain things are not evidence. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they say in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them from the evidence differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Lawyers have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by my ruling on it.

(3) Anything that I have excluded from evidence or ordered stricken and instructed you to disregard is not evidence. You must not consider such items.

(4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

(5) The indictment is not evidence. This case, like most criminal cases, began with an indictment. You will have that indictment before you in the course of your deliberations in the jury room. That indictment was returned by a grand jury, which heard only the government's side of the case. I caution you, as I have before, that the fact that this defendant has had an indictment filed against him/her is no evidence whatsoever of his/her guilt. The indictment is simply an accusation. It is the means by which the allegations and charges of the government are brought before this court. The indictment proves nothing.

PART 4 FINAL INSTRUCTIONS: ELEMENTS OF SPECIFIC CRIMES [Organized by Statutory Citation]

A. Offenses Under Title 18

4.01 Attempt

4.02 Aid and Abet, 18 U.S.C. § 2

4.03 Conspiracy, 18 U.S.C. § 371; 21 U.S.C. § 846

4.04 Escape from Custody, 18 U.S.C. § 751

4.05 Assisting Escape, 18 U.S.C. § 752

4.06 Possession of a Firearm or Ammunition in or Affecting Commerce by a Convicted Felon, 18 U.S.C. § 922(g)

4.07 Using or Carrying a Firearm During and in Relation to Drug Trafficking or Crime of Violence, 18 U.S.C. § 924(c)

4.08 Making a False Statement to a Federal Agency, 18 U.S.C. § 1001

4.09 Making a False Statement or Report, 18 U.S.C. § 1014

4.10 Access Device or Credit Card Fraud, 18 U.S.C. § 1029(a)(2)

4.11 Harboring or Concealing an Escaped Prisoner, 18 U.S.C. § 1072

4.12 Mail Fraud, 18 U.S.C. § 1341

4.13 Wire Fraud, 18 U.S.C. § 1343

4.14 Bank Fraud, 18 U.S.C. § 1344(1) & (2)

4.15 False Statement in Document Required by Immigration Law, 18 U.S.C. § 1546(a)

4.16 Interference with Commerce by Robbery or Extortion (Hobbs Act), 18 U.S.C. § 1951

4.17 Money Laundering—Illegal Structuring, 18 U.S.C. § 1956

4.18 Unarmed Bank Robbery, 18 U.S.C. § 2113(a)

4.19 Armed or Aggravated Bank Robbery, 18 U.S.C. § 2113(a), (d)

4.20 Interstate Transportation of Stolen Money or Property, 18 U.S.C. § 2314

B. Offenses Under Other Titles

4.21 Immigration Through Fraudulent Marriage, 8 U.S.C. § 1325(c)

4.22 Possession with Intent to Distribute a Controlled Substance, 21 U.S.C. § 841(a)(1)

4.23 Distribution of a Controlled Substance, 21 U.S.C. § 841(a)(1)

4.24 Manufacture of a Controlled Substance, 21 U.S.C. §§ 841(a)(1), 802(15)

4.25 Income Tax Evasion, 26 U.S.C. § 7201

4.26 Failure to File a Tax Return, 26 U.S.C. § 7203

4.27 False Statements on Income Tax Return, 26 U.S.C. § 7206(1)

4.28 Money Laundering—Illegal Structuring, 31 U.S.C. §§ 5322, 5324

4.01 Attempt

In order to carry its burden of proof for the crime of attempt to [_____] as charged in Count [___] of the indictment, the government must prove the following two things beyond a reasonable doubt:

> First, that [defendant] intended to commit the crime of [_____]; and
>
> Second, that [defendant] engaged in a purposeful act that, under the circumstances as he/she believed them to be, amounted to a substantial step toward the commission of that crime and strongly corroborated his/her criminal intent.

A "substantial step" is an act in furtherance of the criminal scheme. A "substantial step" must be something more than mere preparation, but less than the last act necessary before the substantive crime is completed.

The "substantial step" may itself prove the intent to commit the crime, but only if it unequivocally demonstrates such an intent.

Comment

(1) "There is no general federal statute which proscribes the attempt to commit a criminal offense. Thus, attempt is actionable only where a specific criminal statute outlaws both its actual as well as its attempted violation." United States v. Rivera-Sola, 713 F.2d 866, 869 (1st Cir. 1983). An attempt offense may be incorporated into a particular statute, e.g., 18 U.S.C. § 2113(a) (bank robbery), or set forth in a separate statute, e.g., 21 U.S.C. § 846 (attempted drug possession).

(2) Although "[t]here is no statutory definition of attempt anywhere in the federal law," the First Circuit has adopted the Model Penal Code standard. United States v. Dworken, 855 F.2d 12, 16-17 (1st Cir. 1988) (applying Model Penal Code § 5.01(1)(c) to attempt under federal drug law, 21 U.S.C. § 846.

(3) The Model Penal Code's standard for attempt covers act *or omissions*. See Model Penal Code § 5.01(1)(c). Because the First Circuit has only dealt with "overt act" cases to date, see e.g., United States v. George, 752 F.2d 749, 756 (1st Cir. 1985); Rivera-Sola, 713 F.2d at 869, it has not had occasion to address circumstances under which an omission could amount to a substantial step.

(4) Under the Model Penal Code, a defendant commits an attempt if he/she performs an act that, "under the circumstances as he[/she] believes them to be,"

constitutes a substantial step toward commission of a crime. Model Penal Code § 5.01(1)(c); see also Dworken, 855 F.2d at 19. Factual impossibility is not a defense to the charge of attempt. See United States v. Medina-Garcia, 918 F.2d 4, 8 (1st Cir. 1990).

(5) "If the substantial steps are themselves the sole proof of the criminal intent, then those steps unequivocally must evidence such an intent; that is, it must be clear that there was a criminal design and that the intent was *not* to commit some non-criminal act." Dworken, 855 F.2d at 17. See also United States v. Levy-Cordero, 67 F.3d 1002, 1019 (1st Cir. 1995) (discussing the substantial step requirement), cert. denied, 116 S. Ct. 1558 (1996); Rivera-Sola, 713 F.2d at 869-70 (same). On the other hand, if there is "separate evidence of criminal intent independent from that provided by the substantial steps (e.g., a confessed admission of a design to commit a crime), then substantial steps . . . must *merely* corroborate that intent." Dworken, 855 F.2d at 17 n.3 (emphasis supplied).

4.02 Aid and Abet, 18 U.S.C. § 2

To "aid and abet" means intentionally to help someone else commit a crime. To establish aiding and abetting, the government must prove beyond a reasonable doubt that (1) someone else committed the charged crime and (2) [defendant] [willfully] associated himself/herself in some way with the crime and [willfully] participated in it as he/she would in something he/she wished to bring about. This means that the government must prove that [defendant] consciously shared the other person's knowledge of the underlying criminal act and intended to help him/her. [Defendant] need not perform the underlying criminal act, be present when it is performed, or be aware of the details of its execution to be guilty of aiding and abetting. But a general suspicion that an unlawful act may occur or that something criminal is happening is not enough. Mere presence at the scene of a crime and knowledge that a crime is being committed are also not sufficient to establish aiding and abetting.

[An act is done "willfully" if done voluntarily and intentionally with the intent that something the law forbids be done—that is to say with bad purpose, either to disobey or disregard the law.]

Comment

(1) This instruction is based on United States v. Spinney, 65 F.3d 231, 234-35 (1st Cir. 1995), and United States v. Loder, 23 F.3d 586, 590-91 (1st Cir. 1994).

(2) The Committee was evenly divided on whether to include the term "willfully" and the bracketed definition. Title 18 U.S.C. § 2 has two subsections, only the first of which, subsection (a), deals specifically with aiding and abetting. Subsection (a) does not require that an aider and abettor act "willfully." Subsection (b), dealing with one who causes an act to be done which, if performed directly by the accused or another, would be a crime, does require proof of willfulness. Subsection (b), however, did not appear until 1948 and willfulness was not added as a requirement in subsection (b) until 1951. For a good discussion of the legislative history of subsection (b) see United States v. Ruffin, 613 F.2d 408 (2d Cir. 1979), and of subsection (a) see Standefer v. United States, 447 U.S. 10 (1980). First Circuit caselaw has not consistently recognized a difference between the two subsections, treating them both generically as "aid and abet," and at least some First Circuit cases use the term "willfully" when dealing specifically with subsection (a). See, e.g., United States v, O'Campo, 973 F.2d 1015, 1020 (1st Cir. 1992). Complicating matters further, "willfully" is a term subject to a variety of definitions, see Ratzlaf v. United States, 510 U.S. 135, 141 (1994), and it is unclear whether the First Circuit meant to require specific intent (to violate the law) in subsection (a) cases by using the term. Many statutes penalize conduct simply because the defendant undertakes it, regardless of

whether the defendant knows that the conduct amounts to a crime (e.g., felon in possession of a firearm, 18 U.S.C. § 922(g)); it is unclear why an aider and abettor should be held to a more demanding intent. In fact, there is language in First Circuit cases supporting the contrary conclusion. In Loder, the court said that "the defendant [must] consciously share the principal's knowledge of the underlying criminal act," 23 F.3d at 591, and quoted approvingly the statement in United States v. Valencia, 907 F.2d 671 (7th Cir. 1990): "The state of mind required for conviction as an aider and abettor is the same state of mind as required for the principal offense." Id. At 680. Finally, the First Circuit at times has recognized that subsection (b) is different from subsection (a), see United States v. Strauss, 443 F.2d 986, 988 (1st Cir. 1971), and has recently held that "[a] defendant may be convicted under this section [b] even though the individual who did in fact commit the substantive act lacked the necessary criminal intent." United States v. Dodd, 43 F.3d 759, 762 (1st Cir. 1995). If the two subsections are treated as interchangeable, Dodd would be inconsistent with Loder's holding that culpability under (a) requires a shared knowledge of the underlying criminal act between or among the actors. But if (b) is treated separately from (a) as Dodd suggests, the willfulness element of (b) becomes a sensible additional requirement of specific intent for culpability of a defendant charged with causing an innocent person to act. Following the logic of Loder, where the underlying criminal act is not a specific intent crime, it may be defensible to leave out "willfully" and its definition in a subsection (a) prosecution.

4.03 Conspiracy, 18 U.S.C. § 371; 21 U.S.C. § 846

[Defendant] is accused of conspiring to commit a federal crime—specifically, the crime of [insert crime]. It is against federal law to conspire with someone to commit this crime.

For you to find [defendant] guilty of conspiracy, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that the agreement specified in the indictment, and not some other agreement or agreements, existed between at least two people to [substantive crime]; and
>
> Second, that [defendant] willfully joined in that agreement; [and
>
> Third, that one of the conspirators committed an overt act in an effort to further the purpose of the conspiracy.]

A conspiracy is an agreement, spoken or unspoken. The conspiracy does not have to be a formal agreement or plan in which everyone involved sat down together and worked out all the details. But the government must prove beyond a reasonable doubt that those who were involved shared a general understanding about the crime. Mere similarity of conduct among various people, or the fact that they may have associated with each other or discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy, but you may consider such factors.

To act "willfully" means to act voluntarily and intelligently and with the specific intent that the underlying crime be committed—that is to say, with bad purpose, either to disobey or disregard the law—not to act by ignorance, accident or mistake. The government must prove two types of intent beyond a reasonable doubt before [defendant] can be said to have willfully joined the conspiracy: an intent to agree and an intent, whether reasonable or not, that the underlying crime be committed. Mere presence at the scene of a crime is not alone enough, but you may consider it among other factors. Intent may be inferred from the surrounding circumstances.

Proof that [defendant] willfully joined in the agreement must be based upon evidence of his/her own words and/or actions. You need not find that [defendant] agreed specifically to or knew about all the details of the crime, or knew every other co-conspirator or that he/she participated in each act of the agreement or played a major role, but the government must prove beyond a reasonable doubt that he/she knew the essential features and general aims of the venture. Even if [defendant] was not part of the agreement at the very start, he/she can be found guilty of conspiracy if the government proves that he/she willfully joined the agreement later. On the other hand,

a person who has no knowledge of a conspiracy, but simply happens to act in a way that furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

[An overt act is any act knowingly committed by one or more of the conspirators in an effort to accomplish some purpose of the conspiracy. Only one overt act has to be proven. The government is not required to prove that [defendant] personally committed or knew about the overt act. It is sufficient if one conspirator committed one overt act at some time during the period of the conspiracy.]

The government does not have to prove that the conspiracy succeeded or was achieved. The crime of conspiracy is complete upon the agreement to commit the underlying crime [and the commission of one overt act].

Comment

(1) This charge is based largely upon United States v. Rivera-Santiago, 872 F.2d 1073, 1078-80 (1st Cir.), cert. denied, 492 U.S. 910 (1989), as modified by United States v. Piper, 35 F.3d 611, 614-15 (1st Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1118 (1995). See also United States v. Boylan, 898 F.2d 230, 241-43 (1st Cir.), cert. denied, 498 U.S. 849 (1990); Blumenthal v. United States, 332 U.S. 539, 557 (1947).

(2) The third element (overt act) is not required in a drug conspiracy under 21 U.S.C. § 846. See United States v. Shabani, ___ U.S. ___, 115 S. Ct. 382, 383 (1994). For discussion of overt acts see United States v. Flaherty, 668 F.2d 566, 580 n.4 (1st Cir. 1981).

(3) The Government does not have to prove that the defendant intended to commit the underlying offense himself/herself. See Piper, 35 F.3d at 614-15. There must be proof, however, that a second conspirator with criminal intent existed. See United States v. Alzanki, 54 F.3d 994, 1003 (1st Cir. 1995), cert. denied, 116 S. Ct. 909 (1996).

(4) "Whether there is a single conspiracy, multiple conspiracies, or no conspiracy at all is ordinarily a factual matter for the jury to determine." United States v. Mena-Robles, 4 F.3d 1026, 1033 (1st Cir. 1993), cert. denied, 511 U.S. 1035 (1994). A multiple conspiracy instruction should be provided if "'on the evidence adduced at trial, a reasonable jury could find more than one such illicit agreement, or could find an agreement different from the one charged.'" United States v. Brandon, 17 F.3d 409, 449 (1st Cir.) (quoting Boylan, 898 F.2d at 243), cert. denied, 513 U.S. 820 (1994).

