**COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS**
**THIRD CIRCUIT**

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INTRODUCTION:

In the summer of 2004 Chief Judge Anthony J. Scirica appointed a Committee of district judges to draft model criminal jury instructions to help judges communicate more effectively with juries. He and the Committee enlisted Professor James A. Shellenberger of Temple University Law School and Professor Anne Bowen Poulin of Villanova University School of Law to serve as Reporters for the Committee. The Committee also appointed an Advisory Committee including representatives of the U.S. Attorney's Office, the Federal Defender's Office and private defense counsel from each of the Districts in the Circuit. A list of the members of the Advisory Committee follows. Throughout its work the Committee and the Reporters also received assistance from Circuit Executive, Toby Slawsky, Administrative Assistant, Susan Mangino, and, especially, Assistant Circuit Executive, Theresa Burnett. The project was funded by contributions from the Court of Appeals and each District Court in the Third Circuit.[*]

The Committee commenced its work in September 2004. The final set of model instructions includes preliminary and final instructions, instructions for use during trial and

[*]Neither the Court of Appeals nor any judge of that Court participated in the drafting of the model instructions and the Court of Appeals has not in any manner approved the use of these instructions.

instructions covering the most frequently litigated federal crimes and defenses. In addition to model instructions, the Committee and the Reporters prepared Comments to accompany those instructions, summarizing relevant Third Circuit and Supreme Court precedent. Although we believe the Comments are accurate in every respect they do not pretend to be exhaustive discussions of the subject matter. The extraordinary efforts of the Reporters and the scholarly strength they brought to the task of drafting these instructions cannot be overly emphasized. In addition, the members of the Committee wish to acknowledge the leadership and tireless efforts of Judge Yohn as Chairman, which were indispensable to a project of this nature. Finally, the suggestions of the Advisory Committee on our proposed instructions have been invaluable.

We recognize that the manner of instructing a jury varies widely among judges. These model instructions are available to judges and litigants to be used in their discretion in tailoring the instructions in a particular case. They are intended to be model, not mandatory, instructions. Every effort has been made to assure conformity with current Third Circuit law; however, it cannot be assumed that all of these model instructions in the form given will necessarily be appropriate under the facts of a particular case or that the Third Circuit will approve these instructions, if given.

The model instructions are available electronically on the Third Circuit website at www.ca3.uscourts.gov. A tab at the top of the home page will take you to another page that contains the model civil and criminal jury instructions. The documents are provided in two formats: WordPerfect and PDF (for easy referral to just the Table of Contents, you should save the Table of Contents web page as one of your "favorites"). All instructions will shortly be published by Thomson West.

The subject matter of the Model Criminal Jury Instructions is set forth in the Table of Contents. We call your attention particularly to the instructions in Chapter 2, which we believe will be extremely helpful to trial judges and lawyers, both as to the language of the instruction and the law which applies to its use, in order to resolve issues that arise during the course of a trial.

By referring to the Table of Contents beginning with General Instruction No. 1.01 and then proceeding through the Table of Contents one may select particular instructions. It must be emphasized, however, that every case is unique, having its particular fact pattern, and care must be exercised when adapting the model instructions to the individual case. Some of the instructions may contain paragraphs or sentences that address issues not relevant to the case actually being tried. All unnecessary concepts and terms should be removed so the instructions may properly focus the attention of the jury only on the precise issue or issues that it is being asked to resolve and nothing else.

These Model Criminal Jury Instructions remain a work in progress. The law develops as time passes. Even as the instructions were being assembled in final form, opinions of the Court of Appeals came down that required additions or revisions. Undoubtedly, judges and lawyers who use these Instructions will have suggestions for improvement. As these instructions are used, if a judge or lawyer believes improvements can made in the clarity of any instruction, or that a particular instruction is in error, we would appreciate being advised. You may e-mail any comments to: Tburnett_comments_juryinstructions@ca3.uscourts.gov. The Committee will

meet annually with its Reporters to review developments in the law and the comments of those who use the model instructions. Revised editions will be issued from time to time. The Committee hopes that this work will ease the burden of district judges in preparing their jury instructions and will also provide a technique for the rapid preparation and assembly of complete instructions in suitable form for submission to the jury.

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*Although not officially members of the Advisory Committee, the Committee wants to acknowledge the very substantial contributions made by Nancy Hoppock, Esquire, George Leone, Esquire and Robert Zauzmer, Esquire.

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## Chapter 1: Preliminary Instructions Before Opening Statements

**1.01 Preliminary Instructions to Jury Panel**

**I am Judge** *(name)*, **the trial judge in this case. You have been called to this courtroom as a panel of prospective jurors for the case of United States v.** *(defendant's (s') name(s))*. **This is a criminal case in which** *(name(s)) (is) (are)* **charged with committing the crime***(s)* **of** *(offense(s) charged)*, **in violation of federal criminal law.**

**From this panel we will select the jurors who will sit on the jury that will decide this case. We will also select alternate jurors, who will be part of this trial and available in the event that one of the regular jurors becomes ill or is otherwise unable to continue on the jury.**

**We rely on juries in this country to decide cases tried in our courts, so service on a jury is an important duty of citizenship. Jurors must conduct themselves with honesty, integrity, and fairness.**

**Under our system of justice, the role of the jury is to find the facts of the case based on the evidence presented in the trial. That is, from the evidence seen and heard in court, the jury decides what the facts are, and then applies to those facts the law that I will give in my instructions to the jury. My role as the trial judge is to make whatever legal decisions must be made during the trial and to explain to the jury the legal principles that will guide its decisions.**

**We recognize that you are all here at some sacrifice. However, we cannot**

**excuse anyone merely because of personal inconvenience, unless serving on this jury would be a compelling hardship.**

**In a few minutes you will be sworn to answer truthfully questions about your qualifications to sit as jurors in this case. This questioning process is called the voir dire. I will conduct the questioning, and the lawyers for the parties may also participate. It is, of course, essential that you answer these questions truthfully; a deliberately untruthful answer could result in severe penalties.**

**The voir dire examination will begin with a brief statement about the particulars of this case. The purpose of this statement is to tell you what the case is about and to identify the parties and their lawyers.**

**Questions will then be asked to find out whether any of you have any personal interest in this case or know of any reason why you cannot render a fair and impartial verdict. We want to know whether you are related to or personally acquainted with any of the parties, their lawyers, or any of the witnesses who may appear during the trial, and whether you already know anything about this case. Other questions will be asked to determine whether any of you have any beliefs, feelings, life experiences, or any other reasons that might influence you in rendering a verdict.**

**The questions are not intended to embarrass you. If you have a response that you are uncomfortable sharing publicly, please let me know and I will see that you**

**are questioned in private. I also may decide on my own that questions should be asked in private.**

**After this questioning, some of you will be chosen to sit on the jury for this case. If you are not chosen, you should not take it personally and you should not consider it a reflection on your ability or integrity.**

**There may be periods of silence during the voir dire process, when the lawyers and I are not speaking openly. During those times you may talk, but you must not talk about this case or about the voir dire questions and answers.**

*[If the trial judge wants to give a further explanation of the challenge and selection process, here is alternative language that may be used for that purpose:*

*Alternative 1: After we complete the questioning, the lawyers and I will decide which of you will be chosen to sit on the jury. Please be patient while we complete the selection process.*

*Alternative 2: After this questioning is completed, the parties on either side may ask that a member of the panel be excused or exempted from service on the jury in this case. These are called challenges.*

*First: A prospective juror may be challenged for cause if the voir dire examination shows that he or she might be prejudiced or otherwise unable to render a fair and impartial verdict in this case. I will excuse a prospective juror if I decide that there is sufficient cause for the challenge. There is no limit to the number of challenges for cause.*

*Second: The parties also have the right to a certain limited number of challenges for which no cause is necessary. These are called peremptory challenges, and each party has a predetermined number of peremptory challenges. The peremptory challenge is a right long-recognized by the law as a means of giving the parties some choice in the make-up of the jury.*

*You should understand that if you are eliminated from the jury panel by a peremptory challenge that is not a reflection on your ability or integrity.]*

**Comment**

This instruction should be given at the beginning of voir dire. It is based on the Handbook for Trial Jurors Serving in the United States District Courts, published by the Administrative Office of the United States Courts. Also *see* Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1 *Federal Jury Practice and Instructions* (6th ed. 2006) [hereinafter O'Malley et al] Ch. 4 (Choosing and Empaneling the Jury).

**Questioning Prospective Jurors Privately.** The trial judge may decide to question prospective jurors privately, either because they express concern about embarrassment or because the judge is concerned that answers could taint other prospective jurors who are listening. Some judges prefer to question panel members privately at sidebar; others prefer to send the panel out of the courtroom and bring prospective jurors back into the courtroom individually for questioning.

**Alternative Language Regarding Excusing Jurors.** Prospective jurors may be excused in three ways, because of hardship, challenges for cause, or peremptory challenges. How the trial judge handles these and how the judge wants to explain them to the jury panel varies. Many courts handle these matters differently. The alternative language at the end of this instruction suggests ways that these matters may be explained to the panel, but there are many others.

**Highly Publicized Cases.** In a highly publicized case, where there is likely to be significant media coverage during jury selection, the trial judge may want give a preliminary instruction to the panel similar the paragraph (6) of Instruction 1.03 (Conduct of the Jury).

**Sequestration of Jurors.** Whether to sequester a jury for the trial is within the discretion of the trial judge and may be ordered sua sponte. *See, e.g., United States v. Shiomos*, 864 F.2d 16, 18-19 (3d Cir 1988); *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). If possible, this decision

should be made at the beginning of voir dire, because sequestration may affect whether it would be a hardship for potential jurors to serve on the jury. *See United States v. Shiomos.* If the trial judge decides to sequester the jury, the judge should explain that at the beginning of voir dire. The following instruction to the panel is suggested:

Sequestration of Jurors

> I have concluded that the jurors will be sequestered during this trial. That is, the jurors will not be allowed to separate during the recesses in the trial, including overnight, but rather will remain together at all times. I realize that this will be a hardship on you.
>
> I have decided to sequester the jury because this case has already and will likely continue to generate a substantial amount of publicity. I am concerned that this publicity might affect the fairness of the trial and the integrity of the process. I do not lack confidence in your ability as jurors to disregard the publicity and to render a fair verdict based only on the evidence, but I want to avoid a later claim that something that may have occurred outside this courtroom could have had an influence on the jury's decision.

*See* 1A O'Malley § 10.09. In addition, either at the beginning of voir dire or certainly at the beginning of the trial, the judge should also give the jurors detailed instructions about how their personal and family needs will be met while they are sequestered during the trial.

**Anonymous Jury.** Where the evidence in a particular case provides a basis for legitimate concerns that jurors might fear retaliation against themselves or their families, the trial judge also has the discretion to seat an anonymous jury, ordering at the beginning of jury selection that the names, addresses and other identifying information about the jurors will be disclosed only to the court and its personnel. The Third Circuit has upheld this procedure in order to promote impartial decision making by allaying the jurors' fears. *See, e.g., United States v. Scarfo*, 850 F.2d 1015 (3d Cir.), cert. denied, 488 U.S. 910 (1988) (trial judge did not abuse his discretion in withholding information about jurors' identities before and after voir dire, where prosecution evidence describing the defendant's organized crime group might have caused anxiety among the jurors). If the judge decides to seat an anonymous jury, the judge should give an instruction at the beginning of voir dire explaining this procedure and the reasons for it, without infringing on the presumption of innocence and protecting the defendant from possible adverse inferences. *See United States v. Scarfo*, 850 F.2d at 1026-28 (upholding trial judge's lengthy instruction explaining anonymous jury procedure). *Also see* Eleventh Circuit Pattern Jury Instructions, Trial Instruction # 1 (Preliminary and Explanatory Instructions to Innominate (Anonymous) Jury).

**1.02 Role of the Jury**

**Now that you have been sworn, let me tell you what your role is as jurors in this case.**

**Under our system of justice, the role of the jury is to find the facts of the case based on the evidence presented in the trial. You must decide the facts only from the evidence presented to you in this trial.**

**From the evidence that you will hear and see in court, you will decide what the facts are and then apply to those facts the law that I will give to you in my final instructions. That is how you will reach your verdict.**

**Whatever your verdict, it will have to be unanimous. All of you will have to agree on it or there will be no verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up his or her own mind. Therefore, each of you has a responsibility which you cannot avoid and you should do your best throughout the trial to fulfill this responsibility.**

**I play no part in finding the facts. You should not take anything I may say or do during the trial as indicating what I think of the evidence or about what your verdict should be. My role is to make whatever legal decisions have to be made during the course of the trial and to explain to you the legal principles that must guide you in your decisions.**

**You must apply my instructions about the law. Each of the instructions is**

**important. You must not substitute your own notion or opinion about what the law is or ought to be. You must follow the law that I give to you, whether you agree with it or not.**

**Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religion, national ancestry, or gender** *[, sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community].*

**Comment**

*See* 1A O'Malley et al, supra, § 10.01 (Opening Instruction). For variations in other Circuits, *see* First Circuit § 1.01; Fifth Circuit § 1.04; Sixth Circuit § 1.02; Seventh Circuit § 1.01; Eighth Circuit § 1.01.

One or more of the characteristics listed in the bracketed language in the last paragraph should be mentioned also, if it appears that there may be a risk that jurors could be influenced by those characteristics in a particular case. The trial judge may need to mention other characteristics that are not listed if it appears that they might influence jurors in a particular case.

**1.03 Conduct of the Jury**

**Here are some important rules about your conduct as jurors:**

**(1) Keep an open mind. Do not make up your mind about the verdict until you have heard all of the evidence, and I have given final instructions about the law at the end of the trial, and you have discussed the case with your fellow jurors during your deliberations.**

**(2) Do not discuss the case among yourselves until the end of the trial when you retire to the jury room to deliberate. You need to allow each juror the opportunity to keep an open mind throughout the entire trial. During trial you may talk with your fellow jurors about anything else of a personal nature or of common interest.**

**(3) During the trial you should not speak to any of the parties, lawyers, or witnesses involved in this case, not even to pass the time of day. If any lawyer, party, or witness does not speak to you when you pass in the hall, ride the elevator, or the like, remember it is because they are not supposed to talk or visit with you, either.**

**(4) Do not talk with anyone else or listen to others talk about this case until the trial has ended and you have been discharged as jurors. It is important not only that you do justice in this case, but that you give the appearance of justice. If anyone should try to talk to you about the case during the trial, please report that to me, through my courtroom deputy, immediately. Do not discuss this situation with any**

**other juror.**

**(5) Do not discuss the case with anyone outside the courtroom or at home, including your family and friends. You may tell your family or friends that you have been selected as a juror in a case and you may tell them how long the trial is expected to last. However, you should also tell them that the judge instructed you not to talk any more about the case and that they should not talk to you about it. The reason for this is that sometimes someone else's thoughts can influence you. Your thinking should be influenced only by what you learn in the courtroom.**

**(6) Until the trial is over and your verdict is announced, do not watch or listen to any television or radio news programs or reports about the case, or read any news or internet stories or articles about the case, or about anyone involved with it.** *[In highly publicized cases, the judge may want to add an additional instruction in this regard.]*

**(7) Do not use a computer, cellular phone, or other electronic devices while in the courtroom or during deliberations. These devices may be used during breaks or recesses for personal uses, but may not be used to obtain or disclose information about this case.**

**(8) Do not do any research or make any investigation on your own about any matters relating to this case or this type of case. This means, for example, that you must not visit the scene, conduct experiments, consult reference works or**

**dictionaries, or search the internet for additional information, or use a computer, cellular phone, or other electronic devices, or any other method, to obtain information about this case, this type of case, the parties in this case, or anyone else involved in this case. You must decide this case based only on the evidence presented in the courtroom and my instructions about the law. It would be improper for you to try to supplement that information on your own.**

**(9) Finally, you should not concern yourselves with or consider the possible punishment that might be imposed if you return a verdict of guilty.**

**Comment**

*See* 1A O'Malley et al, supra, § 10.01 (Opening Instruction). For variations in other Circuits, *see* First Circuit § 1.07; Fifth Circuit § 1.01; Eighth Circuit § 1.08; Ninth Circuit § 1.9; Eleventh Circuit § 2.1.

The trial judge should give this instruction on jury conduct after the jurors are sworn and before opening statements. Depending on the circumstances, it may be useful to give this instruction, or parts of it, during the trial as well. For example, if the punishment for the offense(s) charged is mentioned during the trial, the judge should give paragraph 8 of this instruction at that time.

The following instruction may also be added if necessary:

> (9) Finally, if any member of the jury has a friend or family member who is in attendance at this public trial, that visitor must first register with my Clerk because special rules will govern their attendance. You may not discuss any aspect of this trial with the visitor, nor may you permit the visitor to discuss it with you.

**Pre-deliberation Discussions Among Jurors Disapproved.** Some states permit pre-deliberation discussions among the jurors themselves. However, the Third Circuit has declared that:

> "It is fundamental that every litigant who is entitled to trial by jury is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process." *Waldorf v. Shuta*, 3 F.3d 705, 709 (3d Cir. 1993). Partly

> to ensure that this right is upheld, "it [has been] a generally accepted principle of trial administration that jurors must not engage in discussions of a case before they have heard both the evidence and the court's legal instructions and have begun formally deliberating as a collective body." [United States v.] Resko, 3 F.3d [684] at 688 [(3d Cir. 1993]).

*United States v. Bertoli*, 40 F.3d 1384, 1393 (3d Cir. 1994). Premature deliberations present a number of concerns, the most important being that jurors who discuss the case among themselves may harden their positions before all of the evidence is presented and the jury is instructed. Moreover, "[o]nce a juror has expressed views on a particular issue, that juror has a 'stake' in the expressed views and may give undue weight to additional evidence that supports, rather than undercuts, his or her view." *Id.*

**Highly Publicized Cases.** In a highly publicized case the trial judge might also want to instruct:

> Until the trial is over I suggest that you avoid reading any newspapers or news journals at all, and avoid listening to any TV or radio newscasts at all. I do not know whether there might be any news reports of this case, but if there are you might inadvertently find yourself reading or listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. It is important for you to understand that this case must be decided only by the evidence presented in the courtroom and the instructions I give you.

If potentially prejudicial publicity, such as newspaper, radio, or television reports, appears during trial, the trial judge should also give Instruction No. 2.36 (Prejudicial Publicity During Trial) at the time the judge learns about that publicity.

The trial judge also has the discretion to sequester the jury during trial and to seat an anonymous jury. *See* Comment to Instruction 1.01 (Preliminary Instructions to Jury Panel).

(Revised 12/09)

**1.04 Bench (Side-Bar) Conferences**

**During the trial it may be necessary for me to talk with the lawyers out of your hearing. That is called a bench or side-bar conference. If that happens, please be patient. We also ask that you advise me, through my courtroom deputy, if you are able to hear any of the bench or side-bar conferences, because the purpose is to hold these discussions outside the hearing of the jury, for important reasons.**

**I know you may be curious about what we are discussing. We are not trying to keep important information from you. These conferences are necessary for me to discuss with the lawyers objections to evidence and to be sure that evidence is presented to you correctly under the rules of evidence. We will, of course, do what we can to keep the number and length of these conferences to a minimum. If I think the conference will be long, I will call a recess.**

**I may not always grant a lawyer's request for a conference. Do not consider my granting or denying a request for a conference as suggesting my opinion of the case or of what your verdict should be.**

**Comment**

*See* 1A O'Malley et al, supra, §10.01. For variations in other circuits, *see* First Circuit (Criminal) § 1.05; Eighth Circuit § 1.03; Ninth Circuit § 2.2. For a shortened version of this instruction, *see* Fifth Circuit § 2.7.

If, after granting a request for a side-bar conference, the court instructs the clerk to turn on a white noise machine to prevent the jury from hearing what is said, the following instruction may be given:

A white noise generator is installed over the jury box for use when the lawyers and I are speaking at the bench or at side-bar. This machine neutralizes sound and prevents the jury from hearing what is said without requiring us to whisper.

**1.05 Note Taking by Jurors**

*Option 1:*

**At the end of the trial you must make your decision based on what you remember of the evidence. You will not have a written transcript of the testimony to review. You must pay close attention to the testimony as it is given.**

**If you wish, you may take notes to help you remember what witnesses said. My courtroom deputy will arrange for pens, pencils, and paper. If you do take notes, please keep them to yourself until the end of trial when you and your fellow jurors go to the jury room to decide the case. Here are some other specific points to keep in mind about note taking:**

**(1) Note-taking is permitted, but it is not required. You are not required to take notes. How many notes you want to take, if any, is entirely up to you.**

**(2) Please make sure that note-taking does not distract you from your tasks as jurors. You must listen to all the testimony of each witness. You also need to decide whether and how much to believe each witness. That will require you to watch the appearance, behavior, and manner of each witness while he or she is testifying. You cannot write down everything that is said and there is always a fear that a juror will focus so much on note-taking that he or she will miss the opportunity to make important observations.**

**(3) Your notes are memory aids; they are not evidence. Notes are not a record**

**or written transcript of the trial. Whether or not you take notes, you will need to rely on your own memory of what was said. Notes are only to assist your memory; you should not be overly influenced by notes.**

**(4) In your deliberations, do not give any more or less weight to the views of a fellow juror just because that juror did or did not take notes. Do not assume that just because something is in someone's notes that it necessarily took place in court. It is just as easy to write something down incorrectly as it is to hear or remember it incorrectly. Notes are not entitled to any greater weight than each juror's independent memory of the evidence. You should rely on your individual and collective memories when you deliberate and reach your verdict.**

**(5) You should not take your notes away from court.** *[Here the judge should describe the logistics of storing and securing jurors' notes during recesses and at the end of the court day. For example, jurors may be told to put their notes in an envelope provided for that purpose at the beginning of each recess and at the end of the day. The jurors could be told to leave the envelope containing the notes on their chairs. The judge's courtroom staff could collect the notes and place them in a locked drawer at the end of each day or the jurors might be told to leave their notes in the jury room at the end of the day.]*

**My staff is responsible for making sure that no one looks at your notes.**

**Immediately after you have finished your deliberations and I have accepted your verdict, my staff will collect and destroy your notes, to protect the secrecy of your deliberations.**

*Option 2:*

**At the end of the trial you must make your decision based on what you remember of the evidence. Although we have a court reporter here, you will not have a written transcript of the testimony to review during your deliberations. You must pay close attention to the testimony as it is given.**

**You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying and to the witness' appearance, behavior, and manner while testifying. One of the reasons for having a number of persons on the jury is to gain the advantage of your individual and collective memories so that you can then deliberate together at the end of the trial and reach agreement on the facts. While some of you might feel comfortable taking notes, other members of the jury may not feel as comfortable and may not wish to do so. Notes might be given too much weight over memories, especially the memories of those who do not take notes. So, for those reasons, you may not take notes during this trial.**

**Comment**

*See* 1A O'Malley et al, supra, § 10.03 (Note-Taking Prohibited) & § 10.04 (Note-Taking Permitted). For variations in other Circuits, *see* First Circuit § 1.08; Fifth Circuit § 1.02; Eighth Circuit § 1.06; Ninth Circuit §§ 1.10, 1.11; Eleventh Circuit § 3.1.

**Trial Court Discretion to Allow Juror Note-Taking.** In *United States v. Maclean,* 578 F.2d 64 (3d Cir. 1978), the Third Circuit held that the trial judge has discretion to allow jurors to take notes. The court stated that if note-taking is permitted, jurors must be instructed that the notes are only aids to memory, that they are not conclusive, and they are not to be given precedence over a juror's independent recollection of the facts.

**Transcript of Testimony; Read backs of Testimony.** The instruction also states that jurors will not have a written transcript of the testimony to review during deliberations. It does not say absolutely that a transcript will not be provided. This instruction is in accordance with *United States v. Bertoli,* 40 F.3d 1384 (3d Cir. 1994), which held that the trial judge has discretion to provide a transcript to jurors during deliberations. The trial judge also has the discretion to order portions of the testimony read back to the jury during deliberations, and the judge may want to tell the jury in his or her preliminary instructions that the judge may allow read backs of selected portions of testimony on request.

**Studies on Juror Note-Taking.** Two experimental studies suggest that juror note-taking may improve jurors' functioning. Lynne ForsterLee et al., *Effects of Notetaking on Verdicts and Evidence Processing in a Civil Trial*, 18 LAW & HUM. BEHAV. 567 (1994); David L. Rosenhan et al., *Notetaking Can Aid Juror Recall*, 18 LAW & HUM. BEHAV. 53 (1994). Another study suggests that note-taking's usefulness may vary depending on the complexity of the case. Lynne ForsterLee & Irwin A. Horowitz, *Enhancing Juror Competence in a Complex Trial*, 11 APPLIED COGNITIVE PSYCHOLOGY 305 (1997). Field studies failed to detect benefits from note-taking, but may not have been likely to do so given their design. Steven D. Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOL. PUB. POL'Y & L. 259 (1997); Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 LAW & HUM. BEHAV. 121 (1994); Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231 (1988). Those field studies found that the asserted disadvantages of note-taking did not materialize. Note-taking gets generally (though not uniformly) positive reviews from judges, lawyers, and jurors. Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985); Neil P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34 U. MEM. L. REV. 1 (2003).

**1.06 Questions by Jurors of Witnesses**

*Option 1:*

**Only the lawyers and I are allowed to ask questions of witnesses. You are not permitted to ask questions of witnesses.** *[The specific reasons for not allowing jurors to ask questions may be explained.]*

**If, however, you are unable to hear a witness or a lawyer, please raise your hand and I will correct the situation.**

*Option 2:*

**Generally only the lawyers and I ask questions of witnesses. However, I may allow you to submit questions for some witnesses. After the lawyers have finished asking their questions on direct and cross-examination but before I have excused the witness, if you have a question on an important matter and feel that an answer would be helpful to you in understanding the case, please raise your hand. Write your question on a piece of paper and hand it to my courtroom deputy, who will give the question to me. Do not discuss your question with any other juror.**

**You should only submit questions that will help you decide important issues in this case. Also, the rules of evidence must be considered before any questions can be approved. Therefore, I will discuss your question with the lawyers, outside your hearing, and decide whether the question is allowed under the rules. If the question**

**is not allowed under the rules, I will not ask it. You should not make any conclusions from the fact that I do not ask the question. You should not take it personally if I do not ask the question or if I ask it in a form that is different from what you submitted. If I do ask your question you should not give the answer to it any greater weight than you would give to any other testimony.**

**Remember that you are here to judge the facts impartially. You can submit a question if testimony of a witness is unclear on an important point or if, after the lawyers have finished questioning the witness, you think there is still an important question that has not been asked. You should not submit a question just to argue with a witness or a question that might suggest your view or conclusion about the outcome of the case.**

**Comment**

*See* 1A O'Malley et al, supra, § 10.05 (Questions by jurors – Prohibited), § 10.06 (Questions by jurors – Permitted); Federal Judicial Center § 2 (providing both options). For variations in other Circuits, *see* Eighth Circuit § 1.06A (the Notes for Use discuss different methods for juror questioning).

**Juror Questions Within Trial Court's Discretion; Options.** Whether to allow jury questions is within the discretion of the trial judge. Option 1 is for judges who want to disallow jury questions explicitly. Option 2 is for judges who want to tell jurors explicitly that they may submit questions to be asked of witnesses. Some judges, however, may not want to give an explicit instruction allowing or disallowing jury questions, but may wish instead to wait and see if jurors inquire about asking questions and then rule on whether to allow questions. If a judge does not give an explicit instruction, but a juror inquires about asking questions, the judge should then decide whether to allow or disallow juror questions and, depending on that decision, should instruct in accordance with the appropriate option given above.

In *United States v. Hernandez*, 176 F.3d 719, 723 (3d Cir. 1999), the Third Circuit "approved of the practice [of permitting juror questions] so long as it is done in a manner that

insures the fairness of the proceedings, the primacy of the court's stewardship, and the rights of the accused." *Hernandez* also held that if the trial judge allows jury questions, the court should follow a procedure for questions to prevent jury misconduct. *Id.* at 726 (warning that "the judge should ask any juror-generated questions, and he or she should do so only after allowing attorneys to raise any objection out of the hearing of the jury"). The procedure for jury questions is set forth in Option 2.

The Third Circuit recognized in *Hernandez* that there are arguments for and against allowing jurors to submit questions for witnesses. The best argument in favor of jury questioning is that it helps jurors clarify factual confusions and understand as much of the facts and issues as possible so that they can reach an appropriate verdict. *Id.* at 724-25. On the other hand, allowing jurors to ask questions may risk turning them into advocates and compromising their neutrality, or it may waste time if there is a very inquisitive juror. *Id*. at 724, citing *United States v. Bush*, 47 F.3d 511 (2d Cir. 1995). In this regard, it is not appropriate to allow jurors to ask questions that appear to suggest guilt or innocence.

**Studies on Juror Questions.** The practice of allowing jurors to submit questions for witnesses has become more prevalent. Field studies indicate that permitting juror questions can aid juror understanding, and that the feared downsides of juror questions do not materialize in practice. Steven D. Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOL. PUB. POL'Y & L. 259 (1997); Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 LAW & HUM. BEHAV. 121 (1994). One field study suggests the benefits of permitting juror questions may increase with the factual and legal complexity of the trial. Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29 (1994). Jurors are in favor of permitting juror questions. Neil P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34 U. MEM. L. REV. 1 (2003). Judges are generally (though not uniformly) favorable, Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985). Lawyers are split, with one study suggesting that plaintiff/prosecution lawyers favor the practice but defense lawyers are less enthusiastic. Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985); Neil P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34 U. MEM. L. REV. 1 (2003).