(5) The definition of "willfully" comes from United States v. Monteiro, 871 F.2d 204, 208-09 (1st Cir.), cert. denied, 493 U.S. 833 (1989). For alternate definitions

see United States v. Porter, 764 F.2d 1, 17 (1st Cir. 1985), cert. denied, 481 U.S. 1048 (1987), and United States v. Drape, 668 F.2d 22, 26 (1st Cir. 1992). Specific intent is preferred. See United States v. Yefsky, 994 F.2d 885, 899 (1st Cir. 1993).

(6) Impossibility is not a defense. See United States v. Giry, 818 F.2d 120, 126 (1st Cir.), cert. denied, 484 U.S. 855 (1987).

(7) A conspiracy to defraud the IRS may present unique problems of "purpose" or "knowledge." United States v. Goldberg, 105 F.3d 770, 774 (1st Cir. 1997).

(8) Note that some substantive offenses contain their own conspiracy prohibitions. See, e.g., 18 U.S.C. § 1201(c) (kidnapping) (overt act required); 18 U.S.C. § 1951(a) (Hobbs Act) (no overt act required).

(9) Withdrawal is not an affirmative defense if the conspiratorial agreement has already been made. See United States v. Rogers, 102 F.3d 641, 644 (1st Cir. 1996).

4.04 Escape from Custody, 18 U.S.C. § 751

[Defendant] is accused of escaping [attempting to escape] from the [facility] while he/she was in federal custody. It is against federal law to [attempt to] escape from federal custody. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that on [date], [defendant] was in federal custody at [facility];

Second, that he/she was in custody because he/she had been [e.g., arrested for a felony charge; arrested for a misdemeanor charge; convicted of a crime];

Third, that he/she left [attempted to leave] the [facility] without permission; and

Fourth, that he/she knew that he/she did not have permission to leave.

Comment

(1) The nature of the custody must be proven specifically, since the statute provides for dual penalties: escape is a felony if custody was by reason of any conviction or a felony arrest, but only a misdemeanor if custody was by reason of a misdemeanor arrest or for extradition or expulsion. See United States v. Vanover, 888 F.2d 1117, 1121 (6th Cir. 1989), cert. denied, 495 U.S. 934 (1990); United States v. Green, 797 F.2d 855, 858 n.4 (10th Cir. 1986); United States v. Edrington, 726 F.2d 1029, 1031 (5th Cir. 1984); United States v. Richardson, 687 F.2d 952, 958 (7th Cir. 1982); see also United States v. Bailey, 444 U.S. 394, 407 (1980) (stating in dictum that prosecution must prove nature of custody to convict under section 751(a)). The determination of whether an offense underlying an arrest is a felony or misdemeanor is a question of law for the court, but the determination that the defendant was being held by reason of conviction or arrest for a particular crime is a question of fact for the jury. See Richardson, 687 F.2d at 958.

(2) Custody need not involve physical restraint; the failure to comply with an order that restrains the defendant's freedom may be an escape. See Bailey, 444 U.S. at 413 (holding that failure to return to custody is an "escape" in violation of section 751); United States v. Puzzanghera, 820 F.2d 25, 26 n.1 (1st Cir.), cert. denied, 484 U.S. 900 (1987) (same); see also 18 U.S.C. § 4082(a) ("The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed . . . shall be deemed an escape [under 18 U.S.C. §§ 751-757].").

(3) The defense of necessity or duress may be an issue. On this matter, see Bailey, 444 U.S. at 409-13.

4.05 Assisting Escape, 18 U.S.C. § 752

[Defendant] is accused of aiding or assisting [prisoner]'s escape from [facility] while he/she was in federal custody. It is against federal law to aid or assist someone else in escaping [attempting to escape] from federal custody. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that on [date], [prisoner] was in federal custody at [facility];

Second, that [prisoner] was in custody because he/she had been [e.g., arrested for a felony charge, convicted of a crime];

Third, that [prisoner] left [attempted to leave] the [facility] without permission;

Fourth, that [prisoner] knew that he/she did not have permission to leave; and

Fifth, that [defendant] knew that [prisoner] was escaping [attempting to escape] and intentionally helped him/her to do so.

Comment

(1) See generally Notes to First Circuit Pattern Instruction 4.04 for Escape, 18 U.S.C. § 751.

(2) Section 752 also makes it an offense to instigate an escape. If the facts so warrant, the word "instigate" should be added or substituted for "aid or assist" with appropriate grammatical changes.

(3) The crime of aiding or assisting an escape cannot occur after the escapee reaches temporary safety or a point beyond immediate active pursuit. See United States v. DeStefano, 59 F.3d 1, 4-5 n.6 (1st Cir. 1995). At that point, any further assistance can at most constitute harboring or concealing under 18 U.S.C. § 1072. See id. at 4.

(4) The government need not prove that the defendant was aware of the federal status of the escaped prisoner. See United States v. Aragon, 983 F.2d 1306, 1310 (4th Cir. 1993); United States v. Hobson, 519 F.2d 765, 769-70 (9th Cir.), cert. denied, 423 U.S. 931 (1975). Cf. United States v. Feola, 420 U.S. 671, 685 (1975) ("The concept of criminal intent does not extend so far as to require that the actor understand

not only the nature of his act but also its consequence for the choice of a judicial forum.”).

4.06 Possession of a Firearm or Ammunition In or Affecting Commerce by a Convicted Felon, 18 U.S.C. § 922(g)

[Defendant] is charged with possessing a firearm [ammunition] in or affecting commerce after having been convicted of a crime punishable by imprisonment for more than one year. For you to find [defendant] guilty of this crime, you must be satisfied that the government has proven each of the following things beyond a reasonable doubt:

> First, that [defendant] has been convicted in any court of [at least one] crime punishable by imprisonment for a term exceeding one year. I instruct you that the crime of [_____] is such a crime. [*Alternative:* The parties have stipulated that [defendant] has been convicted of a crime which is punishable by imprisonment for a term exceeding one year. You are to take that fact as proven.]
>
> Second, that [defendant] knowingly possessed the firearm [ammunition] described in the indictment. [The term "firearm" means any weapon which will or is designed or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon.]
>
> Third, that the firearm was connected with interstate [foreign] commerce. This means that the firearm [ammunition], at any time after it was manufactured, moved from one state to another [or from a foreign country into the United States]. The travel need not have been connected to the charge in the indictment and need not have been in furtherance of any unlawful activity.

The word "knowingly" means that the act was done voluntarily and intentionally, not because of mistake or accident.

The term "possess" means to exercise authority, dominion or control over something. It is not necessarily the same as legal ownership. The law recognizes different kinds of possession.

[Possession includes both actual and constructive possession. A person who has direct physical control of something on or around his person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term "possession" in these instructions, I mean actual as well as constructive possession.]

[Possession [also] includes both sole and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I have used the word "possession" in these instructions, I mean joint as well as sole possession.]

Comment

(1) The charge is based on United States v. Bartelho, 71 F.3d 436, 439 (1st Cir. 1995).

(2) The definition of "knowingly" is based on United States v. Tracy, 36 F.3d 187, 194-95 (1st Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1717 (1995).

(3) United States v. Rogers, 41 F.3d 25, 29 (1st Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 2287 (1995), discusses dominion, control, possession and ownership. United States v. Booth, 111 F.3d 1, 2 (1st Cir. 1997), counsels against defining constructive possession in terms of dominion and control "over the area in which the object is located" and thereby limits United States v. Wight, 968 F.2d 1393, 1398 (1st Cir. 1992). However, the jury may be told in appropriate circumstances that knowledge could be inferred from control of the area. See Booth, 111 F.3d at 2.

(4) The First Circuit has not addressed how to deal with multiple firearms and/or ammunition charges. The difficult issue is whether the facts indicate separate possessions, because possession is the proscribed conduct. Ten circuits (Second through Eleventh) have held that receipt or possession of multiple firearms and/or ammunition constitutes a single offense under 18 U.S.C. § 922(g)[1] unless there is a showing that the firearms and/or ammunition were stored or acquired at different times or places. See United States v. Pelusio, 725 F.2d 161, 168-69 (2d Cir. 1983); United States v. Frankenberry, 696 F.2d 239, 244-46 (3d Cir. 1982), cert. denied, 463 U.S. 1210 (1983); United States v. Mullins, 698 F.2d 686, 687 (4th Cir.), cert. denied, 460 U.S. 1073 (1983); United States v. Bullock, 615 F.2d 1082, 1086 (5th Cir.), cert. denied, 449 U.S. 957 (1980); United States v. Throneburg, 921 F.2d 654, 657 (6th Cir. 1990); United States v. Oliver, 683 F.2d 224, 232-33 (7th Cir. 1982); United States v. Powers, 572 F.2d 146, 150-52 (8th Cir. 1978); United States v. Szalkiewicz, 944 F.2d 653, 653-54 (9th Cir. 1991); United States v. Valentine, 706 F.2d 282, 292-94 (10th Cir. 1983); United States v. Bonavia, 927 F.2d 565, 569 (11th Cir. 1991). Separate acquisition or storage of the firearms or ammunition are the commonly-cited indicia, but there could be other indicia in a given case. Because possession of multiple weapons is a single offense unless there are separate possessions, the trial judge faced with multiple possession counts must decide whether to (1) require the government to

[1] The current felon in possession statute, 18 U.S.C. § 922(g), is a combination of former 18 U.S.C. § 922(h) and 18 U.S.C. § 1202(a). The cited cases are all decided under one of those provisions; there is no distinction among the provisions that is relevant to the multiplicity issue.

elect or combine counts before trial; (2) allow multiple counts but require a specific jury finding of separate possessions; or (3) allow multiple counts with no special jury instruction, but make a post-verdict "correction" by not entering judgment of conviction on any multiplicitous counts. Three circuits have made it clear that the jury, not the trial or appellate judges, must find separate possession as a critical element of a multi-count weapons possession conviction. See Frankenberry, 696 F.2d at 245 (3rd Cir.); Szalkiewicz, 944 F.2d at 654 (9th Cir.); Valentine, 706 F.2d at 294 (10th Cir.). The Eleventh Circuit has held that it was not plain error for the trial judge to fail to give a separate possession instruction, and upheld conviction on multiple counts because sufficient evidence of separate possession was presented at trial, even though there was no jury finding to that effect. See Bonavia, 927 F.2d at 569-71. The Sixth Circuit in Throneburg explained that the trial judge should exercise his/her discretion to vacate any multiplicitous guilty verdicts; the government in its discretion can decide how many counts to bring, and no jury instruction or finding is required as to separate possessions. See 921 F.2d at 657. A possible instruction is as follows:

> If you have found the defendant guilty on Count I, you may not find him guilty on Count II unless you also find that the government has proven beyond a reasonable doubt that the firearm and ammunition were acquired at different times or that they were stored in different places.

(5) United States v. Acosta, 67 F.3d 334, 340 (1st Cir. 1995), cert. denied, ___ U.S. ___, 116 S. Ct. 965 (1996), supports the broad definition of "commerce." See also United States v. Gillies, 851 F.2d 492, 493-95 (1st Cir.) (finding that "affecting commerce" includes possession of a gun that traveled interstate before the felon possessed it), cert. denied, 488 U.S. 857 (1988).

(6) The trial judge determines as a matter of law whether a previous conviction qualifies under 18 U.S.C. § 922(g). See Bartelho, 71 F.3d at 440. The *fact* of conviction, however, is for the jury unless it is stipulated, and so too is any factual issue on the restoration of civil rights. Id. at 440-41. It should be noted that, although the court in Bartelho found the approach of United States v. Flower, 29 F.3d 530 (10th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 939 (1995), persuasive, see 71 F.3d at 440, Flower seems to be in conflict with Bartelho to the extent that it treats a factual dispute concerning restoration of civil rights as a preliminary matter to be resolved by the court prior to admitting the conviction into evidence. See 29 F.2d at 535-36.

(7) An aiding and abetting charge under the statute requires the court to instruct the jury that the aiding and abetting defendant must know or have cause to believe the firearm possessor's status as a convicted felon. See United States v. Xavier, 2 F.3d 1281, 1286-87 (3rd Cir. 1993).

4.07 Using or Carrying a Firearm During and in Relation to Drug Trafficking or Crime of Violence, 18 U.S.C. § 924(c)

[Defendant] is accused of using or carrying a firearm during and in relation to [_____]. For you to find [defendant] guilty of this crime, you must be satisfied that the government has proven each of the following things:

> First, [defendant] committed the crime of [_____, described in Count ___]; and
>
> Second, during and in relation to the commission of that crime, [defendant] knowingly used or carried a firearm.

The word "knowingly" means that an act was done voluntarily and intentionally, not because of mistake or accident.

To "carry" a firearm during and in relation to a crime means to move or transport the firearm on one's person or in a vehicle or container during and in relation to the crime. It need not be immediately accessible. To "use" a firearm during and in relation to a crime means to employ the firearm actively, such as to brandish, display, barter, strike with, fire or attempt to fire it, or even to refer to it in a way calculated to affect the underlying crime. The firearm must have played a role in the crime or must have been intended by the defendant to play a role in the crime. That need not have been its sole purpose, however.

Comment

(1) If the predicate crime of violence or drug trafficking is not charged in the same indictment, the jury must be instructed as to the elements of that crime and that the government must prove each element beyond a reasonable doubt. The First Circuit has cautioned against "generic references to 'a drug trafficking crime' when referring to the particular predicate offense." United States v. Manning, 79 F.3d 212, 221 n.9 (1st Cir.), cert. denied, 117 S. Ct. 147 (1996). It is a question of law for the court, however, whether the crime, if proven, qualifies as a crime of violence or drug trafficking. See United States v. Weston, 960 F.2d 212, 217 (1st Cir. 1992), overruled on other grounds by Stinson v. United States, 508 U.S. 36 (1993). But see Eleventh Circuit Instruction 28 (instructing jury to determine whether or not the predicate offense is a "crime of violence"), criticized by 1A Sand, et al., Modern Federal Jury Instructions ¶ 35.08 at 35-112. "Drug trafficking crime" and "crime of violence" are defined at 18 U.S.C. § 924(c)(2) & (3).

(2) The definition of "knowingly" is based upon United States v. Tracy, 36 F.3d 187, 194-95 (1st Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1717 (1995).

(3) The definition of "use" comes from United States v. Valle, 72 F.3d 210, 217 (1st Cir. 1995), and Bailey v. United States, 116 S. Ct. 501, 505-09 (1995). Earlier cases must be treated with great care. The definition of "carry" comes from United States v. Cleveland, 106 F.3d 1056, 1065-67 (1st Cir. 1997) (a firearm can be "carried" in a car's trunk), petition for cert. filed, (U.S. Apr. 30, 1997) (No. 96-8837); United States v. Ramirez-Ferrer, 82 F.3d 1149, 1153-54 (1st Cir. 1996) (a firearm can be "carried" by having it in a boat), cert. denied, 117 S. Ct. 405 (1996); Manning, 79 F.3d at 212.

It seems best not to define "use or carry" separately from "during and in relation to." Possession alone without proof of a relationship to the underlying crime is insufficient, see United States v. Plummer, 964 F.2d 1251, 1254-55 (1st Cir.), cert. denied, 506 U.S. 926 (1992), but facilitating the predicate crime need not be the sole purpose. See United States v. Payero, 888 F.2d 928, 929 (1st Cir. 1989).

Use or availability of the firearm for offensive or defensive purposes is not required. See Smith v. United States, 508 U.S. 223, 236-39 (1993) (holding that § 924(c)(1) applies where the defendant merely bartered weapons for drugs).

(4) For definition of "firearm," see 18 U.S.C. § 921(a)(3).

(5) An aiding or abetting instruction may be appropriate for either or both of the two elements of the crime, but the jury should be instructed that the "shared knowledge" requirement see Instruction 4.02 (Aid and Abet), requires that the defendant have a "practical certainty" the firearm will be used. See United States v. Spinney, 65 F.3d 231, 238 (1st Cir. 1995).

4.08 Making a False Statement to a Federal Agency, 18 U.S.C. § 1001

[Defendant] is charged with making a false statement in a matter within the jurisdiction of a government agency. For you to find the defendant guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, that [defendant] knowingly made a material false statement;
>
> Second, that [defendant] made the statement voluntarily and intentionally; and
>
> Third, that [defendant] made the statement in a [e.g., U.S. Customs declaration].

A false statement is made "knowingly" if [defendant] knew that it was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth.

A statement is "material" if it has a natural tendency to influence or to be capable of influencing the decision of the decisionmaker to which it was addressed.

A statement is "false" if it was untrue when made.

Comment

(1) The charge refers only to false statements. Section 1001, the False Statements Accountability Act of 1996, is much broader, and in a given case the instruction will need to be modified to deal with the other potential violations. See 18 U.S.C. § 1001(a)(1)-(3) (punishing one who "knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry") (as amended by PL 104-292, Oct. 11, 1996).

(2) In United States v. London, 66 F.3d 1227, 1241-42 (1st Cir. 1995), cert. denied, 116 S. Ct. 1542 (1996), the First Circuit stated that "[i]n the context of the False Statements Act, 18 U.S.C. § 1001, a false statement is made knowingly if defendant demonstrated a reckless disregard of the truth, with a conscious purpose to avoid learning the truth." The First Circuit also has approved instructing the jury on good faith and referring to advice of counsel in that respect. See United States v. Arcadipane, 41 F.3d 1, 8 (1st Cir. 1994); see also United States v. Dockray, 943 F.2d

152, 155 (1st Cir. 1991) ("[G]ood faith is an absolute defense to a charge of mail or wire fraud. . . .").

(3) In United States v. Gaudin, ___ U.S. ___, 115 S. Ct. 2310, 2320 (1995), the Supreme Court held that the issue of materiality is for the jury. According to the concurrence by Chief Justice Rehnquist, Justice O'Connor and Justice Breyer, the majority opinion did not resolve a conflict among the circuits "over whether materiality is an element of the offense created by the second clause of section 1001." Id. at 2320-21. (The second clause covers a defendant who "makes any false, fictitious, or fraudulent statement or representation." 35 U.S.C. § 1001(a)(2).) That may be an overstatement by the concurrence. What the majority opinion actually said was: "It is uncontested that conviction under this provision requires that the statements be 'material' to the Government inquiry, and that 'materiality' is an element of the offense that the Government must prove." Id. at 2313. The most conservative route for a trial court to take seems to be to include the materiality requirement under all the provisions of section 1001.

(4) The definition of materiality is based upon the court's description of what the parties agreed to as a definition in Gaudin. Accord Arcadipane, 41 F.3d at 7 ("[M]ateriality requires only that the fraud in question have a natural tendency to influence, or be capable of affecting or influencing, a governmental function. The alleged concealment or misrepresentation need not have influenced the actions of the Government agency, and the Government agents need not have been actually deceived.") (quoting United States v. Corsino, 812 F.2d 26, 30 (1st Cir. 1986)).

(5) The statute deals only with false statements "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." 18 U.S.C. § 1001(a). It seems best to specify in the instruction the document or other context in which the false statement was allegedly made. Whether it was made there is a jury issue. It should be a separate question for the judge whether that document or context brings it within the "jurisdiction of the executive, legislative, or judicial branch of the Government of the United States."

(6) The government is not required to prove that the defendant had a purpose to mislead a federal agency. See United States v. Yermian, 468 U.S. 63, 68-75 (1984).

4.09 Making a False Statement or Report, 18 U.S.C. § 1014

[Defendant] is charged with making a false statement or report for the purpose of influencing the action of [appropriate governmental agency or entity listed in statute] upon his/her [application, commitment, loan, etc.]. For you to find the defendant guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, that [defendant] made or caused to be made a false statement or report to [appropriate governmental agency or entity listed in statute] upon [an application, commitment, loan, etc.];
>
> Second, that [defendant] acted knowingly; and
>
> Third, that [defendant] made the false statement or report for the purpose of influencing in any way the action of [appropriate governmental agency/ financial institution] on the [application, commitment, loan, etc.].

A false statement is made "knowingly" if [defendant] knew that it was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth.

A statement is "false" if it was untrue when made.

Comment

(1) This charged is based largely upon United States v. Concemi, 957 F.2d 942, 951 (1st Cir. 1992).

(2) Materiality is not required. See United States v. Wells, ___ U.S. ___, 117 S. Ct. 921, 926-31 (1997).

(3) Section 1014 also includes "willful overvalu[ation]." This charge refers only to false statements or reports, but can be modified accordingly.

(4) Section 1014 lists the governmental agencies and related entities covered by the statute as well as the kinds of actions that are covered.

4.10 Access Device or Credit Card Fraud, 18 U.S.C. § 1029(a)(2)

[Defendant] is charged with knowingly and fraudulently using [an] unauthorized access device[s] between [date] and [date]. It is against federal law to knowingly and fraudulently use access devices without authorization.

For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] used [an] access device[s];

Second, that [defendant] used it without authorization and thereby obtained something of value aggregating at least $1,000 during the one-year period from [date] to [date];

Third, that [defendant] acted knowingly, willfully and with the intent to defraud;

Fourth, that [defendant]'s conduct affected interstate or foreign commerce.

The term "access device" [means any card, plate, code, account number or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services or any other thing of value, or that can be used to initiate a transfer of funds other than a transfer originated solely by paper instrument. It] includes credit cards.

The term "unauthorized access device" includes any access device or credit card that is lost, stolen, expired, revoked, canceled or obtained with intent to defraud.

[Defendant] acted "knowingly" if he/she was conscious and aware of his/her actions, realized what he/she was doing or what was happening around him/her, and did not act because of ignorance, mistake or accident.

To act with "intent to defraud" means to act with the intent to deceive or cheat someone. Good faith on the part of [defendant] is a complete defense to a charge of credit card fraud. If [defendant] actually believed in good faith that he/she was acting properly, even if he/she was mistaken in that belief, and even if others were injured by his/her conduct, there would be no crime. An honest mistake in judgment does not rise to the level of criminal conduct. A defendant does not act in good faith if, even though he/she honestly holds a certain opinion or belief, he/she also acted with the purpose of deceiving others. While the term good faith has no precise definition, it means among other things a belief or opinion honestly held, an absence of malice or ill will, and an

intention to avoid taking unfair advantage of another. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt. The defendant is under no obligation to prove good faith.

Conduct "affects" interstate or foreign commerce if the conduct has a demonstrated connection or link with such commerce. It is not necessary for the government to prove that [defendant] knew or intended that his/her conduct would affect commerce; it is only necessary that the natural consequences of her conduct affected commerce in some way.

Comment

The definition of good faith used here was cited approvingly in the context of credit card fraud in United States v. Goodchild, 25 F.3d 55, 59-60 (1st Cir. 1994).

4.11 Harboring or Concealing an Escaped Prisoner, 18 U.S.C. § 1072

[Defendant] is accused of harboring or concealing an escaped prisoner, [prisoner]. It is against federal law to harbor or conceal an escaped prisoner. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, that [prisoner] escaped from [the custody of the Attorney General] [federal penal or correctional institution];
>
> Second, that [defendant] did some physical act to help to allow [prisoner] to avoid detection or apprehension;
>
> Third, that [defendant] acted knowingly and willfully.

To act "knowingly and willfully" means to act with the knowledge that [prisoner] has escaped from custody and with the purpose and intent to help or allow him to avoid detection or apprehension.

Comment

(1) If the Attorney General has designated a nonfederal facility as the place of incarceration, escape from that facility is an escape from "the custody of the Attorney General" under this section. United States v. Eaglin, 571 F.2d 1069, 1073 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978).

(2) Several circuits have held that "[t]he words 'harbor' and 'conceal' refer to any physical act of providing assistance, including food, shelter, and other assistance to aid the prisoner in avoiding detection and apprehension." United States v. Kutas, 542 F.2d 527, 528 (9th Cir. 1976), cert. denied, 429 U.S. 1073 (1977); see also Laaman v. United States, 973 F.2d 107, 114 (2d Cir. 1992) (construing same terms as in section 1071, which proscribes concealing fugitives from arrest rather than escaped prisoners), cert. denied, 507 U.S. 954 (1993); United States v. Yarbrough, 852 F.2d 1522, 1543 (9th Cir.) (same), cert. denied, 488 U.S. 866 (1988); United States v. Silva, 745 F.2d 840, 849 (4th Cir. 1984) (same), cert. denied, 470 U.S. 1031 (1985); United States v. Foy, 416 F.2d 940, 941 (7th Cir. 1969) (same).

(3) Section 1072 requires proof that the defendant "willfully" harbored or concealed the escaped prisoner. This element has been read to require that the defendant had knowledge that the person whom he aided had escaped from custody. See Eaglin, 571 F.2d at 1074; United States v. Deaton, 468 F.2d 541, 543 (5th Cir.

1972), cert. denied, 410 U.S. 934 (1973). It is not necessary that the government prove that the defendant was aware of the federal status of the escaped prisoner. Eaglin, 571 F.2d at 1074 n.4; cf. United States v. Aragon, 983 F.2d 1306, 1310 (4th Cir. 1994) (knowledge of federal status not an element of assisting escape under 18 U.S.C. § 752); United States v. Feola, 420 U.S. 671, 684-85 (1975) (knowledge of federal status not an element of assaulting a federal officer under 18 U.S.C. § 111).

4.12 Mail Fraud, 18 U.S.C. § 1341

[Defendant] is charged with violating the federal statute making mail fraud illegal.

For you to find [defendant] guilty of mail fraud, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, a scheme, substantially as charged in the indictment, to defraud [or to obtain money or property by means of false or fraudulent pretenses];
>
> Second, [defendant's] knowing and willful participation in this scheme with the intent to defraud [or to obtain money or property by means of false or fraudulent pretenses]; and
>
> Third, the use of the United States mail, on or about the date charged, in furtherance of this scheme.

A scheme includes any plan, pattern or course of action. The term "defraud" means to deprive another of something of value by means of deception or cheating. A scheme to defraud is ordinarily accompanied by a desire or purpose to bring about some gain or benefit to oneself or some other person or by a desire or purpose to cause some loss to some person. It includes a scheme to deprive another of the intangible right of honest services.

[The term "false or fraudulent pretenses" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth and that were made with the intent to defraud. They include actual, direct false statements as well as half-truths and the knowing concealment of facts.]

[A "material" fact or matter is one that has a natural tendency to influence or be capable of influencing the decisionmaker to whom it was addressed.]

[Defendant] acted "knowingly" if he/she was conscious and aware of his/her actions, realized what he/she was doing or what was happening around him/her, and did not act because of ignorance, mistake or accident.

An act or failure to act is "willful" if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. Thus, if [defendant] acted in good faith, he/she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

To act with "intent to defraud" means to act willfully and with the specific intent to deceive or cheat for the purpose of either causing some financial loss to another or bringing about some financial gain to oneself. Thus, if [defendant] acted in good faith, he/she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme or that the material transmitted by mail was itself false or fraudulent or that the alleged scheme actually succeeded in defrauding anyone or that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proven beyond a reasonable doubt is that [defendant] knowingly devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment, and that the use of the mail on or about the date alleged was closely related to the scheme because [defendant] either received something in the mail or caused it to be mailed in an attempt to execute or carry out the scheme. To "cause" the mail to be used is to do an act with knowledge that the use of the mail will follow in the ordinary course of business or where such use can reasonably be foreseen.

Comment

(1) This instruction is based on United States v. Cassiere, 4 F.3d 1006, 1011 (1st Cir. 1993). We have dropped the statutory term "artifice" as archaic. It adds nothing to "scheme," a term more understandable to most jurors.

(2) Cassiere and its predecessors, United States v. Serrano, 870 F.2d 1, 6 (1st Cir. 1989), and United States v. Brien, 617 F.2d 299, 307 (1st Cir.), cert. denied, 446 U.S. 919 (1980), collapsed the statutory language into Cassiere's "scheme to defraud by means of false pretenses." 4 F.3d at 1101. No explanation was given for doing so and in light of the clear statutory language to the contrary, it was probably unintentional. Almost all of the other circuits have addressed the issue, and they are in unanimous

agreement that the first clause of section 1341, "scheme or artifice to defraud," should be read independently of the second, "obtaining money or property by means of false or fraudulent pretenses." See United States v. Margiotta, 688 F.2d 108, 121 (2d Cir. 1982) (mail fraud), cert. denied, 461 U.S. 913 (1983); United States v. Frankel, 721 F.2d 917, 919-21 (3d Cir. 1983) (mail fraud); Landry v. Air Line Pilots Ass'n Int'l, 901 F.2d 404, 428 (5th Cir.) (mail fraud), cert. denied, 498 U.S. 895 (1990); United States v. Stone, 954 F.2d 1187, 1190 & n.4 (6th Cir. 1992) (mail and wire fraud); United States v. Doherty, 969 F.2d 425, 429 (7th Cir.) (mail, wire and bank fraud), cert. denied, 506 U.S. 1002 (1992); United States v. Clausen, 792 F.2d 102, 104 (8th Cir.) (wire fraud), cert. denied, 479 U.S. 858 (1986); United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981) (mail fraud); United States v. Cronic, 900 F.2d 1511, 1513 (10th Cir. 1990) (mail and wire fraud); United States v. Scott, 701 F.2d 1340, 1343 (11th Cir.) (mail fraud), cert. denied, 464 U.S. 856 (1983). This instruction, therefore, follows the statute.