**1.07 Description of Trial Proceedings**

**The trial will proceed in the following manner:**

**First: The lawyers will have an opportunity to make opening statements to you. The prosecutor may make an opening statement at the beginning of the case. The defendant's *(s')* lawyer*(s)* may make *(an)* opening statement*(s)* after the prosecutor's opening statement or the defendant*(s)* may postpone the making of an opening statement until after the government finishes presenting its evidence. The defendant*(s) (is) (are)* not required to make an opening statement.**

**The opening statements are simply an outline to help you understand what each party expects the evidence to show. What is said in the opening statements is not itself evidence.**

**Second: After opening statements, the government will introduce the evidence that it thinks proves the charge*(s)* stated in the indictment. The government will present witnesses and the defendant's *(s')* lawyer*(s)* may cross-examine those witnesses. The government may also offer documents and other exhibits into evidence.**

**Third: After the government has presented its evidence, the defendant*(s)* may present evidence, but *(he) (she) (they) (is) (are)* not required to do so. As I will tell you many times during this trial, the government always has the burden or obligation to prove each and every element of the offense*(s)* charged beyond a reasonable doubt.**

**The defendant*(s) (is) (are)* presumed to be innocent of the charge*(s)*. The law never imposes on a defendant*(s)* in a criminal case the burden of proving *(his) (her) (their)* innocence by calling any witnesses, producing any exhibits, or introducing any evidence.**

*[If the court knows that the defendant will be presenting an affirmative defense, see discussion in the Comment below about possible additional instructions.]*

**Fourth: After all of the evidence has been presented, the lawyers will have the opportunity to present closing arguments. Closing arguments are designed to present to you the parties' theories about what the evidence has shown and what conclusions may be drawn from the evidence. What is said in closing arguments is not evidence, just as what is said in the opening statements is not evidence.**

**Fifth: After you have heard the closing arguments, I will give you orally *[and in writing]* the final instructions concerning the law that you must apply to the evidence presented during the trial. As I am doing now, I may also give you instructions on certain aspects of the law throughout the trial, as well as at the end of the trial.**

**Sixth: After my final instructions on the law, you will retire to consider your verdict. Your deliberations are secret. You will not be required to explain your verdict to anyone. Your verdict must be unanimous; all twelve of you must agree to it.**

**You must keep your minds open during this trial. Do not make up your mind about any of the questions in this case until you have heard each piece of evidence and all of the law which you must apply to that evidence – in other words, until you begin your deliberations.**

**Comment**

*See* 1A O'Malley et al, supra, § 10.01 (Opening Instruction). For model instructions in other Circuits outlining the trial procedures, *see* First Circuit § 1.09; Fifth Circuit § 1.01; Eighth Circuit § 1.09.

This instruction, specifically the fifth and sixth paragraphs, should be modified if final instructions are given before closing arguments.

**Affirmative Defenses and the Burden of Proof.** If the defendant presents at trial an affirmative defense (*i.e.,* a defense that does not involve one of the elements of the offense*(s)* charged) and the law places the burden of persuasion on the defendant as to that defense, then the discussion in the *Third* paragraph of this instruction is somewhat inaccurate or incomplete. Although it will ordinarily be premature to instruct about affirmative defenses during preliminary instructions, if the trial judge knows that the defendant will be presenting such a defense and if the defendant does not object, the judge may want to modify the *Third* paragraph to read as follows:

> The government always has the burden or obligation to prove each and every element of the offense*(s)* charged beyond a reasonable doubt. The defendant*(s) (is) (are)* presumed to be innocent of the charge*(s)*. The law does not impose on the defendant*(s)* the burden of proving *(his) (her) (their)* innocence as to any of the elements of the offense*(s)* charged. The defendant*(s) (name)* in this case will, however, present a defense of *(state the affirmative defense that the defendant(s) will present.)* This is what the law calls an "affirmative defense." An affirmative defense does not require the defendant*(s)* to disprove an element of the offense*(s)* charged, but does require the defense to prove certain other things that the law recognizes as a sufficient reason to find the defendant*(s)* not guilty. I will instruct you further on this affirmative defense in my final instructions at the end of the trial.

For model instructions on affirmative defenses and commentary discussing burdens of proof on defenses, *see* Chapter 7 (Defenses and Theories of Defense).

**1.08 Evidence (What is; is Not)**

**You must make your decision in this case based only on the evidence that you see and hear in the courtroom. Do not let rumors, suspicions, or anything else that you may see or hear outside of court influence your decision in any way.**

**The evidence from which you are to find the facts consists of the following:**

**(1) The testimony of the witnesses;**

**(2) Documents and other things received as exhibits; and**

**(3) Any fact or testimony that is stipulated; that is, formally agreed to by the parties.**

**The following are not evidence:**

**(1) Statements and arguments of the lawyers for the parties in this case;**

**(2) Questions by the lawyers and questions that I might ask. You must not assume that a fact is true just because one of the lawyers or I ask a question about it. It is the witness' answers that are evidence. Of course, you may need to consider the question to know what a witness means by his or her answer. For example, if a witness answers yes to a question, you will have to consider the question to understand what the witness is saying.**

**(3) Objections by lawyers, including objections in which the lawyers state facts;**

**(4) Any testimony I strike or tell you to disregard; and**

**(5) Anything you may see or hear about this case outside the courtroom.**

**You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience and common sense tell you that certain evidence reasonably leads to a conclusion, you may reach that conclusion.**

**The rules of evidence 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. An objection simply means that the lawyer is asking me to decide whether the evidence should be allowed under the rules. Lawyers have a responsibility to their clients to make objections when they think evidence being offered is improper under the rules of evidence. You should not be influenced by the fact that an objection is made.**

**You should also not be influenced by my rulings on objections to evidence. If I overrule an objection, the question may be answered or the exhibit may be received as evidence, and you should treat the testimony or exhibit like any other. I may allow evidence (testimony or exhibits) only for a limited purpose. If I do that, I will instruct you to consider the evidence only for that limited purpose, and you must follow that instruction.**

**If I sustain an objection, the question will not be answered or the exhibit will**

**not be received as evidence. Whenever I sustain an objection, you must disregard the question or the exhibit entirely. Do not think about or guess what the witness might have said in answer to the question; do not think about or guess what the exhibit might have shown. Sometimes a witness may have already answered before a lawyer objects or before I rule on the objection. If that happens and if I sustain the objection, you should disregard the answer that was given.**

**Also, I may order that some testimony or other evidence be stricken or removed from the record. If I do that, I will instruct you to disregard that evidence. That means, when you are deciding the case, you must not consider or be influenced in any way by the testimony or other evidence that I told you to disregard.**

**Although the lawyers may call your attention to certain facts or factual conclusions that they think are important, what the lawyers say is not evidence and is not binding on you. It is your own recollection and interpretation of the evidence that controls your decision. Also, do not assume from anything I do or say during the trial that I have any opinion about the evidence or about any of the issues in this case or about what your verdict should be.**

**Comment**

*See* 1A O'Malley et al, supra, § 12.03. For variations in other Circuits, *see* First Circuit § 1.05; Fifth Circuit § 1.06; Sixth Circuit § 1.04; Eighth Circuit § 1.03.

If the trial judge knows that he or she will be taking judicial notice of any facts, the judge should include in describing what is evidence, "(4) Any facts that will be judicially noticed--that is, facts which I say you may accept as true even without other evidence."

**1.09 Direct and Circumstantial Evidence**

**Two types of evidence may be used in this trial, "direct evidence" and "circumstantial (or indirect) evidence." You may use both types of evidence in reaching your verdict.**

**"Direct evidence" is simply evidence which, if believed, directly proves a fact. An example of "direct evidence" occurs when a witness testifies about something the witness knows from his or her own senses — something the witness has seen, touched, heard, or smelled.**

**"Circumstantial evidence" is evidence which, if believed, indirectly proves a fact. It is evidence that proves one or more facts from which you could find or infer the existence of some other fact or facts. An inference is simply a deduction or conclusion that reason, experience, and common sense lead you to make from the evidence. An inference is not a suspicion or a guess. It is a reasoned, logical decision to find that a disputed fact exists on the basis of another fact.**

**For example, if someone walked into the courtroom wearing a wet raincoat and carrying a wet umbrella, that would be circumstantial or indirect evidence from which you could find or conclude that it was raining. You would not have to find that it was raining, but you could.**

**Sometimes different inferences may be drawn from the same set of facts. The government may ask you to draw one inference, and the defense may ask you to**

**draw another. You, and you alone, must decide what inferences you will draw based on all the evidence.**

**You should consider all the evidence that is presented in this trial, direct and circumstantial. The law makes no distinction between the weight that you should give to either direct or circumstantial evidence. It is for you are to decide how much weight to give any evidence.**

**Comment**

*See* 1A O'Malley et al, supra, § 12.04; Hon. Leonard Sand, John S. Siffert, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal* (2003) [hereinafter, Sand et al.] 74-2. For variations in other Circuits, see Fifth Circuit § 1.07; Sixth Circuit § 1.06; Seventh Circuit § 1.05; Eighth Circuit §§ 1.03 & 1.04; Ninth Circuit § 1.6.

This instruction provides a general explanation of what the terms direct and circumstantial evidence, infer and inference mean in the context of a trial. This instruction should be given in most cases since it is likely that the lawyers will use these terms.

In *Woodson v. Scott Paper Co.*, 109 F.3d 913 (3d Cir. 1997), the Third Circuit defined "direct evidence" as "evidence that proves an ultimate fact in a case without any process of inference, save inferences of credibility." Direct evidence is evidence given by a witness as to a fact which the witness has observed or perceived. In contrast to direct evidence, circumstantial evidence is offered to prove an ultimate fact, but an inferential step by the fact finder is required to reach that fact. *See United States v. Casper*, 956 F.2d 416 (3d Cir. 1992). It is essential that there be a logical and convincing connection between the facts established and the conclusion inferred. *See, e.g., County Court v. Allen*, 442 U.S. 140 (1979); *United States v. Soto*, 539 F.3d 191, 194 (3d Cir. 2008) (quoting *United States v. Cartwright,* 359 F.3d 281, 287 (3d Cir.2004)). The fact that evidence is circumstantial does not mean that it has less probative value than direct evidence. *See Lukon v. Pennsylvania R. Co.*, 131 F.2d 327 (3d Cir. 1942).

**Inferences not Presumptions.** In criminal cases, the Constitution mandates the use of permissive inferences rather than presumptions. *See Sandstrom v. Montana*, 442 U.S. 510, 515-17 (1979). The court should avoid the use of the term presume because it may unconstitutionally shift the burden of proof to the defendant.

(revised 12/09)

**1.10 Credibility of Witnesses**

**In deciding what the facts are, you must decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses. Credibility refers to whether a witness is worthy of belief: Is the witness truthful? Is the witness' testimony accurate? You may believe everything a witness says, or only part of it, or none of it.**

**You may decide whether to believe a witness based on his or her behavior and manner of testifying, the explanations the witness gives, and all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection. In deciding the question of credibility, remember to use your common sense, your good judgment, and your experience.**

**In deciding what to believe, you may consider a number of factors:**

**(1) The opportunity and ability of the witness to see or hear or know the things about which the witness testifies;**

**(2) The quality of the witness' knowledge, understanding, and memory;**

**(3) The witness' appearance, behavior, and manner while testifying;**

**(4) Whether the witness has an interest in the outcome of the case or any motive, bias, or prejudice;**

**(5) Any relation the witness may have with a party in the case and any effect**

**that the verdict may have on the witness;**

**(6) Whether the witness said or wrote anything before trial that is different from the witness' testimony in court;**

**(7) Whether the witness' testimony is consistent or inconsistent with other evidence that you believe** *[alternative: how believable the witness' testimony is when considered with other evidence that you believe]*; **and**

**(8) Any other factors that bear on whether the witness should be believed.**

**Inconsistencies or discrepancies in a witness' testimony or between the testimony of different witnesses may or may not cause you to disbelieve that witness' testimony. Two or more persons witnessing an event may simply see or hear it differently. Mistaken recollection, like failure to recall, is a common human experience. In weighing the effect of an inconsistency, you should consider whether it is about a matter of importance or an insignificant detail. You should also consider whether the inconsistency is innocent or intentional.**

**You are not required to accept testimony even if the testimony is not contradicted and the witness is not impeached. You may decide that the testimony is not worthy of belief because of the witness' bearing and demeanor, or because of the inherent improbability of the testimony, or for other reasons that are sufficient to you.**

**After you make your own judgment about the believability of a witness, you**

**can then attach to that witness' testimony the importance or weight that you think it deserves.**

**The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testify. What is more important than numbers is how believable the witnesses are, and how much weight you think their testimony deserves.**

**Comment**

*See* 1A O'Malley et al, supra, § 15.01 (Credibility of Witnesses--Generally). For variations in other Circuits, *see* First Circuit § 1.08; Fifth Circuit § 1.02; Eighth Circuit § 1.06; Ninth Circuit §§ 1.10, 1.11; Eleventh Circuit § 3.1.

This instruction should be given in the preliminary instructions at the beginning of the trial. In the final instructions, Instruction No. 3.04 (Credibility of Witnesses) should be given. The last paragraph of this instruction may be given usefully in a case in which witnesses on one side outnumber the other.

Some judges may want to explain the factors in this instruction by presenting them as questions that the jurors should ask themselves. *See* Sixth Circuit § 1.07.

## 1.11 Nature of the Indictment

**The government has charged the defendant** *(name)* **with violating federal law, specifically** *(state the offense(s) charged)*. **The charge***(s)* **against** *(name) (is) (are)* **contained in the indictment. An indictment is just the formal way of specifying the exact crime***(s)* **the defendant is accused of committing. An indictment is simply a description of the charge***(s)* **against a defendant. It is an accusation only. An indictment is not evidence of anything, and you should not give any weight to the fact that** *(name)* **has been indicted in making your decision in this case.**

**Comment**

*See* 1A O'Malley et al, supra, §10.01. For variations in other Circuits, *see* First Circuit § 1.02; Sixth Circuit § 1.03; Seventh Circuit § 2.01; Ninth Circuit § 1.2; Eleventh Circuit § 2.1.

**1.12 Elements of the Offense*(s)* Charged**

**The defendant** *(name)* **is charged in the indictment with committing the offense of** *(state the offense charged).* **To help you follow the evidence, I will now give you a brief summary of the elements of that offense, each of which the government must prove beyond a reasonable doubt in order to convict** *(name)* **of the offense charged. The elements are:**

**First:** *(State the first element)*;

**Second:** *(State the second element)*;

**Third:** *(State the third element)*; **and**

*(State each additional element).*

*(Name)* **is also charged with committing the offense of** *(state any additional offenses charged).* **The elements of that offense are:**

*(State the elements of any additional offenses, as above.)*

**What I have just told you is only a preliminary outline of the elements of the offense*(s)* charged. At the end of trial, I will give you final instructions on the elements of the offense*(s)* charged and on other matters of law. Those final instructions will be more detailed; they will guide you in reaching your verdict in this case.**

**Comment**

*See* 1A O'Malley et al, supra, § 10.01. For variations in other Circuits, *see* First Circuit §

1.04; Eighth Circuit § 1.02; Ninth Circuit § 1.2; Eleventh Circuit Basic Instructions § 8.

The trial judge should outline the elements of each offense charged, in language that is as plain as possible. In a complex case or where there are complicated charges, the trial judge might find it useful to confer with the attorneys before the preliminary instructions to discuss how to formulate the preliminary instruction on the elements of the offenses.

**Studies on Preliminary Instructions Regarding Elements of Charged Offense(s).** Giving the jury in preliminary instructions at the beginning of the trial a brief outline of the elements of the offense(s) charged will assist the jurors in understanding the evidence as it is presented and also in understanding the judge's final instructions explaining the elements in more detail. Field studies and experiments suggest that such preliminary instructions ("preinstruction") improve jury performance, especially in more complicated cases. Lynne ForsterLee et al., *Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality*, 78 J. APPLIED PSYCHOL. 14 (1993); Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making*, 76 J. APPLIED PSYCHOL. 220 (1991); Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUM. BEHAV. 409 (1989); Donna Cruse & Beverly A. Browne, *Reasoning in a Jury Trial: The Influence of Instructions*, 114 J. GEN. PSYCHOL. 129 (1987); Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 J. PERSONALITY & SOCIAL PSYCHOLOGY 1877 (1979); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163 (1977). The benefits of preinstruction may be heightened when jurors are also permitted to take notes during trial. Lynne ForsterLee & Irwin A. Horowitz, *Enhancing Juror Competence in a Complex Trial*, 11 APPLIED COGNITIVE PSYCHOLOGY 305 (1997). Preinstruction has also received favorable reviews from practitioners in at least one study. Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985). A practical problem noted in one study is that, of course, it is not always possible to anticipate the precise nature of the issues before evidence is presented. Vicki L. Smith, *The Feasibility and Utility of Pretrial Instruction in the Substantive Law: A Survey of Judges*, 14 LAW & HUM. BEHAV. 235 (1990).

For comprehensive instructions on the elements of many federal crimes, *see* the model instructions in Chapter 6 (Elements of Offenses).

If the indictment contains multiple counts or if there are multiple defendants who are being tried together, *see* Instructions Nos. 1.14-1.17 (Separate Consideration).

## 1.13 Presumption of Innocence; Burden of Proof; Reasonable Doubt

**The defendant** *(name)* **has pleaded not guilty to the offense***(s)* **charged.** *(Name)* **is presumed to be innocent.** *(He) (She)* **starts the trial with a clean slate, with no evidence against** *(him) (her)***. The presumption of innocence stays with** *(name)* **unless and until the government presents evidence that overcomes that presumption by convincing you that** *(name)* **is guilty of the offense***(s)* **charged beyond a reasonable doubt. The presumption of innocence requires that you find** *(name)* **not guilty, unless you are satisfied that the government has proved guilt beyond a reasonable doubt.**

**The presumption of innocence means that** *(name)* **has no burden or obligation to present any evidence at all or to prove that** *(he) (she)* **is not guilty. The burden or obligation of proof is on the government to prove that** *(name)* **is guilty, and this burden stays with the government throughout the trial.**

**In order for you to find** *(name)* **guilty of the offense***(s)* **charged, the government must convince you that** *(name)* **is guilty beyond a reasonable doubt. That means that the government must prove each and every element of the offense***(s)* **charged beyond a reasonable doubt. A defendant may not be convicted based on suspicion or conjecture, but only on evidence proving guilt beyond a reasonable doubt.**

**Proof beyond a reasonable doubt does not mean proof beyond all possible doubt or to a mathematical certainty. Possible doubts or doubts based on conjecture or speculation are not reasonable doubts. A reasonable doubt is a fair doubt based**

**on reason, logic, common sense, or experience. A reasonable doubt means a doubt that would cause an ordinary reasonable person to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the lack of evidence, or from the nature of the evidence.**

**If, after hearing all the evidence, you are convinced that the government has proved** *(name)* **guilty beyond a reasonable doubt, you should return a verdict of guilty. However, if you have a reasonable doubt as to an element of an offense, then you must return a verdict of not guilty.**

**Comment**

*See* 1A O'Malley et al, supra, § 10.01. For variations in other Circuits, *see* First Circuit § 1.02, Fifth Circuit §§ 1.01 & 1.05, Sixth Circuit § 1.03, Seventh Circuit §2.03, Ninth Circuit §1.2, Eleventh Circuit § 2.1.

It is imperative that the trial judge accurately define the government's burden of proof and the meaning of "beyond a reasonable doubt." As long as these concepts are accurately conveyed to the jury, there are no specific words that must be used. *See, e.g., United States v. Dufresne*, 58 Fed. Appx. 890 (3d Cir. 2003); *United States v. Hernandez*, 176 F.3d 719 (3d Cir. 1999). This instruction is modeled after the instructions the Third Circuit approved in these cases. In *United States v. Hoffecker*, 530 F.3d 137, 175 (3d Cir. 2008), the Third Circuit noted that the reasonable doubt instruction upheld in that case and approved in *Hernandez* mirrored our model instruction, Third Circuit Model Criminal Jury Instructions § 3.06.

**"Two Inference" Instruction Disapproved.** In *United States v. Issac*, 134 F.3d 199 (3d Cir. 1998), the Third Circuit considered a challenge to the district court's instructions on reasonable doubt. Specifically the district court gave the so-called "two inference" instruction, as follows: "So if the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, the jury should, of course, adopt the conclusion of innocence." 134 F.3d at 202. The Third Circuit in *Issac* first noted that in *United States v. Jacobs,* 44 F.3d 1219, 1226 & n. 9 (3d Cir.), *cert. denied,* 514 U.S.1101 (1995), it "urged trial courts to heed the Second Circuit's criticism of the "two-inference" instruction when it is specifically brought to their attention." (The Court's reference to the Second Circuit was to *United States v. Inserra,* 34 F.3d 83, 91 (2d Cir.1994), which held that the "two-inference"

instruction is improper because it "may mislead a jury into thinking that the government's burden is somehow less than proof beyond a reasonable doubt,"quoting *United States v. Khan,* 821 F.2d 90, 93 (2d Cir.1987)). The Third Circuit in *Issac* continued, "Although we disapproved of the "two-inference" instruction in *Jacobs,* we did not hold that the instruction was so constitutionally deficient *per se* that it infected the entire instruction on reasonable doubt. 44 F.3d at 1226." Ultimately, the Third Circuit upheld the instruction in *Issac*, because "this deficiency was rectified by the remainder of the reasonable doubt instruction." 134 F.3d at 202. Courts are, nevertheless, advised to instruct in accordance with the instruction above and to abstain from using the "two-inference" instruction.

(revised 12/09)

## 1.14 Separate Consideration – Single Defendant Charged with Multiple Offenses

*(Name)* **is charged with** *(more than one offense) (several offenses)*; **each offense is charged in a separate count of the indictment.**

**The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. You must separately consider the evidence that relates to each offense, and you must return a separate verdict for each offense. For each offense charged, you must decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of that particular offense.**

**Your decision on one offense, whether guilty or not guilty, should not influence your decision on any of the other offenses charged. Each offense should be considered separately.**

**Comment**

*See* 1A O'Malley et al, supra, § 10.01. For variations in other Circuits, *see* Fifth Circuit § 1.21; Sixth Circuit § 2.01A; Ninth Circuit § 3.12; Eleventh Circuit § 10.1

## 1.15 Separate Consideration – Multiple Defendants Charged with a Single Offense

**The defendants *(names)* are all charged with one offense. In our system of justice, however, guilt or innocence is personal and individual. You must separately consider the evidence against each defendant, and you must return a separate verdict for each defendant. For each defendant, you must decide whether the government has proved that particular defendant guilty beyond a reasonable doubt.**

**Your decision on one defendant, whether guilty or not guilty, should not influence your decision on any of the other defendants. Each defendant should be considered individually.**

**Comment**

*See* 1A O'Malley et al, supra, § 10.01. For variations in other Circuits, *see* Fifth Circuit § 1.22; Sixth Circuit § 2.01B; Ninth Circuit § 3.13; Eleventh Circuit § 10.03.

## 1.16 Separate Consideration – Multiple Defendants Charged with the Same Offenses

**The defendants** *(names)* **are all charged with** *(more than one offense) (several offenses)*; **each offense is charged in a separate count of the indictment. The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. Also, in our system of justice, guilt or innocence is personal and individual. You must separately consider the evidence against each defendant on each offense charged, and you must return a separate verdict for each defendant on each offense. For each defendant and offense, you must decide whether the government has proved beyond a reasonable doubt that the particular defendant is guilty of the particular offense.**

**Your decision on any one defendant or any one offense, whether guilty or not guilty, should not influence your decision on any of the other defendants or offenses. Each defendant and each offense should be considered separately.**

**Comment**

*See* 1A O'Malley e al, supra, § 10.01. For variations in other Circuits, *see* Fifth Circuit § 1.22; Sixth Circuit § 2.01B & C; Ninth Circuit § 3.13; Eleventh Circuit § 10.03.

## 1.17 Separate Consideration – Multiple Defendants Charged with Different Offenses

**The defendants *(names)* are charged with different offenses. I will explain to you in more detail shortly which defendants are charged with which offenses. Before I do that, however, I want to emphasize several things.**

**The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. Also, in our system of justice, guilt or innocence is personal and individual. You must separately consider the evidence against each defendant on each offense charged, and you must return a separate verdict for each defendant for each offense. For each defendant and each offense, you must decide whether the government has proved beyond a reasonable doubt that a particular defendant is guilty of a particular offense.**

**Your decision on any one defendant or any one offense, whether guilty or not guilty, should not influence your decision on any of the other defendants or offenses. Each defendant and each offense should be considered separately.**

**Comment**

*See* 1A O'Malley et al, supra, § 10.01. For variations in other Circuits, *see* Fifth Circuit § 1.23; Sixth Circuit § 2.01D; Ninth Circuit § 3.14; Eleventh Circuit § 10.04.

## 1.18 Pro Se Defendant

*(Name of defendant)* **has decided to represent** *(himself) (herself)* **in this trial and not to use the services of a lawyer.** *(He) (She)* **has a constitutional right to do that.** *(His) (Her)* **decision has no bearing on whether** *(he) (she)* **is guilty or not guilty, and it must not affect your consideration of the case.**

**Because** *(name of defendant)* **has decided to act as** *(his) (her)* **own lawyer, you will hear** *(him) (her)* **speak at various times during the trial.** *(He)(She)* **may make an opening statement and closing argument.** *(He) (She)* **may ask questions of witnesses, make objections, and argue to the court. I want to remind you that when** *(name of defendant)* **speaks in these parts of the trial** *(he) (she)* **is acting as a lawyer in the case, and** *(his) (her)* **words are not evidence. The only evidence in this case comes from witnesses who testify under oath on the witness stand and from exhibits that are admitted.**

**Comment**

This instruction is derived from Eighth Circuit § 2.22 and Federal Judicial Center § 6.

**Assuring Valid Counsel Waiver.** This instruction should be given when a defendant exercises the constitutional right under *Faretta v. California*, 422 U.S. 806 (1975), to waive the Sixth Amendment right to assistance of counsel and proceed pro se. In order to assure that the waiver is valid, the court should engage in a colloquy with the defendant following the outline set forth in *United States v. Peppers*, 302 F.3d 120, 136-37 (3d Cir. 2002) (based in part on § 1.02 of the *Benchbook for U.S. District Court Judges* (4th ed. 2000)). *See also Iowa v. Tovar*, 541 U.S. 77, 88-91 (2004) (emphasizing that there is no script for the colloquy and that the requirements depend on the particular circumstances of the case and holding that the trial court was not required to inform the defendant that an attorney could provide an independent opinion or that without an attorney the defendant risked overlooking a defense).

The instruction informs the jury of the defendant's choice to proceed pro se. In addition, it directs the jury to treat the words spoken by the defendant while functioning as counsel like those of any other lawyer and not to treat them as evidence in the case.

**Standby Counsel.** The court may appoint standby counsel to assist the pro se defendant. A pro se defendant is not constitutionally entitled to standby counsel or to hybrid representation, in which the defendant shares the role of counsel with standby counsel. *See McKaskle v. Wiggins,* 465 U.S. 168 (1984). Nevertheless, the trial court has discretion to permit either and may even appoint standby counsel over the defendant's objection. *See McKaskle*, 465 U.S. 182-83; *Faretta*, 422 U.S. at 834 n.46. In *McKaskle*, the Court held that the pro se defendant is constitutionally entitled to actual control of the case and the appearance to the jury of actual control; standby counsel must interfere with neither aspect of the right to self-representation. *McKaskle*, 465 U.S. at 187. If the court appoints standby counsel, the court may wish to inform the jury of standby counsel's role in the case.

## 1.19 Corporate Criminal Responsibility *[if there is a corporate defendant]*

**The defendant** *(name)* **is a corporation. A corporation is a legal entity that may act only through individuals who are called its agents. The agents of a corporation are its officers, directors, employees, and other persons who are authorized by the corporation to act for it.**

**You may find a corporate defendant guilty or not guilty of the offense***(s)* **charged under the same instructions that apply to an individual defendant. You must give to a corporate defendant the same impartial consideration of the evidence that you would give to any individual.**

**The legal responsibility of a corporation, if any, is based on the conduct of its agents. To find** *(name of corporate defendant)* **guilty of the offense***(s)* **charged, you will need to find that the government proved beyond a reasonable doubt that each of the elements of** *(the) (each)* **offense was committed by an officer, director, employee, or some other agent of** *(name of corporate defendant)* **and that this person committed those elements within the course and scope of** *(his) (her)* **employment or agency and that this person committed those elements with the intent to benefit** *(name of corporate defendant*).

**This is only a preliminary outline of corporate criminal responsibility. At the end of the trial, I will give you final instructions on corporate criminal responsibility and on other matters of law. Those final instructions will be more detailed; they will guide you in reaching your verdict in this case**

**Comment**

This instruction should be given as part of preliminary instructions when there is a corporate defendant. In those cases, the final instructions should also include Instruction No. 7.06 (Corporate Criminal Responsibility), which more fully explains corporate criminal responsibility. Neither O'Malley et al, supra, nor the other Circuits include a preliminary instruction on this point, but they do include final instructions on corporate criminal responsibility, as listed in the Comment to Instruction 7.06 (Corporate Criminal Responsibility).