(3) Schemes to deprive others of the intangible right of honest services are included by virtue of 18 U.S.C. § 1346. For a lengthy discussion of the scope of this phrase, see United States v. Sawyer, 85 F.3d 713, 723-25 (1st Cir. 1996).

(4) Materiality logically should not be relevant to a "scheme to defraud," but only to a scheme to obtain money or property by "false or fraudulent pretenses." See Comment 6 to Instruction 4.14 (Bank Fraud). United States v. Faulhaber, 929 F.2d 16, 18 (1st Cir. 1991), found no materiality requirement. It may be open to question, however. See United States v. Lopez, 71 F.3d 954, 962 (1st Cir. 1995), cert. denied, 116 S. Ct. 2529 (1996).

(5) "It is not necessary to establish that the intended victim was *actually* defrauded." United States v. Allard, 926 F.2d 1237, 1242 (1st Cir. 1991). Mail fraud does "not require that the victims be pure of heart." United States v. Camuti, 78 F.3d 738, 742 (1st Cir. 1996).

(6) Although good faith is included in this charge, "[a] separate instruction on good faith is not required in this circuit where the court adequately instructs on intent to defraud." Camuti, 78 F.3d at 744 (citing United States v. Dockray, 943 F.2d 152, 155 (1st Cir. 1991)).

4.13 Wire Fraud, 18 U.S.C. § 1343

[Defendant] is charged with violating the federal statute making wire fraud illegal.

For you to find [defendant] guilty of wire fraud, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, a scheme, substantially as charged in the indictment, to defraud [or to obtain money or property by means of false or fraudulent pretenses];
>
> Second, [defendant]'s knowing and willful participation in this scheme with the intent to defraud; and
>
> Third, the use of interstate [or foreign] wire communications, on or about the date alleged, in furtherance of this scheme.

"Interstate [or foreign] wire communications" include telephone communications from one state to another [or between the United States and a foreign country.] [The term also includes a wire transfer of funds between financial institutions.]

A scheme includes any plan, pattern or course of action. The term "defraud" means to deprive another of something of value by means of deception or cheating. A scheme to defraud is ordinarily accompanied by a desire or purpose to bring about some gain or benefit to oneself or some other person or by a desire or purpose to cause some loss to some person. It includes a scheme to deprive another of the intangible right of honest services.

[The term "false or fraudulent pretenses" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth and that were made with the intent to defraud. They include actual, direct false statements as well as half-truths and the knowing concealment of facts.]

[A "material" fact or matter is one that has a natural tendency to influence or be capable of influencing the decisionmaker to whom it was addressed.]

[Defendant] acted "knowingly" if he/she was conscious and aware of his/her actions, realized what he/she was doing or what was happening around him/her, and did not act because of ignorance, mistake or accident.

An act or failure to act is "willful" if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do

something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

To act with "intent to defraud" means to act willfully and with the specific intent to deceive or cheat for the purpose of either causing some financial loss to another or bringing about some financial gain to oneself. Thus, if [defendant] acted in good faith, he/she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

Phone calls designed to lull a victim into a false sense of security, postpone injuries or complaints, or make the transaction less suspect are phone calls in furtherance of a scheme to defraud.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme or that the material transmitted by wire was itself false or fraudulent or that the alleged scheme actually succeeded in defrauding anyone or that the use of wire communications facilities in interstate commerce was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proven beyond a reasonable doubt is that [defendant] knowingly devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment; and that the use of the wire communications facilities in interstate [or foreign] commerce on or about the date alleged was closely related to the scheme because [defendant] either made or caused an interstate [or foreign] telephone call to be made in an attempt to execute or carry out the scheme. To "cause" an interstate [or foreign] telephone call to be made is to do an act with knowledge that an interstate [or foreign] telephone call will follow in the ordinary course of business or where such a call can reasonably be foreseen.

Comment

(1) Schemes to deprive others of the intangible right of honest services are included by virtue of 18 U.S.C. § 1346. For a lengthy discussion of the scope of this phrase, see United States v. Sawyer, 85 F.3d 713, 723-25 (1st Cir. 1996).

(2) On "scheme to defraud [or to obtain money or property by means of false or fraudulent pretenses]," see Comment 2 to Instruction 4.12 (Mail Fraud). On materiality, see Comment 4 to Instruction 4.12 (Mail Fraud). "The mail and wire fraud statutes share the same language in relevant part" and are therefore subject to the same analysis. Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987); accord McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 791 n.8 (1st Cir.) (same), cert. denied, 498 U.S. 992 (1990). "Accordingly, . . . caselaw construing § 1341 is instructive for purposes of § 1343." United States v. Fermin Castillo, 829 F.2d 1194, 1198 (1st Cir. 1987).

(3) "[U]se of the wires must be 'incident to an essential part of the scheme.'" United States v. Lopez, 71 F.3d 954, 961 (1st Cir. 1995), (quoting Pereira v. United States, 347 U.S. 1, 8 (1954)), cert. denied, 116 S. Ct. 2529 (1996). That concept is construed broadly, however, and includes use of the wires to "'lull victims into a sense of false security, [and] postpone their ultimate complaint to the authorities.'" Id. (quoting United States v. Lane, 474 U.S. 438, 451-52 (1986)).

4.14 Bank Fraud, 18 U.S.C. § 1344(1), (2)

[Defendant] is charged with bank fraud. It is against federal law to engage in such conduct against certain financial institutions. For you to find [defendant] guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, the financial institution was federally insured or was a federal reserve bank or a member of the federal reserve system;
>
> Second, [defendant] engaged in a scheme, substantially as charged in the indictment, to defraud or made false statements or misrepresentations to obtain money from that institution;
>
> Third, [defendant] acted knowingly.

"Knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident.

A scheme includes any plan, pattern or course of action. The term "defraud" means to deprive another of something of value by means of deception or cheating. A scheme to defraud is ordinarily accompanied by a desire or purpose to bring about some gain or benefit to oneself or some other person or by a desire or purpose to cause some loss to some person. It includes a scheme to deprive another of the intangible right of honest services.

[The term "false or fraudulent pretenses" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth and that were made with the intent to defraud. They include actual, direct false statements as well as half-truths and the knowing concealment of facts.]

[A "material" fact or matter is one that has a natural tendency to influence or be capable of influencing the decisionmaker to whom it was addressed.]

[Defendant] acted "knowingly" if he/she was conscious and aware of his/her actions, realized what he/she was doing or what was happening around him/her, and did not act because of ignorance, mistake or accident.

An act or failure to act is "willful" if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

To act with "intent to defraud" means to act willfully and with the specific intent to deceive or cheat for the purpose of either causing some financial loss to another or bringing about some financial gain to oneself. Thus, if [defendant] acted in good faith, he/she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

The government need not prove that the scheme was successful, that the financial institutions suffered a financial loss, that the defendant knew that the victim of the scheme was a federally insured financial institution [federal reserve bank; member of the federal reserve system] or that the defendant secured a financial gain.

Comment

(1) This instruction is based largely on United States v. Brandon, 17 F.3d 409, 424-28 (1st Cir.), cert. denied, 513 U.S. 820 (1994).

(2) Schemes to deprive others of the intangible right of honest services are included by virtue of 18 U.S.C. § 1346. For a lengthy discussion of the scope of this phrase, see United States v. Sawyer, 85 F.3d 713, 723-25 (1st Cir. 1996).

(3) We have dropped the statutory term "artifice" as archaic. It adds nothing to "scheme," a term more understandable to most jurors. Note that the statute speaks of a "scheme . . . to defraud . . . or to obtain . . . moneys . . . by means of false or fraudulent pretenses, representations, or promises." Brandon, however, collapses this to the formulation in the instruction. 17 F.3d at 424.

(4) If more than one scheme is charged in a particular count, the jury should be instructed that it has to make a unanimous finding with respect to a particular scheme. See United States v. Puerta, 38 F.3d 34, 40-41 (1st Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1797 (1995).

(5) The First Circuit has approved the following instruction in a duty to disclose case:

> A failure to disclose a material fact may also constitute a false or fraudulent misrepresentation if, one, the person was under a general professional or specific contractual duty to make such a disclosure; and, two, the person actually knew such disclosure ought to be made; and, three, the person failed to make such disclosure with the specific intent to defraud.
>
> . . . .
>
> The Government has to prove as to each count considered separately, that the alleged misrepresentation as charged in the indictment was made with the intent to defraud, that is, to advance the scheme or artifice to defraud. Such a scheme in each case has to be reasonably calculated to deceive a lender of ordinary prudence, ordinary care and comprehension.
>
> . . . .
>
> [I]t is not a crime simply to be careless or sloppy in discharging your duties a[s] an appraiser. That may be malpractice, but it's not a crime.

United States v. Cassiere, 4 F.3d 1006, 1022 (1st Cir. 1993) (alterations in original).

(6) Materiality is required if the charge is under section 1344(2) (scheme to obtain monies or property by false or fraudulent pretenses, representations, or promises). United States v. Smith, 46 F.3d 1223, 1235-36 (1st Cir.), cert. denied, 116 S. Ct. 176 (1995). Materiality is *not* required if the charge is under section 1344(1) (scheme to defraud). See United States v. Fontana, 948 F.2d 796, 802 (1st Cir. 1991), reiterated in Smith, 46 F.3d at 1236 n.7 (1st Cir. 1995). Materiality is a question for the jury. See United States v. Gaudin, ___ U.S. __, 115 S. Ct. 2310, 2320 (1995) (a false statement case under 18 U.S.C. § 1001). Gaudin necessarily overrules United States v. Arcadipane, 41 F.3d 1, 7 (1st Cir. 1994). The definition of "materiality" is one the Supreme Court described—apparently approvingly —as agreed upon by the parties in Gaudin. 115 S. Ct. at 2313. It seems consistent with United States v. Brien, 617 F.2d 299, 311 (1st Cir.), cert. denied, 446 U.S. 919 (1980) ("[I]t makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright. . . . The only issue is whether there is a plan, scheme or artifice intended to defraud.").

(7) Good faith is an absolute defense. See United States v. Dockray, 943 F.2d 152, 155 (1st Cir. 1991). A separate instruction is not required, see id., but seems advisable.

(8) The prosecution need not prove that the defendant knew the financial institution's status; it is sufficient for the prosecutor to prove the objective fact that the institution was insured. See Brandon, 17 F.3d at 425.

4.15 False Statements in Document Required by Immigration Law, 18 U.S.C. § 1546(a)

[Defendant] is charged with making a false statement under oath in a document required by federal immigration laws. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] knowingly made a material false statement under oath;

Second, that [defendant] made the statement voluntarily and intentionally; and

Third, that defendant made the statement in an immigration form [identify number and title of document]

A false statement is made "knowingly" if [defendant] knew that it was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth.

The statement is "material" if it has a natural tendency to influence or to be capable of influencing the decision of the decisionmaker to which it was addressed.

A statement is "false" if it is untrue when made.

4.16 Interference with Commerce by Robbery or Extortion (Hobbs Act), 18 U.S.C. § 1951

[Defendant] is accused of obstructing, delaying and affecting commerce by committing robbery [extortion]. It is against federal law to obstruct, delay or affect commerce by committing robbery [extortion]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that [defendant] knowingly and willfully obtained property from [person or corporation robbed/extorted];
>
> Second, that [defendant] did so by means of robbery [extortion];
>
> Third, that [defendant] knew that [person or corporation robbed/ extorted] or its employees parted with the property because of the robbery [extortion]; and
>
> Fourth, that the robbery [extortion] affected commerce.

It is not necessary for you to find that [defendant] knew or intended that his actions would affect commerce. It is only necessary that the natural consequences of the acts committed by [defendant] as charged in the indictment would affect commerce in any way or degree. The term "commerce" means commerce between any point in a state and any point outside the state.

"Robbery" means the unlawful taking or obtaining of personal property from the person or the presence of another, against his/her will, by means of actual or threatened force, or violence, or fear of injury to his/her person or property, or property in his/her custody or possession, or of anyone in his/her company at the time.

"Extortion" means the obtaining of property from another with his/her consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.

Comment

(1) In a color-of-official-right extortion case, the government must prove that the payee accepted the money knowing it was designed to influence his/her actions, but does not have to prove an affirmative act of inducement by the official. See Evans v. United States, 504 U.S. 255, 268 (1992) ("[F]ulfillment of the quid pro quo is not an element of the offense."). In the case of political or campaign contributions to elected public officials, however, the government must prove that "the payments are made in

return for an explicit promise or understanding by the official to perform or not to perform an official act." McCormick v. United States, 500 U.S. 257, 273 (1991).

(2) The "fear" element of extortion can include fear of economic loss. See United States v. Sturm, 870 F.2d 769, 771-72 (1st Cir. 1989) (addressing creditor's fear of non-repayment). For an instruction on that issue, see United States v. Capo, 817 F.2d 947, 951 (2d Cir. 1987). If the extortion is economic fear, the term "wrongful" must be defined to require that the government prove that the defendant did not have a claim of right to the property, see Sturm, 870 F.2d at 772-73, and that the defendant knew that he/she was not legally entitled to the property obtained. See id. at 774-75. See also United States v. Tormos-Vega, 959 F.2d 1103, 1109-10 (1st Cir.), cert. denied, 506 U.S. 866 (1992).

(3) Section 1951 has its own conspiracy provision and does not require an overt act. See Tormos-Vega, 959 F.2d at 1115.

(4) For elaboration on what it means to affect commerce, see Tormos-Vega, 959 F.2d at 1112-13. The definition of "commerce" should be modified according to the facts of the case within the range provided under 18 U.S.C. § 1951(b)(3). United States v. McKenna, 889 F.2d 1168, 1171 (1st Cir. 1989), states:

> The district court must determine if, as a matter of law, interstate commerce could be affected. If the court determines it could be, the question is turned over to the jury to determine if, as a matter of fact, interstate commerce was affected as the district court charged it could have been.

4.17 Money Laundering—Illegal Structuring, 18 U.S.C. § 1956

[Defendant] is charged with violating that portion of the federal money laundering statute that prohibits structuring transactions to avoid reporting requirements. For [defendant] to be convicted of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that [defendant] entered into a financial transaction or transactions, on or about the date alleged, with a financial institution engaged in interstate commerce, involving the use of proceeds of unlawful activities, specifically, proceeds of the [_____];
>
> Second, that [defendant] knew that these were the proceeds of unlawful activity;
>
> Third, that [defendant] knew that the transaction or transactions were structured or designed in whole or in part so as to avoid transaction reporting requirements under federal law.

A withdrawal [deposit, transfer, etc.] of funds from a bank is a financial transaction.

Federal law requires that withdrawal [deposit, transfer, etc.] of a sum of more than $10,000 cash from [into] a bank account in a single business day be reported by the bank to the Internal Revenue Service.

Knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

Comment

(1) "'[T]he defendant need not know exactly what crime generated the funds involved in a transaction, only that the funds are the proceeds of some kind of crime that is a felony under Federal or State law.'" United States v. Isabel, 945 F.2d 1193, 1201 n.13 (1st Cir. 1991) (quoting S. Rep. No. 433, 99th Cong., 2d Sess. 12 (1986)) (alteration in original).

(2) The requirements for withdrawal/deposit transaction reporting are set forth at 31 U.S.C. § 5313; 31 C.F.R. § 103.22 (1997).

4.18 Unarmed Bank Robbery, 18 U.S.C. § 2113(a)

The defendant is accused of robbing the [bank, savings and loan association or credit union]. It is against federal law to rob a federally insured [bank, savings and loan association or credit union]. For you to find the defendant guilty of this crime, you must be convinced that the Government has proven each of these things beyond a reasonable doubt:

> First, that the defendant intentionally took money belonging to the [bank, savings and loan association or credit union], from a [bank, savings and loan association or credit union] employee or from the [bank, savings and loan association or credit union] while a [bank, savings and loan association or credit union] employee was present;
>
> Second, that the defendant used intimidation or force and violence when he did so; and
>
> Third, that at that time, the deposits of the [bank, savings and loan association or credit union] were insured by the [_____]. [The parties have so stipulated].

"Intimidation" is actions or words used for the purpose of making someone else fear bodily harm if he or she resists. The actual courage or timidity of the victim is irrelevant. The actions or words must be such as to intimidate an ordinary, reasonable person.

Comment

(1) Subjective intent to steal (*i.e.*, knowledge by the defendant that he/she has no claim to the money) is not a required element under 18 U.S.C. § 2113(a). See United States v. DeLeo, 422 F.2d 487, 490-91 (1st Cir.), cert. denied, 397 U.S. 1037 (1970).

(2) See Comment to Instruction 4.19 (Armed or Aggravated Bank Robbery).

4.19 Armed or Aggravated Bank Robbery, 18 U.S.C. § 2113(a) & (d)

[Defendant] is accused of robbing the [bank, savings and loan association or credit union]. It is against federal law to rob a federally insured [bank, savings and loan association or credit union]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, that [defendant] intentionally took money belonging to the [bank, savings and loan association or credit union] from a [bank, savings and loan association or credit union] employee or from the [bank, savings and loan association or credit union] while a [bank, savings and loan association or credit union] employee was present;
>
> Second, that [defendant] used intimidation or force and violence when he/she did so;
>
> Third, that at that time, the deposits of the [bank, savings and loan association or credit union] were insured by the [_____]. [The parties have so stipulated]; and
>
> Fourth, that [defendant], by using a dangerous weapon or device, assaulted someone or put someone's life in jeopardy.

"Intimidation" is actions or words used for the purpose of making someone else fear bodily harm if he or she resists. The actual courage or timidity of the victim is irrelevant. The actions or words must be such as to intimidate an ordinary, reasonable person.

"Assault" means to threaten bodily harm with an apparent present ability to succeed, where the threat is intended to and does generate a reasonable apprehension of such harm in a victim. The threat does not have to be carried out.

Lesser Offense, 18 U.S.C. § 2113(a)

If you find [defendant] not guilty of this charge, you must proceed to consider whether the defendant is guilty of the lesser offense of robbing a [bank, savings and loan association or credit union] without either an assault or jeopardizing someone's life with a dangerous weapon. The lesser offense requires the government to prove beyond a reasonable doubt the first, second and third, but not the fourth, things I have described. In other words, the government must prove everything except using a dangerous weapon to assault someone or jeopardize someone's life.

Comment

(1) Subjective intent to steal (*i.e.*, knowledge by the defendant that he/she has no claim to the money) is not a required element under 18 U.S.C. § 2113(a) & (d). See United States v. DeLeo, 422 F.2d 487, 490-91 (1st Cir.), cert. denied, 397 U.S. 1037 (1970).

(2) In some cases it may be appropriate to charge that possession of recently stolen property may support an inference of participation in the theft of the property. See United States v. Rose, 104 F.3d 1408, 1413 (1st Cir. 1997), cert. denied, ___ U.S. ___, ___ S. Ct. ___, No. 96-8861, 1997 WL 251219 (U.S. June 2, 1997). The inference is permissible, not mandatory or permissible, but is not a presumption. See id.

(3) "[B]y using a dangerous weapon or device" modifies both the "assaulted" and "put someone's life in jeopardy" language of § 2113(d). Simpson v. United States, 435 U.S. 6, 13 n.6 (1978). This part of Simpson is not affected by the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 924(c)(1).

(4) An unloaded gun is a dangerous weapon. See McLaughlin v. United States, 476 U.S. 16, 17-18 (1986). Whether some other weapon or device is dangerous is generally a question of fact for the jury. See Federal Judicial Center Instruction 105, commentary at 146; Eighth Circuit Instruction 6.18.2113B, commentary at 375 n.4; United States v. Benson, 918 F.2d 1, 2-4 (1st Cir. 1990) (upholding bench trial decision that movement of hand inside a pocket, revealing a metallic object that a teller could reasonably believe to be a gun (actually a knife) and telling the teller that it was a gun, amounts to use of a dangerous weapon or device); United States v. Cannon, 903 F.2d 849, 854 (1st Cir.) (approving instruction that toy gun "may be dangerous if it instills fear in the average citizen, creating an immediate danger that a violent response will follow"), cert. denied, 498 U.S. 1014 (1990).

(5) The instruction on the lesser offense of unarmed bank robbery should be given if there is a factual dispute over use of a weapon and a jury finding of the lesser-included offense would not be irrational. See United States v. Ferreira, 625 F.2d 1030, 1031-33 (1st Cir. 1980). The defendant, however, can waive the right to a lesser-included offense charge. See United States v. Lopez Andino, 831 F.2d 1164, 1171 (1st Cir. 1987) (criminal civil rights charges), cert. denied, 486 U.S. 1034 (1988).

(6) If an aiding and abetting charge is given for armed bank robbery, the jury should be instructed that the shared knowledge requirement, see Instruction 4.02 (Aid and Abet), extends to both the robbery and the understanding that a weapon would be used. Knowledge includes notice of the "likelihood" of a weapon's use—apparently

something more than simple constructive knowledge, but less than actual knowledge. See United States v. Spinney, 65 F.3d 231, 236-37 (1st Cir. 1995). "[A]n enhanced showing of constructive knowledge will suffice." Id. at 237.

4.20 Interstate Transportation of Stolen Money or Property, 18 U.S.C. § 2314

[Defendant] is accused of taking stolen money [property], from [state] to [state], on or about [date]. It is against federal law to transport money [property] from one state to another knowing that the money [property] is stolen. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt;

First, that the money [property] was stolen;

Second, that [defendant] took the money [property] from [state] to [state], or arranged for it to be taken;

Third, that, when [defendant] took the money [property] from [state] to [state], or arranged for it to be taken, he/she knew that it was stolen;

Fourth, that the money [property] totaled [was worth] $5,000 or more.

It does not matter whether [defendant] stole the money [property] or someone else did. However, for you to find [defendant] guilty of this crime, it must be proven beyond a reasonable doubt that he/she took at least $5,000 [worth of property] or arranged for at least $5,000 [worth of property] to be taken from [state] to [state] knowing it was stolen.

Comment

(1) The government must prove that a defendant caused stolen money or property to be transported; it is not necessary to prove that he/she actually transmitted or transported the money or property himself/herself. See United States v. Doane, 975 F.2d 8, 11 (1st Cir. 1992).

(2) Unexplained possession of recently stolen money or property may be used to support an inference that the possessor knew it was stolen in the light of surrounding circumstances shown by evidence in the case so long as the jury is instructed that the inference is permissible, not mandatory. See United States v. Thuna, 786 F.2d 437, 444-45 (1st Cir.), cert. denied, 479 U.S. 825 (1986); see also United States v. Lavoie, 721 F.2d 407, 409-10 (1st Cir. 1983) (same in context of 18 U.S.C. § 2313), cert. denied, 465 U.S. 1069 (1984). Cf. Freije v. United States, 386 F.2d 408, 410-11 (1st Cir. 1967) (defendants who come forward with an explanation for possession of stolen vehicles are entitled to an instruction that the explanation, if believed, negates any inference knowledge arising from mere fact of possession), cert. denied, 396 U.S. 859

(1969). Such possession also may support an inference regarding interstate transportation. See Thuna, 786 F.2d at 444-45 (possession in one state of property recently stolen in another state, if not satisfactorily explained, is a circumstance from which a jury may infer that the person knew the property to be stolen and caused it to be transported in interstate commerce).

(3) This instruction can be modified for the transportation, transmission or transfer of stolen money or property in foreign commerce or for items converted or taken by fraud. 18 U.S.C. § 2314.

(4) This instruction also can be adapted for cases concerning the transportation of stolen vehicles. 18 U.S.C. § 2312.

4.21 Immigration Through Fraudulent Marriage, 8 U.S.C. § 1325(c)

[Defendant] is charged with knowingly entering into marriage for the purpose of evading the immigration laws. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, that [defendant] knowingly married a United States citizen; and
>
> Second, that he/she knowingly entered into the marriage for the purpose of evading a provision of the United States immigration laws.

The word "knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident.

To evade a provision of law means to escape complying with the law by means of trickery or deceit.

Comment

The validity of the marriage is immaterial. See Lutwak v. United States, 344 U.S. 604, 611 (1953).

4.22 Possession With Intent to Distribute a Controlled Substance, 21 U.S.C. § 841 (a) (1)

[Defendant] is accused of possessing [controlled substance] on or about [date] intending to distribute it to someone else. It is against federal law to have [controlled substance] in your possession with the intention of distributing it to someone else. For you to find [defendant] guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, that [defendant] on that date possessed [controlled substance], either actually or constructively;
>
> Second, that he/she did so with a specific intent to distribute the [controlled substance] over which he/she had actual or constructive possession; and
>
> Third, that he/she did so knowingly and intentionally.

It is not necessary for you to be convinced that [defendant] actually delivered the [controlled substance] to someone else, or that he/she made any money out of the transaction. It is enough for the government to prove, beyond a reasonable doubt, that he/she had in his/her possession what he/she knew was [controlled substance] and that he/she intended to transfer it or some of it to someone else.

[A person's intent may be inferred from the surrounding circumstances. Intent to distribute may, for example, be inferred from a quantity of drugs larger than that needed for personal use. In other words, if you find that the defendant possessed a quantity of [controlled substance]—more than that which would be needed for personal use—then you may infer that the defendant intended to distribute [controlled substance]. The law does not require you to draw such an inference, but you may draw it.]

The term "possess" means to exercise authority, dominion or control over something. The law recognizes different kinds of possession.

["Possession" includes both actual and constructive possession. A person who has direct physical control of something on or around his/her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term "possession" in these instructions, I mean actual as well as constructive possession.]

["Possession" [also] includes both sole possession and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more

persons share actual or constructive possession, possession is joint. Whenever I have used the word "possession" in these instructions, I mean joint as well as sole possession.]

Comment

(1) The enumeration of the elements of this crime is based upon United States v. Latham, 874 F.2d 852, 863 (1st Cir. 1989); see also United States v. Akinola, 985 F.2d 1105, 1109 (1st Cir. 1993).

(2) Quantity, see United States v. Ocampo-Guarin, 968 F.2d 1406, 1410 (1st Cir. 1992), or quantity and purity can support an inference of intent to distribute. See United States v. Bergodere, 40 F.3d 512, 518 (1st Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1439 (1995). One ounce of cocaine, however, is not sufficient to support the inference. See Latham, 874 F.2d at 862-63. Other indicia of intent to distribute are scales, firearms and large amounts of cash. See United States v. Ford, 22 F.3d 374, 382-83 (1st Cir.), cert. denied, 513 U.S. 900 (1994).

(3) The defendant's intent to distribute must relate specifically to the controlled substance in his/her possession, not to "some unspecified amount of [controlled substance], that he[/she] did not currently possess, at some unspecified time in the future." Latham, 874 F.2d at 861. However, the government need not prove that the defendant knew which particular controlled substance was involved. See United States v. Kairouz, 751 F.2d 467, 468-69 (1st Cir. 1985) (affirming the instruction: "if defendant . . . 'intend[ed] to distribute a controlled substance, it does not matter that . . . [he has] made a mistake about what controlled substance it happen[ed] to be'") (alteration in original). See also United States v. Garcia-Rosa, 876 F.2d 209, 216 (1st Cir. 1989), cert. denied, 493 U.S. 1030 (1990); United States v. Cheung, 836 F.2d 729, 731 (1st Cir. 1988).

(4) For a discussion on the issue of "possession," see Akinola, 985 F.2d at 1109, Ocampo-Guarin, 968 F.2d at 1409-10, and United States v. Almonte, 952 F.2d 20, 23-24 (1st Cir. 1991), cert. denied, 503 U.S. 1010 (1992).

4.23 Distribution of a Controlled Substance, 21 U.S.C. § 841(a)(1)

[Defendant] is accused of distributing [controlled substance] on or about [date]. It is against federal law to distribute, that is, to transfer [controlled substance] to another person. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that [defendant] on the date alleged transferred [controlled substance] to another person;
>
> Second, that he/she knew that the substance was [controlled substance]; and
>
> Third, that [defendant] acted intentionally, that is, that it was his/her conscious object to transfer the controlled substance to another person.

It is not necessary that [defendant] have benefitted in any way from the transfer.

Comment

(1) The statute defines "distribute" as meaning "to deliver," 21 U.S.C. § 802(11), which in turn is defined as meaning "the actual constructive or attempted *transfer* of a controlled substance, whether or not there exists an agency relationship." § 802(8) (emphasis added). However, the court may refuse to instruct on the meaning of the term "distribute" "because it is within the common understanding of jurors." United States v. Acevedo, 842 F.2d 502, 506-07 (1st Cir. 1988).