## Chapter 2: Instructions For Use During Trial

**2.01 Recesses**

**We are about to take a break or recess during the trial, and I want to remind you of the instructions I gave you earlier about your conduct as jurors.**

**During this recess and all other recesses, do not discuss this case with anyone, including your fellow jurors, other people involved in the trial, members of your family, friends, or anyone else. Do not speak at all with any of the parties, the witnesses, or the attorneys. Do not permit anyone to discuss the case with you. If anyone approaches you and tries to talk to you about the case, please report that to me, through my courtroom deputy, immediately.**

**While I do not know whether there is any news coverage of this case, do not watch or listen to any news reports concerning this trial on television or on radio and do not read any news accounts of this trial in a newspaper or on the Internet. Do not use the internet to search for information about the parties, witnesses, lawyers, or anyone else associated with the trial. The only information you are to consider in deciding this case is what you learn in this courtroom.**

**Remember to keep an open mind. Do not make up your mind about the verdict until you have heard all the evidence, I have given you final instructions about the law at the end of trial, and you have discussed the case with your fellow jurors during your deliberations.**

**Comment**

*See* Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A *Federal Jury Practice and Instructions* [hereinafter O'Malley et al, supra] § 11.01(Admonitions At

Court Recess--Long Form), § 11.02 (Admonitions At Court Recesses--Short Form). For variations, *see* Eighth Circuit § 2.01; Ninth Circuit § 2.1.

## 2.02 Stipulated Testimony

**The parties have agreed what** (*name of witness*)**'s testimony would be if called as a witness. You should consider that testimony in the same way as if it had been given here in court by the witness.**

### Comment

The instruction is derived from Ninth Circuit § 2.3. For variations, *see* Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal Volumes* (Matthew Bender 2003) [hereinafter, Sand et al., supra] 5-7 and Eighth Circuit § 2.02.

When the parties stipulate to what a witness would testify to if called, it is error to instruct the jury that it must consider the stipulated testimony as true. *See United States v. Bennally*, 756 F.2d 773 (10th Cir. 1985). *See* Instruction 2.03 (Stipulation of Fact) if the stipulation is as to an issue of fact.

## 2.03 Stipulation of Fact

**The Government and the defendant***(s)* **have agreed that** *(set forth stipulated fact(s)) (is)(are)* **true. You should therefore treat** *(this fact)(these facts)* **as having been proved. You are not required to do so, however, since you are the sole judge of the facts.**

### Comment

*See* 1AO'Malley et al., supra, § 12.03, Sand et al., supra, 5-6, and Ninth Circuit § 2.4. For variations, *see* Ninth Circuit § 2.4 and Federal Judicial Center § 12.

In a criminal case, the jury is not necessarily bound by a stipulation between the parties. In *United States v. Cornish*, 103 F.3d 302 (3d Cir. 1997), the defendant unsuccessfully argued that the trial court's instruction gave too binding an effect to the stipulation concerning the defendant's prior conviction. The trial court simply instructed the jury that "it's been agreed that on April 16th, 1994, defendant had been previously convicted of such a crime." The Third Circuit concluded that the instruction was not plain error. Nevertheless, the court appeared to express a preference for instructions that tell the jurors they "should" treat stipulated facts as having been proved, commenting that such instructions "avoid the hazard, apparent or not, of directing a verdict on a factual issue and would be shielded from constitutional challenge." *Id.* at 306-07.

In cases where a stipulation may amount to an admission to an element of the offense, the judge may wish to exercise caution. The Third Circuit has yet to address the question, but judges may wish to ascertain that the defendant understands the contents of the stipulation and agrees to it.

## 2.04 Judicial Notice (F.R.E. 201)

**I have taken judicial notice of certain facts.** *(State the fact(s) that are being judicially noticed.)* **I believe** *(this fact is)(these facts are) [(of such common knowledge)(can be so accurately and readily determined from) (name accurate source)]* **that** *(it)(they)* **cannot reasonably be disputed. You may accept this fact as proven, but are not required to do so. As with any fact, the final decision whether or not to accept it is for you to make, and you are not required to agree with me.**

### Comment

This instruction is derived from Eighth Circuit § 2.04. For variations, *see* 1A O'Malley et al., supra, § 12.03; Sand et al., supra, 5-5; Sixth Circuit § 7.19; Seventh Circuit § 1.02; and Ninth Circuit § 2.5.

Rule 201 of the Federal Rules of Evidence governs judicial notice of adjudicative facts. Rule 201(b) defines the kinds of facts that may be judicially noticed:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Judicial notice may be taken at any stage of the proceedings, but generally only after the parties have been afforded an opportunity to be heard on the matter. An instruction on judicial notice should be given at the time that notice is taken. It may also be given at the time the jury is charged at the close of the evidence.

Rule 201(g) directs that "[i]n a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." In this regard, the rule for criminal cases differs from the rule for civil cases, in which the jury has no discretion to reject judicially noticed facts. The Third Circuit has noted with approval instructions that adhere to the language of the rule for criminal cases. *See United States v. Mitchell*, 365 F.3d 215, 251 n.28 (3d Cir. 2004); *United States v. Saada*, 212 F.3d 210, 223 (3d Cir. 2000). While approving the trial court's instructions in both *Mitchell* and *Saada*, the court did not include the text of either instruction. As a result, it is not clear whether the court tracked the language of the rule exactly.

## 2.05 Audio/Video Recordings - Consensual

**You are about to hear** *(audio)(video)* **recordings of conversations with the defendant***(s)* **made without** *(his)(her)(their)* **knowledge. These recordings were made with the consent and agreement of** *(name)*, **one of the other parties to the conversations.**

**The use of this procedure to gather evidence is lawful and the recordings may be used by either party.**

### Comment

*See* Sand et al., supra, 5-10.

This instruction addresses the jurors' possible concern about the legality of recordings offered in evidence. It should not be given routinely, but should be given if there is reason to believe the jury would be concerned and if it is requested by either party.

## 2.06 Audio/Video Recordings – Non-consensual (Wiretaps)

**You are about to hear recordings of conversations with the defendant*(s)* which were made without the knowledge of the parties to the conversations, but with the consent and authorization of the court. These recordings, sometimes referred to as wiretaps, were lawfully obtained.**

**The use of this procedure to gather evidence is lawful and the recordings may be used by either party.**

**Comment**

*See* Sand et al., supra, 5-11.

This instruction addresses the jurors' possible concern about the legality of recordings offered by the government. It should not be given routinely, but should be given if there is reason to believe the jury would be concerned and if it is requested by either party.

## 2.07 Audio/Video Recordings - Transcripts

**You are about to hear *(audio)(video)* recordings that were received in evidence, and you will be given written transcripts of the recordings.**

**Keep in mind that the transcripts are not evidence. They are being given to you only as a guide to help you follow what was being said. The recordings themselves are the evidence. If you notice any differences between what you hear in the recordings and what you read in the transcripts, you must rely on what you hear, not what you read. And if you cannot hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned.**

*[The transcripts name the speakers. But remember, you must decide who is actually speaking in the recording. The names on the transcript are used simply for your convenience.]*

**Comment**

*See* Sixth Circuit § 7.17 and Eighth Circuit § 2.06. For variations, *see* 1A O'Malley et al., supra, § 14.09; Sand et al, supra, 5-9; First Circuit § 2.08; Fifth Circuit § 1.42; Seventh Circuit § 3.17; and Ninth Circuit § 2.17.

Audio and video recordings are generally admissible "'[u]nless the unintelligible portions of the tapes are so substantial as to render the recordings as a whole untrustworthy.'" *United States v. Salvo*, 34 F.3d 1204, 1220 (3d Cir. 1994) (citing *United States v. Arango-Correa*, 851 F.2d 54, 58 (2d Cir. 1988) (quoting *Monroe v. United States*, 234 F.2d 49, 55 (D.C. Cir.), *cert. denied*, 352 U.S. 873 (1956))).

The trial judge has discretion to admit transcripts for use with the recordings. In *United States v. Adams*, 759 F.2d 1099, 1115 (3d Cir.), *cert. denied*, 474 U.S. 906 (1985), the court upheld the admission of a tape recording and transcript, noting that "the judge instructed the jury that the tape recording controlled over the transcript in case of error or ambiguity." *See also Salvo*, 34 F.3d at 1220 (concluding that trial court's instruction that tape controlled and transcript was not evidence protected against unfairness).

This instruction should be given when the recording is played. Instruction 4.06 (Audio/Video Recordings - Transcripts) should be included in the final charge.

The bracketed paragraph should be included only if there is a dispute about the identity of the speakers in the recording . *Government of the Virgin Islands v. Martinez*, 847 F.2d 125, 128 (3d Cir. 1988). When such a dispute arises, the preferred solution is to use neutral designations, such as “Speaker 1" and “Speaker 2" rather than names. *Id.* at 129.

If defense counsel contests the accuracy of a government transcript, the court should consult with the attorneys to determine how to handle the question of the accuracy of the transcript. In some cases, the defense may prefer to address the question entirely on cross-examination and will not offer a defense transcript. If the defense offers its own transcript, the attorneys may request that the jurors have both the defense transcript and the prosecution transcript as they listen to the recording. Alternatively, the defense may prefer to have the entire recording or portions of the recording replayed for the jury during the defense case. If the court admits two alternative transcripts, the court should give the jury an appropriately adapted version of the following instruction, based on the instruction suggested by Sand in the notes to Instruction 5-9:

> You have been handed two separate transcripts. One contains the government's interpretation of what appears on the tape recording; the other contains the defense interpretation. Both of these versions of the transcript have been given to you as a guide to assist you in listening to the tapes. Neither transcript has been received in evidence. Rather, it is the tape recording which is the evidence and the transcripts are only guides. Therefore, you must listen to the tapes themselves very carefully. You alone should make your own interpretation of what appears on the tapes from what you hear. You may use both the government version and the defense version of the transcripts to assist you in this task. If you think you hear something differently than the government or the defense has interpreted on their versions of the transcripts, then you are to follow your own interpretation. You may agree partially with each, and you may accept those portions you agree with and reject those portions you disagree with. You need not select between the two versions, and you may come up with your own findings of what appears on the tapes.
>
> You, the jury, are the sole judges of the facts.

## 2.08 Transcript of Recording in Foreign Language

**You are about to listen to** *(an audio)(a video)* **recording in** *(language used)*. **Each of you has been given a transcript of the recording which has been admitted into evidence. The transcript is a translation of the foreign language recording.**

**Although some of you may know the** *(language used)*, **it is important that all jurors consider the same evidence. Therefore, you must accept the English translation contained in the transcript and disregard any different meaning.**

**Comment**

This instruction is derived from Ninth Circuit § 2.8.

This instruction should be given when recordings in a foreign language are admitted.

When foreign language recordings are introduced, the court should first encourage the parties to agree on a transcript. *United States v. Zambrana*, 841 F.2d 1320, 1335-36 (7th Cir. 1988). If the parties cannot agree on a transcript, then each party may produce its own version either of the entire transcript or of disputed portions of the transcript and also present evidence to establish the accuracy of its transcript. In addition, each party may introduce evidence to challenge the accuracy of the other party's transcript. *Zambrana*, 841 F.2d at 1336. In the event of a dispute, the court should add the following language to the instruction:

> Whether a transcript is an accurate translation, in whole or in part, is for you to decide. In considering whether a transcript is an accurate translation of a conversation, you should consider the testimony presented to you regarding how, and by whom, the transcript was made. You may consider the knowledge, training, and experience of the translator, as well as the nature of the conversation and the reasonableness of the translation in light of all the evidence in the case.

*See United States v. Gutierrez*, 367 F.3d 733, 736 (8th Cir. 2004); Seventh Circuit § 3.18.

The Committee on Federal Criminal Jury Instructions of the Seventh Circuit also suggests that, if the jury views a visual recording of the conversation, the court should instruct the jury that "You may consider the actions of a person, the facial expressions

and lip movements that you can observe on videotapes to help you to determine the identity of speakers." *See* Seventh Circuit § 3.18 (comment).

## Chapter 2: Instructions For Use During Trial

### 2.09 Opinion Evidence (Expert Witnesses)

**The rules of evidence ordinarily do not permit witnesses to state their own opinions about important questions in a trial, but there are exceptions to these rules.**

**You will hear testimony from** *(state the name of the person(s) who will offer an opinion).* **Because of** *(his)(her)(their)* **knowledge, skill, experience, training, or education in the field of** *(state the witness(es)'s field)*, *(Mr.)(Ms.)(Dr.) (name)* **will be permitted to offer** *(an)* **opinion***(s)* **in that field and the reasons for** *(that)(those)* **opinion***(s)*.

**The opinion***(s) (this)(these)* **witness***(es)* **state***(s)* **should receive whatever weight you think appropriate, given all the other evidence in the case. In weighing this opinion testimony you may consider the witness' qualifications, the reasons for the witness' opinions, and the reliability of the information supporting the witness' opinions, as well as the other factors I will discuss in my final instructions for weighing the testimony of witnesses. You may disregard the opinion***(s)* **entirely if you decide that** *(Mr.)(Ms.)(Dr.) (name)***'s opinion***(s) (is)(are)* **not based on sufficient knowledge, skill, experience, training, or education. You may also disregard the opinion***(s)* **if you conclude that the reasons given in support of the opinion***(s)* **are not sound, or if you conclude that the opinion***(s) (is)(are)* **not supported by the facts shown by the evidence, or if you think that the opinion***(s) (is)(are)* **outweighed by other evidence.**

## Comment

*See* Fed. R. Evid. 702; 1A O'Malley et al., supra, § 14.01. For model or pattern instruction from other Circuits regarding expert or opinion testimony in criminal cases, *see* First Circuit § 2.06; Fifth Circuit § 1.17; Sixth Circuit § 7.03; Eighth Circuit § 4.10; Ninth Circuit § 4.16; Eleventh Circuit § 7.

This instruction should be given at the time a witness is qualified to give an opinion. For a comparable instruction that should be given in the final instructions to the jury, *see* Instruction 4.08 (Opinion Evidence (Expert Witnesses)). This instruction should only be used when an "expert" witness is about to offer opinion testimony. When lay witnesses are permitted to offer an opinion, use Instruction 4.09 (Opinion Evidence (Lay Witnesses)). If both expert and lay witnesses are permitted to give opinion testimony, both sets of instructions should be given.

These instructions avoid labeling the witness as an "expert." If the court refrains from designating the witness as an "expert" this will "ensure[] that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and will protect against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials,* 154 F.R.D. 537, 559 (1994). *See also* Fed. R. Evid. 702 advisory committee's note (2000) (cautioning against instructing the jury that the witness is an "expert").