(2) "[D]eliver[y] or transfer [of] possession of a controlled substance to another person" constitutes distribution regardless of whether the transferor has "any financial interest in the transaction." United States v. Morales-Cartagena, 987 F.2d 849, 852 (1st Cir. 1993). Thus, courts are in broad agreement that the mere sharing of narcotics can support a distribution charge. See, e.g., United States v. Corral-Corral, 899 F.2d 927, 936 n.7 (10th Cir. 1990); United States v. Ramirez, 608 F.2d 1261, 1264 (9th Cir. 1979). Distribution, however, does not include "'the passing of a drug between joint possessors who simultaneously acquired possession at the outset for their own use.'" United States v. Rush, 738 F.2d 497, 514 (1st Cir. 1984) (quoting United States v. Swiderski, 548 F.2d 445, 450-51 (2d Cir. 1977)) (overturning distribution conviction of husband and wife who jointly purchased and shared 4 grams of cocaine), cert. denied, 470 U.S. 1004 (1985).

4.24 Manufacture of a Controlled Substance, 21 U.S.C. §§ 841(a)(1), 802(15)

[Defendant] is accused of manufacturing [controlled substance] on or about [date]. It is against federal law to manufacture, that is to produce or prepare, [controlled substance]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] manufactured [controlled substance];

Second, that he/she knew that the substance he/she was manufacturing was [controlled substance]; and

Third, that [defendant] acted intentionally, that is, that it was his/her conscious object to manufacture the controlled substance.

The term "manufacture" as it relates to this case means the production, preparation, propagation, compounding or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin. The term "manufacture" includes the act of growing.

Comment

(1) The definition of manufacture includes other processes in addition to those listed above, *e.g.*, "independently by means of chemical synthesis or by a combination of extraction and chemical synthesis." 21 U.S.C. § 802(15).

(2) Marijuana grown for personal use falls within the definition of "manufacture." See United States v. One Parcel of Real Property (Great Harbor Neck), 960 F.2d 200, 205 (1st Cir. 1992). See also 21 U.S.C. § 802(22) ("'[P]roduction' includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.").

4.25 Income Tax Evasion, 26 U.S.C. § 7201

[Defendant] is charged with income tax evasion. For you to find [defendant] guilty of this crime, the government must prove the following things beyond a reasonable doubt.

> First, that [defendant] owed substantially more federal income tax for the year[s] [_____] than was indicated as due on his/her income tax return;
>
> Second, that [defendant] intended to evade or defeat the assessment or payment of this tax; and
>
> Third, that [defendant] willfully committed an affirmative act in furtherance of this intent.
>
> [Fourth, that [defendant] did not have a good-faith belief that he/she was complying with the provisions of [specific provision]. A belief may be in good faith even if it is unreasonable.]

A person may not be convicted of federal tax evasion on the basis of a willful *omission* alone; he/she also must have undertaken an affirmative act of evasion. The affirmative act requirement can be met by [the filing of a false or fraudulent tax return that substantially understates taxable income or by other affirmative acts of concealment of taxable income such as keeping a double set of books, making false entries or invoices or documents, concealing assets, handling affairs so as to avoid keeping records, and so forth].

[Defendant] acted "willfully" if the law imposed a duty on him/her, he/she knew of the duty, and he/she voluntarily and intentionally violated that duty. Thus, if [defendant] acted in good faith, he/she cannot be guilty of this crime. The burden to prove intent, as with all other elements of the crime, rests with the government. This is a subjective standard: what did [defendant] honestly believe, not what a reasonable person should have believed. Negligence, even gross negligence, is not enough to meet the "willful" requirement.

Comment

(1) This instruction covers two distinct felony crimes under § 7201. A defendant may be charged with a "willful attempt to evade or defeat" either "the 'assessment' of a tax" or "the 'payment' of a tax." United States v. Hogan, 861 F.2d 312, 315 (1st Cir. 1988) (citing Sansone v. United States, 380 U.S. 343, 354 (1965)). "The elements of both crimes are the same." Id.

(2) The felony of tax evasion under § 7201 is distinguishable from the misdemeanor of failing to file a tax return under § 7203 in that it requires an affirmative "attempt to evade or defeat taxes." Sansone, 380 U.S. at 351; see also United States v Waldeck, 909 F.2d 555, 557, 559 (1st Cir. 1990). "A mere willful failure to pay a tax" is not sufficient. Sansone, 380 U.S. at 351.

(3) Although § 7201 does not contain an explicit "substantiality" requirement, most circuits require the government to prove that the amount of tax evaded was substantial. See, e.g., United States v Gonzales, 58 F.3d 506, 509 (10th Cir. 1995); United States v. Romano, 938 F.2d 1569, 1571 (2d Cir. 1991); United States v. Goodyear, 649 F.2d 226, 227 (4th Cir. 1981); United States v. Burkhart, 501 F.2d 993, 995 (6th Cir. 1974), cert. denied, 420 U.S. 946 (1975); McKenna v. United States, 232 F.2d 431, 436 (8th Cir. 1956). But see United States v. Marashi, 913 F.2d 724, 735 (9th Cir. 1990). The First Circuit appears to follow this majority approach. See United States v. Sorrentino, 726 F.2d 876, 879, 880 n.1 (1st Cir. 1984) (showing of substantiality required under net-worth method of proof) (citing United States v. Nunan, 236 F.2d 576 (2d Cir. 1956) (showing that a substantial tax was evaded required generally in § 7201 cases), cert. denied, 353 U.S. 912 (1957)); United States v. Morse, 491 F.2d 149, 153 n.3 (1st Cir. 1974) (showing of a substantial discrepancy required under bank-deposits method of proof);

(4) "Willfulness" is an element of any crime under 26 U.S.C. §§ 7201-7207. That term has been defined in the context of criminal tax cases as "requir[ing] the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." Cheek v United States, 498 U.S. 192, 201 (1991). Mistake, negligence and gross negligence are not sufficient to meet the willfulness requirement of these tax crimes. See Hogan, 861 F.2d at 316; United States v. Aitken, 755 F.2d 188, 191-93 (1st Cir. 1985).

(5) Cheek also held that the government has the burden of "negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws." 498 U.S. at 202. A defendant has a valid good-faith defense "whether or not the claimed belief or misunderstanding is objectively reasonable." Id.; see also Aitken, 755 F.2d at 190-92. However, a belief that the tax statutes are unconstitutional is "irrelevant to the issue of willfulness." Cheek, 498 U.S. at 206.

(6) The court may add an instruction on conscious avoidance "if a defendant claims a lack of knowledge, the facts suggest a conscious course of deliberate ignorance, and the instruction, taken as a whole, cannot be misunderstood as mandating an inference of knowledge." United States v. Littlefield, 840 F.2d 143, 147 (1st Cir.), cert. denied, 488 U.S. 860 (1988). Such an instruction does not impermissibly lessen the government's burden of proof because "it goes to *knowledge* and not to willfulness." Hogan, 861 F.2d at 316 (emphasis added).

4.26 Failure to File a Tax Return, 26 U.S.C. § 7203

The indictment charges [defendant] with willful failure to file a tax return for the year[s] [_____]. For you to find [defendant] guilty of this charge, the government must prove each of the following three things beyond a reasonable doubt:

> First, that [defendant] was required to file an income tax return for the year[s] [_____];
>
> Second, that [defendant] failed to file an income tax return for the year[s] in question; and
>
> Third, that [defendant] acted willfully.

To act "willfully" means to violate voluntarily and intentionally a known legal duty to file, not to act as a result of accident or negligence.

Comment

(1) Failure to file a tax return under § 7203 is a misdemeanor. In the appropriate circumstances, the charge can be used as a lesser included offense for the crime of willful tax evasion under § 7201. See Spies v. United States, 317 U.S. 492, 497-99 (1943). "Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony." Id. at 499.

(2) See Comment to Instruction 4.25 (Income Tax Evasion) for a discussion of willfulness, good faith and deliberate ignorance in the context of tax crimes. See also United States v. Turano, 802 F.2d 10, 11 (1st Cir. 1986) (stating that trial court's instruction on good-faith defense did not "improperly inject[ ] an objective element into the subjective willfulness inquiry."); United States v. Sempos, 772 F.2d 1, 2 (1st Cir. 1985) ("Financial or domestic problems . . . do not rule out willfulness. . . .").

4.27 False Statements on Income Tax Return, 26 U.S.C. § 7206(1)

[Defendant] is charged with willfully filing a false federal income tax return. For you to find [defendant] guilty of this charge, the government must prove each of the following things beyond a reasonable doubt:

> First, that [defendant] signed a federal income tax return containing a written declaration that it was being signed under the penalties of perjury;
>
> Second, that [defendant] did not believe that every material matter in the return was true and correct; and
>
> Third, that [defendant] willfully made the false statement with the intent of violating his/her duty under the tax laws and not as a result of accident, negligence or inadvertence.

A "material" matter is one that is likely to affect the calculation of tax due and payable, or to affect or influence the IRS in carrying out the functions committed to it by law, such as monitoring and verifying tax liability. A return that omits material items necessary to the computation of taxable income is not true and correct.

Comment

(1) Materiality is a question for the jury, and the definition of materiality here comes largely from United States v. DiRico, 78 F.3d 732, 735-36 (1st Cir. 1996). The standard is objective. See United States v. Romanow, 509 F.2d 26, 28 (1st Cir. 1975).

(2) See Comment to Instruction 4.25 (Income Tax Evasion) for a discussion of willfulness, good faith and deliberate ignorance in the context of tax crimes. See also United States v. Pomponio, 429 U.S. 10, 11-13 (1976); United States v. Bishop, 412 U.S. 346, 360 (1973); United States v. Drape, 668 F.2d 22, 26 (1st Cir. 1982) ("Intent may be established where a taxpayer 'chooses to keep himself uninformed as to the full extent that [the return] is insufficient.'") (quoting Katz v. United States, 321 F.2d 7, 10 (1st Cir. 1963)) (alteration in original).

(3) The defendant's signature on the tax return is sufficient to support a finding by the jury that he/she read the return and knew its contents. See United States v. Olbres, 61 F.3d 967, 971 (1st Cir.), cert. denied, ___ U.S. ___, 116 S. Ct. 522 (1995); Drape, 668 F.2d at 26; Romanow, 509 F.2d at 27.

(4) The instruction can be modified to apply to a willful omission of material facts on a tax return. See Siravo v. United States, 377 F.2d 469, 472 (1st Cir. 1967) ("[A] return that omits material items necessary to the computation of income is not 'true and correct' within the meaning of section 7206.").

4.28 Money Laundering—Illegal Structuring, 31 U.S.C. §§ 5322, 5324

[Defendant] is charged with violating that portion of the federal money laundering statute that prohibits structuring a transaction to avoid reporting requirements. It is against federal law to structure transactions for the purpose of evading the reporting requirements. For [defendant] to be convicted of this crime, the government must prove the following things beyond a reasonable doubt:

> First, [defendant] structured or assisted in structuring [attempted to structure or assist in structuring] a transaction with one or more domestic financial institutions; and
>
> Second, [defendant] did so with the purpose of evading the reporting requirements of federal law affecting the transactions.

Federal law requires that transactions in currency of more than $10,000 be reported by a financial institution to the Internal Revenue Service.

A [withdrawal, deposit, etc.] from a [_____] is a financial transaction.

Comment

(1) Congress recently deleted the statutory willfulness requirement for structuring offenses in response to the Supreme Court's decision in Ratzlaf v. United States, 510 U.S. 135, 136-37, 114 S. Ct. 655 (1994) (holding that the government must prove not only the defendant's purpose to evade a financial institution's reporting requirements, but also the defendant's knowledge that structuring itself was unlawful). See Act of Sept. 23, 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2160, 2253, codified at 31 U.S.C. §§ 5322(a) & (b), 5324(c); see also United States v. Hurley, 63 F.3d 1, 14 n.2 (1st Cir. 1995), cert. denied, 116 S. Ct. 1322 (1996). The amendments restore

> the clear Congressional intent that a defendant need only have the intent to evade the reporting requirement as the sufficient mens rea for the offense. The prosecution would need to prove that there was an intent to evade the reporting requirement, but would not need to prove that the defendant knew that structuring was illegal. However, a person who innocently or inadvertently structures or otherwise violates section 5324 would not be criminally liable.

H.R. Conf. Rep. No. 652, 103d Cong., 1st Sess. 147, 194 (1994), reprinted in 1994 U.S.S.C.A.N. 1977, 2024. (For criminal acts after September 23, 1994, the amendments also moot the debate over whether United States v. Aversa, 984 F.2d 493 (1st Cir. 1993), vacated and remanded, 510 U.S. 1069 (1996), which had held that "reckless disregard" was sufficient to satisfy the now defunct willfulness requirement, survived Ratzlaf. See United States v. London, 66 F.3d 1227, 1245 (1st Cir. 1995) (Torruella, J., dissenting), cert. denied, 116 S. Ct. 1542 (1996).)

(2) The requirements for currency transaction reports are set forth at 31 U.S.C. § 5313; 31 C.F.R. § 103.22 (1997).

PART 5 FINAL INSTRUCTIONS: DEFENSES AND THEORIES OF DEFENSE

Introductory Comment

5.01 Alibi

5.02 Mental State That Is Inconsistent with the Requisite Culpable State of Mind

5.03 Intoxication

5.04 Self-Defense

5.05 Duress

5.06 Entrapment

5.07 Insanity

Introductory Comment

The defensive possibilities for a criminal defendant may be divided into two categories. In the first, the theory of defense is to try to raise a reasonable doubt about an element of the crime. The element may be that of "conduct," for which the corresponding defense is, "I didn't do it" (*e.g.*, the alibi defense). Another element is the culpable state of mind. There are myriad formulations of this "requisite but elusive mental element," Morissette v. United States, 342 U.S. 246, 252 (1952), and a corresponding number of variations on the theme, "I didn't mean to do it." Examples include the defenses of ignorance, mistake, intoxication or abnormal mental condition.

The second category includes those defenses that do not negate an original element of the crime. These "free-standing" defensive possibilities may be labeled "defenses" or "affirmative defenses." Except for the insanity defense, the defendant need only meet a burden of production, in which event the burden of persuasion is on the prosecution to negate the defense beyond a reasonable doubt. In other words, once the judge is satisfied that the defendant has met the burden of production, the defense becomes the functional equivalent of an additional element of the crime and the jury is instructed in those terms. Examples include self-defense, entrapment and duress. The insanity defense presents a special case where both the burdens of production and persuasion are on the defendant.

5.01 Alibi

One of the issues in this case is whether [defendant] was present at the time and place of the alleged crime. If, after considering all the evidence, you have a reasonable doubt that [defendant] was present, then you must find [defendant] not guilty.

Comment

A defendant is entitled to a special instruction that on the issue of alibi a reasonable doubt is sufficient to acquit. See, e.g., Duckett v. Godinez, 67 F.3d 734, 745 (9th Cir. 1995), cert. denied, 116 S. Ct. 1549 (1996); United States v. Simon, 995 F.2d 1236, 1243 (3d Cir. 1993); United States v. Hicks, 748 F.2d 854, 858 (4th Cir. 1984); United States v. Burse, 531 F.2d 1151, 1153 (2d Cir. 1976); United States v. Megna, 450 F.2d 511, 513 (5th Cir. 1971).

5.02 Mental State That Is Inconsistent with the Requisite Culpable State of Mind

Evidence has been presented of [defendant's] [carelessness, negligence, ignorance, mistake, good faith, abnormal mental condition, etc.]. Such [_____] may be inconsistent with [the requisite culpable state of mind]. If after considering the evidence of [_____], together with all the other evidence, you have a reasonable doubt that [defendant] acted [requisite culpable state of mind], then you must find [defendant] not guilty.

Comment

(1) This instruction may be given whenever the evidence of defendant's mental state, if believed, would tend to raise a reasonable doubt about the requisite culpable state of mind. See United States v. Batista, 834 F.2d 1, 6 (1st Cir. 1987) (approving an instruction that "the jury . . . consider the statements and acts of appellant or any other circumstance in determining his state of mind, and to make sure that they were convinced beyond a reasonable doubt that appellant acted willfully and knowingly"); cf. United States v. Sturm, 870 F.2d 769, 777 (1st Cir. 1989) ("Jury instructions that allow a conviction even though the jury may not have found that the defendant possessed the mental state required for the crime constitute plain error."). However, this instruction is a reinforcement of—not a substitute for—language instructing the jury on the exact mental state required for conviction under the relevant statute.

(2) A defendant's abnormal mental condition, just as ignorance, mistake or intoxication, may raise a reasonable doubt that the defendant acted with the requisite culpable state of mind. As the Court of Appeals for the First Circuit held in United States v. Schneider, 111 F.3d 197, 201 (1st Cir. 1997), "in principle there should be no bar to medical evidence that a defendant, although not insane, lacked the requisite state of mind." In practice, the trial judge must screen such evidence for relevance, potential for confusion, reliability and helpfulness. Id.

In particular, there must be a fit between proferred expert testimony and the requisite culpable state of mind. See United States v. Meader, 914 F. Supp. 656 (D. Me. 1996), for an example of an analysis of the "fit."

(3) For a discussion of the "tax-crime exception" to the general proposition that ignorance of the law is no defense, see United States v. Aversa, 984 F.2d 493, 500-01 (1st Cir. 1993) (citing Cheek v. United States, 498 U.S. 192, 199-201 (1991), vacated and remanded on other grounds, 510 U.S. 1069 (1994).

5.03 Intoxication

You have heard evidence that [defendant] was intoxicated. "Intoxicated" means being under the influence of alcohol or drugs or both. Some degrees of intoxication may prevent a person from having [the requisite culpable state of mind]. If after considering the evidence of intoxication, together with all the other evidence, you have a reasonable doubt that [defendant] had [the requisite culpable state of mind], then you must find [defendant] not guilty.

Comment

"Voluntary" intoxication may rebut proof of intent in a "specific intent" but not a "general intent" crime. United States v. Oakie, 12 F.3d 1436, 1442 (8th Cir. 1993). The burden of proof to support the necessary intent, however, remains with the Government. See United States v. Burns, 15 F.3d 211, 218 (1st Cir. 1994). In Burns, the court declined to rule on whether intoxication is a diminished capacity defense barred by 18 U.S.C. § 17. See id. at 218 n.4.

5.04 Self-Defense

Evidence has been presented that [defendant] acted in self-defense. Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary in the circumstances.

The government has the burden of proving that [defendant] did not act in self-defense.

Comment

The instruction is modeled on Sixth Circuit Instruction 6.06. A defendant is entitled to a self-defense instruction if he/she produces sufficient evidence "to require the consideration of a reasonable doubt as to the justification for the homicide." DeGroot v. United States, 78 F.2d 244, 251 (9th Cir. 1935); see also United States v. Morton, 999 F.2d 435, 437 (9th Cir. 1993).

5.05 Duress

Evidence has been presented that [defendant] was threatened by [_____] with serious bodily injury or death.

[Defendant] cannot be found guilty if [defendant] participated in the [describe offense] only because [defendant] (1) acted under an immediate threat of serious bodily injury or death; (2) had a well-grounded belief that the threat would be carried out; and (3) had no reasonable opportunity to escape or otherwise frustrate the threat. On this issue, just as on all others, the burden is on the government to prove the defendant's guilt beyond a reasonable doubt. To find [defendant] guilty, therefore, you must conclude beyond a reasonable doubt that when [defendant] participated in the [describe offense] (1) no such threat occurred or it was not immediate; or (2) [defendant] had a reasonable opportunity to escape or otherwise frustrate the threat but did not exercise it; or (3) [defendant] did not have a well-grounded belief that the threat would be carried out.

Comment

Before this defense can go to the jury, the court must determine that the defendant has met the entry-level burden of producing enough evidence to support the three elements for a finding of duress. See United States v. Arthurs, 73 F.3d 444, 448 (1st Cir. 1996); United States v. Amparo, 961 F.2d 288, 291 (1st Cir.), cert. denied, 506 U.S. 878 (1992). This is only a burden of production, not persuasion. The burden of persuasion remains with the government, at least if the charged crime requires *mens rea*. See Amparo, 961 F.2d at 291; see also United States v. Bailey, 444 U.S. 394, 415-16 (1980); United States v. Ciambrone, 601 F.2d 616, 626-27 (2nd Cir. 1979); Model Penal Code § 2.09.

5.06 Entrapment

[Defendant] maintains that he/she was entrapped. A person is "entrapped" when he/she is induced or persuaded by law enforcement officers or their agents to commit a crime that he/she was not otherwise ready and willing to commit. The law forbids his/her conviction in such a case. However, law enforcement agents are permitted to use a variety of methods to afford an opportunity to a defendant to commit an offense, including the use of undercover agents, furnishing of funds for the purchase of controlled substances, the use of informers and the adoption of false identities.

For you to find [defendant] guilty of the crime with which he/she is charged, you must be convinced that the government has proven beyond a reasonable doubt that [defendant] was not entrapped. To show that [defendant] was not entrapped, the government must establish beyond a reasonable doubt one of the following two things:

> One, that [the officer] did not persuade or talk [defendant] into committing the crime. Simply giving someone an opportunity to commit a crime is not the same as persuading him/her, but excessive pressure by [the officer] or an undue appeal to sympathy can be improper; OR
>
> Two, that [defendant] was ready and willing to commit the crime without any persuasion from [the officer] or any other government agent. In that connection, you have heard testimony about actions by [defendant] for which he is not on trial. You are the sole judges of whether to believe such testimony. If you decide to believe such evidence, I caution you that you may consider it only for the limited purpose of determining whether it tends to show [defendant]'s willingness to commit the charged crime or crimes without the persuasion of a government agent. You must not consider it for any other purpose. You must not, for instance, convict a defendant because you believe that he/she is guilty of other improper conduct for which he/she has not been charged in this case.

Comment

(1) To require an entrapment instruction, "[t]he record must show 'hard evidence,' which if believed by a rational juror, 'would suffice to create a reasonable doubt as to whether government actors induced the defendant to perform a criminal act that he was not predisposed to commit.'" United States v. Young, 78 F.3d 758, 760 (1st Cir. 1996) (quoting United States v. Rodriguez, 858 F.2d 809, 814 (1st Cir. 1988)).

(2) The instruction is consistent with recent First Circuit caselaw. See, e.g., United States v. Montañez, 105 F.3d 36, 38 (1st Cir. 1997); United States v. Acosta,

67 F.3d 334, 337-340 (1st Cir. 1995), cert. denied, 116 S. Ct. 965 (1996); United States v. Gendron, 18 F.3d 955, 960-64 (1st Cir.), cert. denied, 513 U.S. 1051 (1994); United States v. Gifford, 17 F.3d 462, 467-70 (1st Cir. 1994); United States v. Hernandez, 995 F.2d 307, 313 (1st Cir.), cert. denied, 510 U.S. 954 (1993); United States v. Reed, 977 F.2d 14, 18 (1st Cir. 1992). See also United States v. Pion, 25 F.3d 18, 20 (1st Cir.), cert. denied, 513 U.S. 932 (1994). We have intentionally avoided using the word "predisposition," a term that has proven troublesome to some jurors. See, e.g., United States v. Rogers, Nos. 95-1889, 96-2032, 1997 WL 476363 (1st Cir. Aug. 26, 1997).

(3) It may be necessary to conform the charge to the defendant's theory of defense:

> Of course, the district court has a great deal of latitude in formulating a charge. But taken as a whole, the examples given were *all* either coercion examples or involved abstractions ("dogged insistence") rather far from the examples of inducement by an undue appeal to sympathy, which the defendant expressly requested and which were more pertinent to his defense. By omitting any "sympathy" examples, the trial court may well have left the jury with the mistaken impression that coercion is a necessary element of entrapment and, in this case, such a misunderstanding could well have affected the outcome.

Montañez, 105 F.2d at 39.

(4) "[T]he government cannot prove predisposition if the defendant's willingness to commit the crime was itself manufactured by the government in the course of dealing with the defendant before he committed the crime charged." United States v. Alzate, 70 F.3d 199, 201 (1st Cir. 1995) (citing Jacobson v. United States, 503 U.S. 540, 549 & n.2 (1992)). If that is the issue, a more precise instruction is advisable. See id. But although the predisposition must exist before the contact with government agents, behavior after the contact can be used as evidence of the pre-existing predisposition. Rogers, 1997 WL 476363, at *11.

5.07 Insanity, 18 U.S.C. § 17

If you find that the government has proven beyond a reasonable doubt all the elements of the crime, you must then determine whether [defendant] has proven by clear and convincing evidence that he/she was legally insane at the time. For you to find [defendant] not guilty only by reason of insanity, you must be convinced that [defendant] has proven each of these things by clear and convincing evidence:

> First, that at the time of the crime [defendant] suffered from severe mental disease or defect;
>
> Second, that the mental disease or defect prevented him/her from understanding the nature and quality or wrongfulness of his/her conduct.

Clear and convincing evidence is evidence that makes it highly probable that [defendant] had a severe mental disease or defect that prevented him/her from understanding the nature and quality of wrongfulness of his/her conduct.

You may consider evidence of defendant's mental condition before or after the crime to decide whether defendant was insane at the time of the crime. Insanity may be temporary or extended.

In making your decision, you may consider not only the statements and opinions of the psychiatric experts who have testified but also all of the other evidence. You are not bound by the statements or opinions of any witness but may accept or reject any testimony as you see fit.

You will have a jury verdict form in the jury room on which to record your verdict. You have three choices. You may find [defendant] not guilty, guilty, or not guilty only by reason of insanity. If you find that the government has not proven all the elements of the crime beyond a reasonable doubt, you will find [defendant] *not guilty*. If you find that the government has proven all the elements of the crime beyond a reasonable doubt and that [defendant] has proven by clear and convincing evidence that he/she was legally insane at the time of the crime, you will find him/her *not guilty only by reason of insanity*. If you find that the government has proven all the elements of the crime beyond a reasonable doubt and that [defendant] has not proven by clear and convincing evidence that he/she was legally insane at the time of the crime, you will find him/her *guilty*.

Comment

(1) The constitutionality of placing the burden on the defendant to prove insanity is settled. See United States v. Pryor, 960 F.2d 1, 3 (1st Cir. 1992) (citing Leland v. Oregon, 343 U.S. 790 (1952) and Rivera v. Delaware, 429 U.S. 877 (1976)).

(2) A trial judge is not required to instruct a jury on the consequences of a verdict of not guilty by reason of insanity, see United States v. Tracy, 36 F.3d 187, 196 (1st Cir. 1994), cert. denied, 115 S. Ct. 1717 (1995), except "under certain limited circumstances," Shannon v. United States, 512 U.S. 573, 587 (1994)—such as when a prosecutor or witness has said before the jury that the defendant will "go free." Id.; Tracy, 36 F.3d at 196 n.8.

(3) The phrase "nature and quality [of defendant's conduct]" can be troublesome. It is not apparent what difference, if any, there is between the words "nature" and "quality." But given the lineage of the phrase to at least M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843), and its presence in the governing statute, 18 U.S.C. § 17, the safer course would be not to truncate the phrase.

A more troublesome issues arises when the defendant raises both the insanity defense and a mens rea defense based on abnormal mental condition. If evidence tends to show that a defendant failed to understand the "nature and quality" of his/her conduct, that evidence will not only tend to help prove an insanity defense but it will also typically tend to raise reasonable doubt about the requisite culpable state of mind. See Pattern Instruction 5.02. In Martin v. Ohio, 480 U.S. 228, 234 (1987), the Supreme Court held that the trial judge must adequately convey to the jury that evidence supporting an affirmative defense may also be considered, where relevant, to raise reasonable doubt as to the requisite state of mind. This "overlap" problem may be solved by adequate instructions. Id. But the "overlap" problem may be *avoided* by omitting the "nature and quality" phrase from the insanity instruction unless the defendant wants it.

PART 6 FINAL INSTRUCTIONS: DELIBERATIONS AND VERDICT

6.01 Foreperson's Role; Unanimity

6.02 Consideration of Evidence

6.03 Reaching Agreement

6.04 Return of Verdict Form

6.05 Communication with the Court

6.06 Charge to a Hung Jury

6.01 Foreperson's Role; Unanimity

I come now to the last part of the instructions, the rules for your deliberations.

When you retire you will discuss the case with the other jurors to reach agreement if you can do so. You shall permit your foreperson to preside over your deliberations, and your foreperson will speak for you here in court. Your verdict must be unanimous.

6.02 Consideration of Evidence

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However, nothing that I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

6.03 Reaching Agreement

Each of you must decide the case for yourself, but you should do so only after considering all the evidence, discussing it fully with the other jurors, and listening to the views of the other jurors.

Do not be afraid to change your opinion if you think you are wrong. But do not come to a decision simply because other jurors think it is right.

This case has taken time and effort to prepare and try. There is no reason to think it could be better tried or that another jury is better qualified to decide it. It is important therefore that you reach a verdict if you can do so conscientiously. If it looks at some point as if you may have difficulty in reaching a unanimous verdict, and if the greater number of you are agreed on a verdict, the jurors in both the majority and the minority should reexamine their positions to see whether they have given careful consideration and sufficient weight to the evidence that has favorably impressed the jurors who disagree with them. You should not hesitate to reconsider your views from time to time and to change them if you are persuaded that this is appropriate.