Before the beginning of trial, the judge should discuss with counsel that they should also avoid using the word "expert" to refer to the witnesses. However, if counsel refers to witnesses as "experts," the trial judge should modify the instruction by telling the jury what an "expert" is. Therefore, the court should include, after the first paragraph of the model instruction set forth above, the following additional paragraph:

> The defendant's lawyer/the prosecutor called *(Mr.)(Ms.)(Dr.)(name)* an expert witness. Someone who is called an expert witness is simply a witness who, because of his or her knowledge, skill, experience, training, or education, may have become knowledgeable in some technical, scientific, or specialized field and therefore is permitted to state an opinion about that field. You should not give any greater weight or credit to *(Mr.)(Ms.)(Dr.)(name)*'s testimony merely because he or she was called an expert witness by the lawyers.

*See* 1A O'Malley et al., supra, § 14.01, 248-49.

Fed. R. Evid. 703 provides that facts or data which are the basis for an expert's opinion but are otherwise inadmissible may nonetheless be disclosed to the jury if the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. In that situation, the comment to the 2000 amendments to the rule states: "If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for

substantive purposes." *See Pineda v. Ford*, 520 F. 3d 237, 247 n. 14 (3d Cir. 2008) (civil case discussing Rule 703 limiting instruction); *United States v. Gradys*, 357 Fed.Appx. 481, 482-83 (3d Cir.2009) (non-precedential) (finding that the defendant's Rule 703 argument was not raised in the trial court and was not plain error).

(Revised 11/10)

## 2.10 Opinion Evidence (Lay Witnesses) (F.R.E. 701)

**Witnesses are not generally permitted to state their personal opinions about important questions in a trial. However, a witness may be allowed to testify to his or her opinion if it is rationally based on the witness' perception and is helpful to a clear understanding of the witness' testimony or to the determination of a fact in issue.**

**In this case, I am permitting** *(name)* **to offer** *(his)(her)* **opinion based on** *(his)(her)* **perceptions. The opinion of this witness should receive whatever weight you think appropriate, given all the other evidence in the case and the other factors I will discuss in my final instructions for weighing and considering whether to believe the testimony of witnesses.**

**Comment**

Federal Rule of Evidence 701 provides that "if the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. *See generally Hirst v. Inverness Hotel Corp.*, 544 F.3d 221 (3d Cir. 2008) (discussing requirements for admission of lay opinion); *United States v. Hoffecker*, 530 F.3d 137, 170-71 (3d Cir. 2008) (discussing Rule 701).

Whether to give this instruction on lay witness opinion testimony is within the trial judge's discretion. Ordinarily, the instruction will not be necessary, but is provided in the event one of the lawyers requests it or the trial judge otherwise considers it necessary in the case on trial. The instruction should not be given routinely for "run of the mill" lay opinion testimony, such as "he looked angry" or "she was driving fast." The instruction should be given when the lay opinion is more like an "expert" opinion or when there is also expert opinion testimony given in the same trial, to avoid the confusion that might result because Instruction 2.09 (Opinion Evidence (Expert Witnesses)) states that opinion testimony is generally not permitted.

If the trial judge decides that an instruction on lay opinion testimony is necessary, the above instruction can be given at the time the witness is giving his or her opinion testimony. For a comparable instruction that should be given in the final instructions to the jury, *see* Instruction 4.09 (Opinion Evidence (Lay Witnesses) (F.R.E. 701)).

(revised 12/09)

## 2.11 Limited Admissibility: Evidence Admitted for a Limited Purpose

**In certain instances evidence may be admitted only for a particular purpose and not generally for all purposes.**

*[You heard evidence that (name of declarant) told the Defendant that (name of victim) was looking for her and had a gun. That evidence was admitted only to explain Defendant's state of mind when she later encountered (name of victim), and you may consider that evidence only in determining Defendant's state of mind and the reasonableness of Defendant's actions. You may not, however, use (name of declarant)'s statement as evidence that (name of victim) actually was looking for Defendant or that (name of victim) actually had a gun.]*

**For the limited purpose for which this evidence has been received you may give it such weight as you feel it deserves. You may not, however, use this evidence for any other purpose not specifically mentioned.**

**Comment**

This instruction is derived from 1A O'Malley et al., supra, § 11.09.

If evidence is admitted for a limited purpose and one of the parties requests a limiting instruction, the court should inform the jury of the limited purpose of the evidence at the time it is introduced. This instruction provides a general template that can be adapted to the specific situation; the bracketed language is an example of a description of evidence and its limited role in the case. If the evidence is admitted only against one defendant in a multiple defendant trial, the court should give Instruction 2.12 (Limited Admissibility: Evidence Admitted Against Only One Defendant) instead. In addition, some specific types of evidence are dealt with in specific instructions. *See, e.g.,* Instruction 2.23 (Defendant's Prior Bad Acts or Crimes (F.R.E. 404(b)). *See generally United States v. Butch*, 256 F.3d 171, 176 n.4 (3d Cir. 2001)(citing with approval trial court's instruction, based on 1A O'Malley et al., supra, § 11.09, limiting consideration of other act evidence admitted under F.R.E. 404(b) for limited purpose).

## 2.12 Limited Admissibility: Evidence Admitted Against Only One Defendant

**You** *(are about to hear)(just heard) (describe testimony or exhibit).* **You can consider** *(this testimony)(this exhibit)* **only in the case against** *(name).* **You must not consider that evidence in the case against the other defendant***(s).* **Each defendant is entitled to have** *(his)(her)* **case decided just on the evidence which applies to** *(him)(her).*

**Comment**

This instruction is derived from Eighth Circuit § 2.14.

If requested, this instruction should be given during the trial of multiple defendants to limit the jury's consideration of evidence admitted against only one defendant. *See generally United States v. Butch*, 256 F.3d 171, 176 n.4 (3d Cir. 2001)(citing with approval trial court's instruction, based on 1A O'Malley et al., supra, § 11.09, limiting consideration of other act evidence admitted under F.R.E. 404(b) for limited purpose).

## 2.13 Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C.A. § 922(g))

**You have heard evidence** *(through a stipulation)* **that the defendant was convicted before this incident in** *(name of court; e.g., a court of the Commonwealth of Pennsylvania)* **of a crime punishable by imprisonment for a term exceeding one year.**

**This prior conviction has been brought to your attention only because it tends to establish one of the elements of the crime of possession of a firearm by a convicted felon as set forth in the indictment, specifically, that the defendant had a prior felony conviction. You are not to speculate as to the nature of the conviction. You may not consider the prior conviction in deciding whether** *(name of defendant)* **was in knowing possession of the gun that** *(he)(she)* **is charged in this case with possessing, which is a disputed issue in this case.**

**The fact that the defendant was found guilty of another crime on another occasion does not mean that** *(he)(she)* **committed this crime on** *(date of offense charged in indictment)*, **and you must not use** *(his)(her)* **guilt of the other crime as proof of the crime charged in this case except for the one element of this crime which I have mentioned. You may find the defendant guilty of this crime only if the government has proved beyond a reasonable doubt all of the elements of this crime and that the defendant committed it.**

**Comment**

This instruction is based on the instruction approved in *United States v. Belk*, 346 F.3d 305, 309 n.4 (2d Cir. 2003).

This instruction should be given when the government introduces evidence that the defendant is a convicted felon as required to prove a violation of 18 U.S.C.A. § 922 (g). Section 922(g) provides:

> It shall be unlawful for any person -
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> * * *
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

In order to establish the defendant's guilt under this section, the government must prove beyond a reasonable doubt that the defendant was convicted of a felony. Evidence of the prior conviction tends to prejudice the defendant, generating a risk that the jury will conclude that the defendant is more likely to have committed the offense(s) for which the defendant is on trial simply because the defendant has previously been convicted. Despite this risk of prejudice, the government must be allowed to prove the felony conviction.

When the defendant is charged only with a violation of §922(g), the court should give this curative instruction when the evidence of the prior conviction is introduced; Instruction 6.18.922G-3 (Evidence of Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))) should be included in the final charge to the jury. The defendant is not entitled to bifurcation of the issues. *See United States v. Jacobs*, 44 F.3d 1219 (3d Cir. 1995).

If the felon in possession charge under §922(g) is joined with other charges, the court should bifurcate the trial of the 922(g) count. In the bifurcated trial, the jury should first hear evidence and deliberate concerning the other counts of the indictment and make a factual determination of whether the defendant was in knowing possession of the firearm. In the second phase of the trial, the jury hears evidence of the defendant's criminal record and deliberates concerning the count charging a violation of Section 922(g). *See, e.g., United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992).

If the court should decide for some reason not to bifurcate the trial, the Third Circuit has expressed a preference for severance of the felon in possession charge, unless the evidence of the prior conviction would be admissible even if the counts were tried separately. *See United States v. Busic*, 587 F.2d 577, 585 (3d Cir. 1978). The defendant is not entitled to severance if the trial court bifurcates the trial. *See United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992).

There are additional steps that the court should take to reduce the prejudice. In *Old Chief v. United States*, 519 U.S. 172 (1997), the Supreme Court recognized the risk of prejudice and held that, where the defendant offered to stipulate that he was a convicted felon, it was reversible error to admit evidence of the name and nature of the offense of which the defendant was convicted. In a bifurcated trial, the prior felony conviction should not be a subject of voir dire. However, in a non-bifurcated trial, the court should address the prior conviction in voir dire. In *United States v. Smith,* 104 Fed. Appx. 266, 275, 2004 WL 1778268 (3rd Cir. 8/10/2004), a non-precedential decision, the Third Circuit noted that "careful *voir dire* can help insure that jurors who would be

influenced by knowledge of the element of a prior felony conviction are not chosen for the jury."

## 2.14 Stricken Testimony, Disregard

**I have ordered *(describe testimony or exhibits)* stricken from the record. This is not proper evidence in the case. You must disregard it entirely. Do not consider *(this testimony)(this exhibit)* in reaching your decision.**

### Comment

This instruction should be given when testimony or exhibits are stricken from the record after they have been presented to the jury. *See, e.g., United States v. Liburd*, 607 F.3d 339 (3d Cir. 2010) (approving court's curative instruction).

(revised 11/10)

## 2.15 Prior Consistent Statements (F.R.E. 801(d)(1)(B))

**You *(just heard)(are about to hear)* evidence that, before *(he)(she)* testified in this trial, *(name)* made statements that were the same as, or similar to, what *(he)(she)* said in the courtroom. You may consider evidence of this statement in determining the facts of this case. In addition, this evidence may help you decide whether you believe *(name)*'s testimony. If *(name)* said essentially the same thing before trial, it may be reason for you to believe *(name)*'s testimony in court.**

**Comment**

This instruction is based on Federal Judicial Center § 34. A prior consistent statement can be offered as substantive evidence under Rule 801(d)(1)(B) of the Federal Rules of Evidence if it "is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." This instruction informs the jurors that they may use the prior consistent statement both to decide the case and to bolster the in-court testimony.

Caution: This instruction should not be given routinely. The prior consistent statements are admitted without limitation, so the jury can consider them in any way it deems relevant. The significance of the prior consistent statements should generally be left to argument of counsel. However, this instruction should be included if prior inconsistent statements are admitted solely to impeach in the same trial as the prior consistent statements. This instruction is then necessary to distinguish the unlimited role of prior consistent statements from the limited role of prior inconsistent statements admitted only to impeach. *See* Instruction 2.16 (Impeachment of Witness - Prior Inconsistent Statement for Credibility Only).

## 2.16 Impeachment of Witness – Prior Inconsistent Statement for Credibility Only

**You have heard the testimony of *(name)*. You have also heard that before this trial *(he)(she)* made a statement that may be different from *(his)(her)* testimony in this trial. It is up to you to determine whether this statement was made and whether it was different from *(his)(her)* testimony in this trial. This earlier statement was brought to your attention only to help you decide whether to believe *(his)(her)* testimony here at trial. You cannot use it as proof of the truth of what the witness said in the earlier statement. You can only use it as one way of evaluating *(name)*'s testimony in this trial.**

***[You have also heard evidence that (this witness)(certain witnesses) made statements before this trial that were (describe requirement; e.g., made under oath, given before the grand jury). When a statement is (describe condition; made under oath, made before the grand jury), you may use it not only to help you decide whether you believe the witness' testimony in this trial but also as evidence of the truth of what the witness said in the earlier statement. But when a statement is (describe condition; e.g., not made under oath, not given before the grand jury), you may use it only to help you decide whether you believe the witness' testimony in this trial and not as proof of the truth of what the witness said in the earlier statement.]***

### Comment

This instruction is based on Sixth Circuit § 7.04 and Seventh Circuit § 3.09. For variations, *see* Sand et al., supra, 7-19; First Circuit § 2.02; Fifth Circuit § 1.10; Eighth Circuit § 3.04; and Eleventh Circuit § 6.1.

Prior inconsistent statements of witnesses may be admitted for two different purposes. First, a witness' statements may be admitted substantively – to prove the truth

of the matters asserted. Second, a witness' statements may be admitted for the limited purpose of impeaching the witness.

Rule 801(d)(1)(A) of the Federal Rules of Evidence allows a prior inconsistent statement to be used substantively as well as to impeach if it was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." If the prior statement falls within Rule 801(d)(1)(A), this instruction should not be given. A key characteristic of statements falling within Rule 801(d)(1)(A) is that they were made under oath. However, even a sworn statement does not fall within the rule and may be used only to impeach if it was not given at a proceeding.

Prior inconsistent statements that do not fall within the rule may still be admissible to impeach the witness. Such a statement is not hearsay because it is not admitted for the truth of the matter asserted, but only for the purpose of impeaching the witness. This instruction should be given to inform the jury of this limited purpose. The defendant is entitled to a limiting instruction at the time of the testimony as well as at the conclusion of the trial. *United States v. Palumbo*, 639 F.2d 123, 128 (3d Cir. 1981); Instruction 4.22 (Impeachment of Witness - Prior Inconsistent Statement for Credibility Only). The court should give the instruction if the defendant requests it. Failure to give the instruction is not necessarily plain error. *United States v. Corson*, 389 F.2d 563 (3d Cir. 1968). To minimize uncertainty concerning the role of inconsistent statements and the need for an instruction, the court may want to advise counsel at the beginning of the trial that they must request a limiting instruction at the time a statement is admitted if they want the jury informed of the limited purpose of the statement.

The bracketed language should be used if both types of prior inconsistent statements have been admitted in the trial – some only to impeach and others for substantive use as well. The court may want to include the bracketed language to emphasize the distinction for the jury.

Some judges may prefer the following variation, based on 1A O'Malley et al., supra, § 15.06:

> The testimony of a witness may be attacked by showing that the witness previously made statements which are different than the witness' testimony here in court. The earlier statements are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during this trial. You must determine whether to believe a witness who has made prior inconsistent statements.
>
> [*If a witness is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of the witness concerning other matters. You may reject all of the testimony of that witness or give it such weight as you determine it deserves*].

**2.17 Impeachment of Defendant's Character Witness (F.R.E. 404, 405)**

**<u>If character witness testified to reputation:</u> You heard *(name of witness)* testify about the defendant's reputation for *(insert character trait covered by testimony)*. On cross-examination of *(name of witness)*, the prosecutor asked *(him)(her)* some questions about whether *(he)(she)* had heard that *(briefly describe the subject of the cross-examination on the character trait, e.g., defendant was convicted of fraud on an earlier occasion)*. The prosecutor was allowed to ask these questions only to test whether *(name of witness)* was familiar with the reputation of the defendant in the community. This is not evidence that the acts described in these questions actually occurred.**

**You may not use the information developed by the prosecutor on this subject for any other purpose. Specifically, you may not use this information to conclude that the defendant committed the act*(s)* charged in the indictment or as proof that the defendant has a bad character or any propensity to commit crimes.**

**<u>If character witness testified to opinion:</u> You heard *(name of witness)* testify about the defendant's character for *(insert character trait covered by testimony)*. On cross-examination of *(name of witness)*, the prosecutor asked *(him)(her)* some questions about whether *(he)(she)* knew that *(briefly describe the subject of the cross-examination on the character trait, e.g., defendant was convicted of fraud on an earlier occasion)*. The prosecutor was allowed to ask these questions only to test whether *(name of witness)* had a good basis for *(his)(her)* opinion of the defendant's character. This is not evidence that the acts described in these questions actually occurred.**

**You may not use the information developed by the prosecutor on this subject for any other purpose. Specifically, you may not use this information to conclude that the defendant committed the act*(s)* charged in the indictment or as proof that the defendant has a bad character or any propensity to commit crimes.**

**Comment**

This instruction is derived from 1A O'Malley et al., supra, § 11.15, Sand et al., supra, 5-16, and Eighth Circuit § 2.10.

This instruction should be given to the jury at the time of the cross-examination when the prosecutor is permitted to cross-examine the defendant's character witness concerning prior instances of the defendant's conduct; Instruction 4.39 (Defendant's Character Evidence) should be included in the final charge to the jury.

Under Rule 404(a) of the Federal Rules of Evidence, a defendant is permitted to introduce evidence of good character to support the inference that the defendant did not commit the offense charged. Instruction 2.15 (Prior Consistent Statements (F.R.E. 801(d)(1)(B))) describes the role of that evidence. Rule 405(a) permits the prosecutor to cross-examine the defendant's character witness concerning specific instances of the defendant's conduct relating to the character trait at issue. The rules thus continue the common law practice discussed in *Michelson v. United States*, 335 U.S. 469 (1948), but with one difference: opinion evidence, which was prohibited at common law, is allowed under the rules. Under the Federal Rules of Evidence, the character witness may testify to either reputation or opinion.

A reputation witness testifies to the defendant's reputation for a specific trait in a specific community, based on conversations with others concerning the defendant. *See Michelson v. United States*, 335 U.S. 469 (1948). Cross-examination of a reputation witness should focus on what the witness has heard and may inquire "about conduct, and even about charges, which may have come to the attention of the relevant community." *See United States v. Curtis*, 644 F.2d 263, 268 (3d Cir. 1981). Guilt-assuming hypothetical questions are not proper during cross-examination of a reputation witness. *See United States v. Kellogg*, 510 F.3d 188, 195-96 (3d Cir. 2007).

An opinion witness testifies to the witness' own opinion of the defendant's character for a specific trait based on that witness' experience with the defendant. Cross-examination of an opinion witness should focus on what the witness knows and will test the accuracy of and basis for the favorable opinion. In *United States v. Curtis*, 644 F.2d 263, 268 (3d Cir. 1981), the Third Circuit noted that, when the character witness testifies to an opinion, "relevant cross examination is only that which bears on the fact or factual basis for formation of the opinion." *See also Kellogg*, 510 F.3d at 198 ("Generally speaking, a person testifying regarding a present opinion should be open to cross-examination on how additional facts would affect that opinion.").

The cross-examination permitted by Rule 405(a) often focuses on prior bad conduct by the defendant and therefore injects a risk of unfair prejudice. The Supreme Court noted in *Michelson*:

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.

335 U.S. at 479. The trial court has broad discretion concerning the cross-examination of character witnesses. *United States v. Boone*, 279 F.3d 163, 175 (3d Cir. 2002); *Kellogg*, 510 F.3d at 192. Correspondingly, the trial judge plays an important role in assuring the fairness of the cross-examination. In *Michelson*, the Court remarked that the discretion to allow relevant cross-examination "is accompanied by heavy responsibility on trial courts to protect the practice from any misuse." 335 U.S. at 480. The Court outlined the safeguards to be taken by the trial court. 335 U.S. at 480-81. The trial court must ensure that the question is fair, that it rests on a factual foundation, and that it is relevant to the character trait addressed by the defendant's witness. 335 U.S. at 480-82. Of course, no evidence may be admitted for the jury establishing that the act occurred.

The Court in *Michelson* also emphasized the importance of limiting instructions directing the jury to consider any prior acts brought out in cross-examination only for purposes of assessing the witness' opinion of the defendant's character trait. *Id.* at 472 n.3. In *Government of Virgin Islands v. Roldan,* 612 F.2d 775, 781 (3d Cir. 1979), the Third Circuit stated, "the defendant is entitled to a limiting instruction to the effect that the prior bad act testimony does not bear on the defendant's propensity to commit such crimes again." *See also United States v. Apfelbaum*, 621 F.2d 62, 64 (3d Cir. 1980)(emphasizing importance of limiting instructions); *Kellogg*, 510 F.3d at 192-93 (setting out trial court's limiting instruction). In *Government of Virgin Islands v. Roldan*, however, the defendant had not requested a limiting instruction, and the Third Circuit held that the trial court did not commit plain error by failing to give an instruction.

(revised 12/09)

## 2.18 Impeachment of Witness – Prior Bad Acts (F.R.E. 608(b))

**<u>Alternative 1</u>*<u>(to be given if the witness admits the bad act):</u>* You have heard evidence that *(name)*, a witness, committed *(describe bad act inquired about during cross-examination)*. You may consider this evidence, along with other pertinent evidence, only in deciding whether to believe *(name)* and how much weight to give *(his)(her)* testimony.**

**<u>Alternative 2</u> *<u>(to be given if the witness denies the bad act):</u>* You heard *(name of lawyer)* ask *(name of witness)* whether *(he)(she)* committed *(describe bad act inquired about during cross-examination)*, and *(he)(she)* denied it. I remind you that questions by the lawyers are not evidence. It is the answer of the witness that provides evidence. There is therefore no evidence that *(name of witness)* committed *(describe act)*.**

### Comment

This instruction is derived from Ninth Circuit § 4.8.

> Rule 608(b) of the Federal Rules of Evidence provides:
> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

Rule 608(b) governs only when the conduct that is the subject of the cross-examination or extrinsic evidence is relevant only to establish the witness' untruthful character. If the evidence is offered to establish something else, such as bias, incompetency, or compromised ability to perceive or recall the events, Rule 608 does not govern. Instead, the court should evaluate the propriety of questions and the admissibility of extrinsic evidence under Rules 402 and 403. *United States v. Abel*, 469 U.S. 45 (1984).

If the court permits cross-examination concerning prior conduct that suggests untruthful character under Rule 608(b), the court should instruct the jury concerning the cross-examination. The appropriate instruction depends on whether the witness admits or denies the prior conduct in response to the questions asked on cross-examination. Alternative 1 should be given if the witness admits the conduct. This instruction merely directs the jury to consider the prior acts in assessing the witness' credibility. However, if the witness denies the conduct, the court should give Alternative 2, directing the jury to draw no inference from the asking of the question. Rule 608(b) precludes the introduction of extrinsic evidence to establish the prior act, so the witness' denial concludes the inquiry. *See United States v. McNeill*, 887 F.2d 448, 453 (3d Cir. 1989); *United States v. Anderson,* 859 F.3d.1171, 1178 (3d Cir. 1988).

Rule 608(b) permits inquiry only concerning prior acts that are probative of untruthful conduct. To fall within the rule, the acts "will normally involve dishonesty or false statement as employed in Rule 609(a)(2)." Graham § 608.4 at 146-47. The Third Circuit has held that Rule 609(a)(2) applies only to crimes that "bear on the witness' propensity to testify truthfully." *See United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004). In *United States v. Irizarry*, 341 F.3d 273 (3d Cir. 2003), the court noted that the trial court properly allowed the prosecutor to cross-examine the defendant about his possession of identification in someone else's name and about his possession of blank Social Security cards. 341 F.3d at 312. The Third Circuit stated that the evidence tended to show deceit and therefore fell within Rule 608(b).

The Third Circuit has also held that the decision whether to allow cross-examination under Rule 608(b) falls within the trial court's discretion. *See United States v. McNeill*, 887 F.2d 448, 453 (3d Cir. 1989). In *Johnson v. Elk Lake School District*, 283 F.3d 138 (3d Cir. 2002), the court held that the trial court acted within its discretion when it precluded plaintiff's counsel from cross-examining a key witness concerning a lie on his resume. *Id.* at 145 n.2. The court noted that the trial court's ruling was reviewed under an abuse of discretion standard with "substantial deference" to the trial court. The court stated that "the trial court was within its discretion to conclude that Stevens' lying on his resume, although duplicitous and wrong, was not so indicative of moral turpitude as to be particularly probative of his character for untruthfulness." *Id.* This result is criticized in Graham who states that "the exercise of discretion should very rarely if ever be exercised to exclude an undisputed act of 'lying'" such as that in *Johnson*. Graham § 608.4 n.5.

The inquiry under Rule 608(b) should focus on the actual acts that suggested untruthfulness and not any third party action, such as suspension from a job, that resulted from those acts. *See United States v. Davis*, 183 F.3d 231, 257 n.12 (3d Cir. 1999). The court may preclude inquiry concerning prior acts if they are remote in time. *See Johnson v. Elk Lake School District*, 283 F.3d 138, 145 n.2 (3d Cir. 2002).

In addition, cross-examination under Rule 608(b) may be limited by the Fifth Amendment. Rule 608(b) provides that no witness, including the accused, waives the Fifth Amendment privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness. The Third Circuit appears not to have addressed this aspect of the rule.

## 2.19 Impeachment of Witness – Prior Conviction (F.R.E. 609)

**You are about to hear evidence that *(name)* has previously been convicted of a crime *(punishable by more than one year in jail)(involving dishonesty or false statement)*. You may consider this evidence, along with other pertinent evidence, in deciding whether or not to believe *(name)* and how much weight to give to *(name)'s* testimony.**

### Comment

This instruction is derived from Ninth Circuit § 4.8 and First Circuit § 2.03. For variations, *see* 1A O'Malley et al., supra, § 15.07; Sand et al., supra, 7-12; Fifth Circuit § 1.12; Sixth Circuit § 7.05B; Seventh Circuit § 3.11; Eighth Circuit § 2.18; and Federal Judicial Center § 30.

This instruction should be given when a witness is to be impeached under Rule 609 of the Federal Rules of Evidence with evidence of a prior conviction. This instruction merely directs the jurors to consider the prior conviction in assessing credibility.

Rule 609 governs the admissibility of prior convictions to impeach. As amended effective December 1, 2006, Rule 609(a) provides:

> (a) General rule.--For the purpose of attacking the character for truthfulness of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

Rule 609 governs the admissibility of prior convictions to impeach. Rule 609(a)(1) permits impeachment of witnesses other than the accused by convictions of crimes punishable by death or imprisonment greater than one year subject only to balancing under Rule 403. Rule 609(a)(2) permits impeachment by conviction of crimes involving false statement or dishonesty; if the crime falls within 609(a)(2), the trial court

must admit the prior conviction. *See United States v. Wong*, 703 F.2d 65, 68 (3d Cir.), *cert. denied,* 464 U.S. 842 (1983). Rule 609(a)(2) is interpreted narrowly and does not include crimes such as theft that do not "bear on the witness' propensity to testify truthfully." *See United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004)(quoting from the Conference Committee notes). As amended, the rule precludes inquiry into the manner in which a crime was committed to establish that it was a crime of dishonesty or false statement. Instead, the nature of the crime must be readily determined.

If more than ten years has passed since the date of conviction or release, the prior conviction is not admissible unless the proponent gives written notice and "the court determines, in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect." Fed. R. Evid. 609(b).

There is no clear authority requiring this instruction. However, the court should give the instruction if requested. It is not clear whether failure to give the instruction will be plain error if the defendant does not request it. *Graham, Handbook of Federal Evidence* § 609.6 at 227-28 (5th ed. 2001).

## 2.20 Impeachment of Witness – Violation of Sequestration Order

**At the beginning of trial, I ordered that no witness *(other than (names of witnesses permitted in courtroom during testimony))* may *(hear)(discuss)(review)* the testimony of another witness before *(he)(she)* testifies *(himself)(herself)*. The purpose of this order was to prevent the testimony of one witness from influencing the testimony of another witness. *(Name of witness)* violated this order. In evaluating *(name of witness)*'s testimony, you may consider the fact that *(name of witness) (describe violation, e.g., remained in the courtroom during the testimony of (name of other witness))*.**

### Comment

This instruction may be given if a witness has violated the court's sequestration order. Rule 615 of the Federal Rules of Evidence provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

Rules permitting sequestration of witnesses are intended to prevent witnesses from coordinating their testimony and to allow the parties to detect falsehood by "exposing inconsistencies in testimony." *Government of the Virgin Islands v. Edinborough*, 625 F.2d 472, 473 (3d Cir. 1980).

As the Third Circuit pointed out in *Pickel v. United States*, 746 F.2d 176, 182 (3d Cir. 1984), the rule "does not explicitly address the question of sanctions for non-compliance." The court went on to note that "case law . . . suggests three appropriate forms of sanctions: (1) holding the witness in contempt, (2) comment by the court on the violation and its effect on weight or credibility of the witness' testimony, and (3) barring or striking the witness' testimony." 746 F.2d at 182 (citations omitted). The court also noted that dismissal might be appropriate, but only in rare cases and only after

consideration of lesser sanctions. 746 F.2d at 182. Determination of the appropriate sanction lies in the court's discretion. *Wright & Miller*, *Federal Practice and Procedure* § 6246. In *Pickel*, however, the Third Circuit concluded that the trial court abused its discretion when it quashed the offending party's summons. 746 F.2d at 182-83.

The Third Circuit has not approved an instruction commenting on a violation of a sequestration order. In *United States v. Ramos-Lopez*, 1988 U.S. App. LEXIS 7378 (3d Cir. 1988), a non-precedential decision, Judge Becker, dissenting from the holding that defendant's counsel's handling of a sequestration violation was not ineffective, commented "I would have expected competent counsel to have sought comment by the court to the jury in the charge, explaining that the jury, in assessing the agent's credibility, could consider the fact that the agent remained in the room during (and probably heard) defendant's testimony." *Id.* at *11. In *United States v. Jimenez*, 780 F.2d 975, 981 (11th Cir. 1986), the Eleventh Circuit commented, "The district court adequately responded to the possibility of prejudice [from the violation of the sequestration order] by specifically instructing the jury that a violation of the rule should be considered in evaluating Agent Robertson's credibility as a witness." *See also Hill v. Porter Memorial Hospital*, 90 F.3d 220, 224 (7th Cir. 1996).