It is important that you attempt to return a verdict, but of course, only if each of you can do so after having made your own conscientious determination. Do not surrender an honest conviction as to the weight and effect of the evidence simply to reach a verdict.

Comment

This is not an Allen charge for a deadlocked jury. See Instruction 6.06. Some authority outside the First Circuit, however, holds that an instruction like this in the general charge makes a later supplemental charge to a deadlocked jury more sustainable. See United States v. Brown, 634 F.2d 1069, 1070 (7th Cir. 1980) (requiring this type of charge as a precondition for a later supplemental charge); Comment to Eighth Circuit Instruction 10.02 ("preferable"); accord United States v. Rodriguez-Mejia, 20 F.3d 1090, 1091-92 (10th Cir.), cert. denied, 513 U.S. 1045 (1994); United States v. Williams, 624 F.2d 75, 76-77 (9th Cir. 1980); see also Comment to Sixth Circuit Instruction 8.04.

6.04 Return of Verdict Form

I want to read to you now what is called the verdict form. This is simply the written notice of the decision you will reach in this case.

[Read form.]

After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the jury officer outside your door that you are ready to return to the courtroom.

After you return to the courtroom, your foreperson will deliver the completed verdict form as directed in open court.

6.05 Communication with the Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the jury officer signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me on anything concerning the case except by a signed writing, and I will communicate with any member of the jury on anything concerning the case only in writing, or orally here in open court. If you send out a question, I will consult with the parties as promptly as possible before answering it, which may take some time. You may continue with your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged.

Comment

(1) Although Rogers v. United States, 422 U.S. 35, 39 (1975), could be read as requiring any response to a deliberating jury's questions to occur orally in open court in the defendant's presence, the First Circuit seems to permit a written response, so long as the lawyers are shown the jury's note and have the opportunity to comment on the judge's proposed response. See, e.g., United States v. Maraj, 947 F.2d 520, 525-26 (1st Cir. 1991).

(2) "[I]t is always best for the trial judge not to know the extent and nature of a division among the jurors and to instruct the jury not to reveal that information. . . ., 'if the jury does volunteer its division, the court may rely and act upon it.'" United States v. Rengifo, 789 F.2d 975, 985 (1st Cir. 1986) (quoting United States v. Hotz, 620 F.2d 5, 7 (1st Cir. 1980)).

6.06 Charge to a Hung Jury

I am going to instruct you to go back and resume your deliberations. I will explain why and give you further instructions.

In trials absolute certainty can be neither expected nor attained. You should consider that you are selected in the same manner and from the same source as any future jury would be selected. There is no reason to suppose that this case would ever be submitted to 12 men and women more intelligent, more impartial or more competent to decide it than you, or that more or clearer evidence would be produced in the future. Thus, it is your duty to decide the case, if you can conscientiously do so without violence to your individual judgment.

The verdict to which a juror agrees must, of course, be his or her own verdict, the result of his or her own convictions, and not a mere acquiescence in the conclusion of his or her fellow jurors. Yet, in order to bring 12 minds to a unanimous result, you must examine the questions submitted to you with an open mind and with proper regard for, and deference to, the opinion of the other jurors.

In conferring together you ought to pay proper respect to each other's opinions and you ought to listen with a mind open to being convinced by each other's arguments. Thus, where there is disagreement, jurors favoring acquittal should consider whether a doubt in their own mind is a reasonable one when it makes no impression upon the minds of the other equally honest and intelligent jurors who have heard the same evidence with the same degree of attention and with the same desire to arrive at the truth under the sanction of the same oath.

On the other hand, jurors favoring conviction ought seriously to ask themselves whether they should not distrust the weight or sufficiency of evidence which fails to dispel reasonable doubt in the minds of the other jurors.

Not only should jurors in the minority re-examine their positions, but jurors in the majority should do so also, to see whether they have given careful consideration and sufficient weight to the evidence that has favorably impressed the persons in disagreement with them.

Burden of proof is a legal tool for helping you decide. The law imposes upon the prosecution a high burden of proof. The prosecution has the burden to establish, with respect to each count, each essential element of the offense, and to establish that essential element beyond a reasonable doubt. And if with respect to any element of any count you are left in reasonable doubt, the defendant is entitled to the benefit of such doubt and must be acquitted.

It is your duty to decide the case, if you can conscientiously do so without violence to your individual judgment. It is also your duty to return a verdict on any counts as to which all of you agree, even if you cannot agree on all counts. But if you cannot agree, it is your right to fail to agree.

I now instruct you to go back and resume your deliberations.

Comment

(1) This charge contains all the elements of the modified Allen[2] charge approved in United States v. Nichols, 820 F. 2d 508, 511-12 (1st Cir. 1987). In the interest of clarity, these elements have been rearranged and clearer language substituted. The elements satisfy the requirements contained in United States v. Flannery, 451 F.2d 880, 883 (1st Cir. 1971): the instruction must be carefully phrased (1) to place the onus of reexamination on the majority as well as the minority, (2) to remind the jury of the burden of proof and (3) to inform the jury of their right to fail to agree. According to United States v. Angiulo, 485 F.2d 37, 40 (1st Cir. 1973), "whenever a jury first informs the court that it is deadlocked, any supplemental instruction which urges the jury to return to its deliberations must include the three balancing elements stated above."

(2) The First Circuit has found such a charge proper upon a sua sponte jury report of deadlock after nine hours of deliberation over two days, see Nichols, 820 F.2d at 511-12, but improper after three hours of deliberation with no jury report of difficulties in agreeing, see Flannery, 451 F.2d at 883.

(3) A direct charge like this must be used once the jury indicates deadlock, rather than an indirect response to a question that may imply an obligation to deliberate indefinitely. See United States v. Manning, 79 F.3d 212, 222-23 (1st Cir. 1996) (finding it improper to respond to jury question whether it was obliged to reach a verdict by asking "Would reading any portion of the testimony to you assist you in reaching a decision?").

(4) In United States v. Barone, No. 94-1593, 1997 WL 292142, at *20 (1st Cir. June 6, 1997), the First Circuit recently cautioned against using the Allen charge a second time because "[a] successive charge tends to create a greater degree of pressure." The First Circuit declined, however, to create a per se rule against such use. See id.

---

[2] Allen v. United States, 164 U.S. 492, 501-02 (1896).

AFTERWORD: HOW TO DRAFT A CHARGE

Traditionally, jury instructions have been lengthy and have repeated various elements of the charge several times and in different ways. That custom may have something to do with the fact that judges are former lawyers and therefore accustomed to using many words when one would do. More charitably, the practice may have instinctively reflected the concern that lay jurors could not easily absorb an oral charge on complicated legal issues and remember all such issues in the jury room unless the law was drummed into them.

These pattern charges are premised on the assumption that at the end of the 20th century there is no good reason to deny a lay juror a written set of instructions to guide deliberations in the jury room. If a written jury charge is provided, any given element need be stated only once, for the jury can use the written charge as a reference in the jury room. Furthermore, the various steps in deciding the case or the elements of the crime, as the case may be, should be laid out in a logical, sequential order so that the jury can easily follow them. If these premises are accepted, the result is a charge that the judge can deliver orally while the jurors simultaneously read the written document silently to themselves in approximately 30 minutes in most cases. The jurors will not become bored nor will they be frightened that they will be unable to remember or follow the law during their deliberations. Instead, they can retire to the jury room with confidence.

It is for these reasons that the language in these pattern instructions is succinct, if not terse. We have tried to use plain English, although others can undoubtedly suggest improvements. We have attempted to follow the spirit of the appellate caselaw without wholesale adoption of the language, which tends to be judges' and lawyers' language not easily comprehensible by a lay juror.

We have presented charges for the types of crimes and the types of issues that seem to arise most frequently in the First Circuit. We will be pleased to add to these as other judges provide proposed language or as experience demonstrates that others are needed.

Since instances will frequently come up, however, where there is no pattern charge for a particular crime, we offer the following suggested approach for writing a new charge. It is only a suggestion, but it may be a useful outline for a new judge confronted with a new crime. This should be done at the outset of the trial so that a draft charge is ready for the lawyers when the trial ends.

1. First, look at the statute in question. The specific elements of the offense usually will be obvious from a reading of the statute. They can then be listed as the separate numbered elements the government must prove beyond a

reasonable doubt. There will commonly be a jurisdictional element (for example, interstate commerce or federal insurance of a financial institution); one or more "forbidden conduct" elements; and a "mens rea" (e.g., knowingly, willfully) element. One can generally begin an instruction as follows:

> [Defendant] is charged with [possession with intent to distribute, possession of a firearm by a convicted felon, etc.]. It is against federal law to [fill in the prohibition]. For you to find the defendant guilty of this offense the government must satisfy you beyond a reasonable doubt of the following elements:
>
> [Proceed to number and describe the elements.]

Bear in mind that some elements may be stipulated. Often times, for example, the jurisdictional element such as the insured status of a bank or the effect on interstate commerce is stipulated. But if there is not actually a stipulation and only an absence of dispute, some circuits require that you list even the undisputed elements as part of the government's burden of proof. See United States v. Howard, 506 F.2d 1131, 1133-34 (2d Cir. 1974); Byrd v. United States, 342 F.2d 939, 941 (D.C. Cir. 1965). The First Circuit appears not to have spoken to this issue. The Supreme Court has granted certiorari to determine whether refusal to instruct on an element of the offense even where there is no dispute in the testimony can ever be harmless error. See Rogers v. United States, ___ S. Ct. ___, 65 U.S.L.W. 3572 (U.S. May 27, 1997) (No. 96-1279).

Dictate or write your first, rough draft now.

2. Next, look at the pattern instructions from other circuits and the Federal Judicial Center. They often will suggest alternative language, and the comments may alert you to relevant caselaw. Those who drafted the pattern instructions—the Federal Judicial Center Pattern Instructions in particular—have made a conscious attempt to write in plain English and to keep the instructions simple. You may also want to consult the several academic writers on jury instructions, although sometimes their suggestions tend to depend more heavily on abstruse appellate caselaw language. Do your first rewrite now.

3. Next, consult the proposed jury instructions submitted by the prosecution lawyer and the defense lawyer to see whether their reading of the statute is different from yours. Do this with an open mind, for they frequently will pick out matters that you have missed. Make appropriate changes to your draft. Be careful, however, of the lawyer's tendency to use legalese that juries cannot

understand, or to copy from a form book or a charge in a different case, without taking the time to ponder what is appropriate in this case.

4. Now read the cases cited in the lawyers' proposed jury instructions, the comments to the pattern instructions or the academic treatises and the annotations to the statute in question. Primarily, of course, you must search for U. S. Supreme Court and First Circuit precedent; if there is no such precedent on point, then you will have to assess other circuits' approaches. Make any necessary corrections to your charge.

5. Be careful of the thorny issue of "intent." In 1952, Justice Robert Jackson sketched out the dimensions of the problem in the landmark case of Morissette v. United States, 342 U.S. 246 (1952). He described the "variety, disparity and confusion of [the] definitions of the requisite but elusive mental element." Id. at 252. That year, the American Law Institute (ALI) began its ten-year quest to remedy the problem, culminating in the promulgation of the Model Penal Code in 1962. The ALI found that there were two reasons why the mental element was so elusive. The first was the reason given by Justice Jackson: There were just too many verbal formulas in circulation, none of which had precise meaning. The second reason was more subtle: The mental element might vary for the different elements of a crime.

   The Model Penal Code remedied both problems. First, it reduced the number of mental states to four ("purposely," "knowingly," "recklessly" and "negligently") and gave relatively precise definitions of each. See Model Penal Code § 2.02(2). Second, it made clear that the state-of-mind analysis should apply *separately* to each element of the crime, and it drafted crimes accordingly. See id. § 2.02(1).

   The Model Penal Code found favor with the vast majority of the states—around 40 of them—but not with Congress. Thus, federal judges still must struggle with pre-Model Penal Code statutory tools. Federal criminal statutes present a "variety, disparity and confusion" of numerous verbal formulas; even where meaning can be ascribed to the mental element, its application to other elements of the crime may remain unclear.

   In 1989, then Attorney General Richard Thornburgh described the situation as follows:

> [W]ithin Title 18, in describing the general criminal intent or mens rea that must accompany conduct before it is considered criminal, the Congress, over the course of 200 years, has provided 78 different terms, ranging from "wantonly" to "without due . . . circumspection," to help clarify the subject. . . .

> As a body of jurisprudence, our federal criminal law is thus not only stultifying but borders on the embarrassing. Far worse, it is seriously inefficient. . . .

Address at the 66th Annual Meeting (May 19, 1989), in A.L.I. Proc. 405, 408 (1989).

Thus, inspection of a federal statute for the state-of-mind requirement must be made with the understanding that issues of interpretation are likely to be lurking, that they are issues of "common law," and that case law must be consulted.

The trickiest issue of interpretation is that of which mental state applies to each element of the crime. This has remained at the heart of a long line of post-Morissette cases in the Supreme Court. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 115 S. Ct. 464, 467-72 (1994); Ratzlaf v. United States, 510 U.S. 135, 140-49 (1994), superseded by statute, 31 U.S.C. §§ 5322(a) & (b), 5324(c); Cheek v. United States, 498 U.S. 192, 199-204 (1991); Liparota v. United States, 471 U.S. 419, 423-33 (1985); United States v. International Minerals & Chem. Corp., 402 U.S. 558, 560-65 (1971); and United States v. Freed, 401 U.S. 601, 607-10 (1971).

In cases where no appellate decision has helpfully interpreted the statute at hand, you will have to engage in the same kind of analysis the Supreme Court undertook in X-Citement Video, Inc., namely, carefully examine the statutory text and context; test each proffered interpretation against criminal law principles; examine cognate case law; search the legislative history; consider applicable canons of construction; finally, make an additional overarching inquiry: which interpretation provides the jury with a more helpful test of the defendant's possible blameworthiness? X-Citement Video, Inc., 513 U.S. at ___, 115 S. Ct. at 467-72.

6. When you have finished these steps, go back and re-work your charge to simplify the language. Use shorter words, avoid legalese, eliminate subordinate clauses and the passive voice where possible and speak in simple declarative sentences. Say it once, clearly and simply, rather than several times in a convoluted fashion. Now distribute it to the lawyers for their consideration—ideally before the trial is even over, and perhaps even at the outset.