## 2.21 Fifth Amendment Privilege of Witness Other Than the Defendant

**No instruction recommended.**

**Comment**

Witnesses other than the defendant sometimes claim Fifth Amendment protection from compelled self-incrimination and decline to answer questions posed to them in the course of a trial. Generally, an attorney or the witness raises the issue, but in some instances the court may identify the problem and raise it sua sponte. When such an issue arises, the court should take protective steps. First, the court should determine whether the Fifth Amendment claim is valid. Second, the court should insulate the jury from the witness' assertion of the Fifth Amendment privilege by having the witness assert the privilege outside the presence of the jury. Third, if the witness exercises the privilege in the jury's presence, the court should give the jury a cautionary instruction.

*First*, the court should evaluate the validity of the witness' claim. Section 5.03 of the Benchbook for U.S. District Court Judges (March 2000 rev.) suggests the proper procedure. The Benchbook suggests that the judge should excuse the jury and then engage in a colloquy with the witness. The court must determine whether "the witness has reasonable cause to believe that answering the particular question might tend to incriminate him or her." Benchbook, §5.03. *See* also *United States v. Hubbell*, 530 U.S. 27 (2000); *Hoffman v. United States*, 341 U.S. 479 (1951).

The Benchbook does not detail a suggested colloquy but cautions the court "not to interrogate the witness about the claim in such a way as to force the witness to surrender the privilege in order to claim it." Benchbook, §5.03 at 147. In addition, the court should not unduly pressure the witness; a colloquy that exerts undue pressure on a defense witness and persuades the witness not to testify violates the defendant's right to due process. *See Webb v. Texas*, 409 U.S. 95 (1972).

In *United States v. Serrano*, 406 F.3d 1208, 1213-14 (10th Cir. 2005), the court approved the following colloquy, which followed the prosecutor's suggestion that the defendant's witness should be advised of his Fifth Amendment privilege against compelled self-incrimination:

> THE COURT: All right. You may be asked a number of questions here by one of the attorneys that may require you to give testimony about things that you know concerning the shotgun. The government has indicated to me that you have given a statement concerning the sawed-off shotgun. You may be asked questions about matters concerning yourself and that shotgun. And before I permit any questioning about the shotgun and any involvement you may have had with that weapon, if any--I don't know, I don't know what the statements are at this point because the questions have not yet been asked--I need to ask you if you have talked to a lawyer

about any of your constitutional rights, specifically the right against self-incrimination?

THE WITNESS: No, ma'am.

THE COURT: All right. I must advise you that a person such as yourself who is now a witness having been sworn to give testimony in this case, you as a witness ha[ve] the privilege under the 5th Amendment to the United States Constitution to decline to respond to a question if that answer would tend to incriminate you. That is, if that answer would tend to indicate that you were guilty of a crime or would furnish a link in the chain of evidence that would be needed to prosecute you for a crime.

I don't know specifically what information you have and what answers you would give or statements that you would make in response to questions that may be asked of you during the course of your testimony here. However, based upon the representations made by the lawyer for the government here, there may be matters that you would be questioned about that would invoke consideration of the 5th Amendment right. And so when I say that, I ask again whether you have talked to a lawyer about any of these matters?

THE WITNESS: No, ma'am.

THE COURT: Okay. Do you wish to confer with a lawyer about this before you give any further testimony?

THE WITNESS: No, ma'am.

THE COURT: Can you explain to me why? Without going into details about the statement or anything about the gun, just tell me why you feel it is not necessary to talk to a lawyer.

THE WITNESS: Because I'm just telling the truth about everything.

THE COURT: I understand that. Has anyone advised you or talked to you about the consequences, the legal consequences that could occur if you give or make certain statements about the gun, the shotgun, and about your involvement with the shotgun?

THE WITNESS: No, ma'am.

THE COURT: All right. I'm going to--I'm not in a position to determine at this moment that this witness understands the nature of the 5th Amendment privilege. I think he needs counsel, and I'm not going to permit any further questioning until he has had an opportunity to confer with counsel....

The court then appointed an attorney to confer with the witness and recessed. The witness exercised his Fifth Amendment privilege against self incrimination after he conferred with his attorney. In *Serrano*, the Tenth Circuit held that this procedure did not violate the defendant's right to present a defense. 406 F.3d at 1214.

*Second*, if the witness intends to assert the Fifth Amendment privilege and decline to answer specific questions, the court should have the witness invoke the privilege

outside the jury's presence. Jurors may not understand the invocation of the privilege and therefore may draw improper inferences from that invocation, possibly prejudicing the parties. *See Douglas v. Alabama* , 380 U.S. 415, 420 (1965); *Nezowy v. United States*, 723 F.2d 1120, 1124 (3d Cir. 1983); *Williams v. Government of the Virgin Islands*, 271 F.Supp.2d 696, 710-11( D.V.I. 2003).

*Third*, if the witness invokes the privilege in the jury's presence, the court may want to give the following cautionary instruction:

> You heard *(witness' name)(describe manner in which witness invoked Fifth Amendment privilege; e.g., decline to answer a question on the ground that the answer might tend to incriminate her)*. That was *(his)(her)* right under the Constitution, and you are not to draw any inference from that choice. A witness may make that choice for a number of reasons, and it would be improper for you to make any assumption or to try to guess why *(witness' name)* did so. You may not consider or discuss *(witness' name)*'s choice not to answer the question in deciding this case. It is not evidence.

In *Lionti v. Lloyd's Insurance Co.*, 709 F.2d 237, 243 (3d Cir. 1983), a witness asserted his Fifth Amendment privilege in the jury's presence. In discussing other evidentiary issues on appeal, the Third Circuit noted that the district court had reduced the impact of the exercise of the privilege by charging as follows:

> There is one more thing you should bear in mind with regard to this particular witness Brice McLane. He exercised his privilege against self-incrimination. That was his right and you are not to infer anything adverse to either the plaintiffs or anything adverse to the defendants by reason of what Brice McLane did. There may very well be a myriad of reasons why he would choose to exercise his privilege against self-incrimination, and it would be improper for you to make any assumption or to try to guess or to surmise or puzzle out why he chose to exercise that privilege. Accordingly, you are directed that Brice McLane's exercise of his constitutional privilege is to have no evidentiary value at all.

709 F.2d at 243. The Third Circuit has not addressed the question of whether such an instruction is required to be given either sua sponte or if requested. In *United States v. Castillo*, 615 F.2d 878 (9th Cir. 1980), the Ninth Circuit held that the trial court's failure to give a cautionary instruction concerning invocation of Fifth Amendment privilege sua sponte was harmless error.

## 2.22 Witness Who Has Pleaded Guilty to the Same or Related Charges

**You have heard evidence that *(name of witness)* pleaded guilty to charges arising from the events that are the subject of this trial. You must not consider *(name of witness)*'s guilty plea as any evidence of *(name of defendant)*'s guilt. *(Name of witness)*'s decision to plead guilty was a personal decision about *(his)(her)* own guilt. You should disregard *(name of witness)*'s guilty plea completely when considering *(name of defendant)*'s guilt or innocence.**

**Instead, you may consider *(name of witness)*'s guilty plea only for the purpose of *(select appropriate purpose):***

**determining how much, if at all, to rely upon *(his)(her)* testimony; *or***

**foreclosing the suggestion that the party producing the witness was concealing evidence; *or***

**rebutting the inference that the witness was not prosecuted and that *(name of defendant)* was singled out for prosecution; *or***

**explaining the witness' firsthand knowledge of the events; *or***

**rebutting the assertion that *(name of witness)* was acting as a government agent while engaged in the activities that formed the basis of the guilty plea.**

**You should give *(name of witness)*'s testimony the weight you believe it deserves, keeping in mind that it must be considered with caution and great care.**

**Comment**

This instruction is derived from Eighth Circuit § 4.04 and Ninth Circuit § 4.9.

In some cases, the jury may learn that an accomplice has pleaded guilty. The instruction suggests some of the possible reasons the witness' plea may be relevant. The list is not exhaustive, and the court must determine on a case by case basis whether any of the reasons apply. In some cases, the court will not be able to determine the relevance of the witness' plea when it is offered mid-trial and should therefore give only the first paragraph of the instruction.

The government may be permitted to prove the guilty plea to help the jury evaluate the witness' credibility, to show that the defendant was not singled out for prosecution, or to explain how the witness has knowledge of the events. *See United States v. Universal Rehabilitation Services, Inc.,* 205 F.3d 657, 667 (3d Cir. 2000)(en banc). An accomplice's guilty plea may also serve to rebut the assertion that the accomplice was acting as a government agent while participating in the criminal conduct. *See United States v. Werme*, 939 F.2d 108, 113-14 (3d Cir. 1991). However, neither the witness' guilty plea nor the plea agreement may be considered as evidence of the defendant's guilt. *See Universal Rehabilitation Services,* 205 F.3d at 668; *United States v. Gaev*, 24 F.3d 473, 476 (3d Cir. 1994); *United States v. Gambino*, 926 F.2d 1355, 1363 (3d Cir. 1991).

The Third Circuit has emphasized the role of limiting instructions in controlling the prejudicial effect of the witness' guilty plea. *See Universal Rehabilitation Services.,* 205 F.3d at 668; *Gaev*, 24 F.3d at 478; *Werme*, 939 F.2d at 113-14 (holding failure to give limiting instruction was error, but concluding it was harmless). In *Gaev*, the Third Circuit approved the court's instructions. 24 F.3d at 475-76. At the time the witness testified, the trial court gave the following instruction:

> [Y]ou have just heard evidence that this witness has pled guilty to a charge of conspiring to fix prices with the defendant now on trial in this case.
>
> I caution you that although you may consider this evidence in assessing the credibility and testimony of this witness, giving it such weight as you feel it deserves, you may not consider this evidence against the defendant on trial, nor may any inference be drawn against him by reason of this witness' plea.

In its final charge, the trial court reiterated this caution and also instructed the jury concerning the testimony of accomplices and admitted felons who had entered into plea agreements with the government. *See* Instruction 4.19 (Credibility of Witnesses - Witness Who Has Pleaded Guilty to Same or Related Offense, Accomplices, Immunized Witnesses, Cooperating Witnesses).

In addition, if a witness testifies who is cooperating with the government, has entered a plea agreement with the government, or has received immunity, a promise of non-prosecution or some other benefit from the government, the trial court may want to caution the jury. The credibility issues raised by the testimony of such witnesses are addressed in Instructions 4.19 (Credibility of Witnesses - Witness Who Has Pleaded Guilty to Same or Related Offense, Accomplices, Immunized Witnesses, Cooperating Witnesses) and 4.20 (Credibility of Witnesses - Testimony of Informer), to be given in the final charge to the jury.

## 2.23 Defendant's Prior Bad Acts or Crimes (F.R.E. 404(b))

**You have heard testimony that the defendant** *(summarize the other act evidence).*

**This evidence of other act***(s)* **was admitted only for** *(a)* **limited purpose***(s)***. You may only consider this evidence for the purpose of deciding whether the defendant** *(describe the precise purpose for which the other act evidence was admitted: for example [Pick only those of the following, or other reasons, that apply],*

**had the state of mind, knowledge, or intent necessary to commit the crime charged in the indictment;** *or*

**had a motive or the opportunity to commit the acts charged in the indictment;** *or*

**was preparing or planning to commit the acts charged in the indictment;** *or*

**acted with a method of operation as evidenced by a unique pattern** (*describe)*; *or*

**did not commit the acts for which the defendant is on trial by accident or mistake;** *or*

**is the person who committed the crime charged in the indictment.**

**You may consider this evidence to help you decide** *(describe how the evidence will be used to prove identity--e.g., whether the evidence that the defendant committed the burglary in which the gun that is the subject of this trial was stolen*

*makes it more likely that the defendant was the person who placed the gun in the trunk of the car*).

**Do not consider this evidence for any other purpose.**

**Of course, it is for you to determine whether you believe this evidence and, if you do believe it, whether you accept it for the purpose offered. You may give it such weight as you feel it deserves, but only for the limited purpose that I described to you.**

**The defendant is not on trial for committing these other acts. You may not consider the evidence of these other acts as a substitute for proof that the defendant committed the crime***(s)* **charged. You may not consider this evidence as proof that the defendant has a bad character or any propensity to commit crimes. Specifically, you may not use this evidence to conclude that because the defendant may have committed the other act,** *(he)(she)* **must also have committed the act***(s)* **charged in the indictment.**

**Remember that the defendant is on trial here only for** *(state the charges briefly)*, **not for these other acts. Do not return a guilty verdict unless the government proves the crime***(s)* **charged in the indictment beyond a reasonable doubt.**

**Comment**

This instruction is derived from Sixth Circuit § 7.13

This instruction should be given at the time evidence of defendant's other crimes or acts is about to be or has been admitted under Federal Rules of Evidence Rule 404(b). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

*See also United States v. Givan*, 320 F.3d 452, 460-61 (3d Cir. 2003). In *United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988) (citing *Huddleston v. United States*, 485 U.S. 681 (1988)), the court summarized the steps necessary to admit evidence under Rule 404(b):

> [T]he Supreme Court has listed four guidelines for admissibility under the Rule. First, the other crimes evidence must have a proper purpose. Second, the proffered evidence must be relevant. Third, its probative value must outweigh its potential for unfair prejudice. Fourth, the court must charge the jury to consider the other crimes evidence only for the limited purpose for which it is admitted.

The instruction should not merely include a laundry list of permitted uses of other act evidence. Rather, it should specifically state the limited purpose for which the other act evidence is admitted. *Graham, Handbook of Federal Evidence*, § 404.5 n.56 (5th ed. 2001).

The Third Circuit has held that Rule 404(b) is a rule of inclusion rather than exclusion, and the purposes for which such evidence may be offered are not limited to those listed in the rule. *See, e.g., United States v. Jemal*, 26 F.3d 1267, 1272 (3d Cir. 1994); *Scarfo*, 850 F.2d at 1019. Other purposes may include: establishing a prior or continuing relationship, familiarity, background information, understanding a co-conspirator's role, and concert of action. *See Scarfo*, 850 F.2d at 1019. *See also United States v. Gilmore*, 553 F.3d 266, 271 (3d Cir. 2009) (approving use of prior drug convictions to impeach defendant by contradicting his testimony that he had never sold drugs and noting that admission of the evidence is governed by Rules 607 and 403).

The Third Circuit "favor[s] the admission of such evidence, 'if relevant for any other purpose than to show a mere propensity or disposition on the part of the defendant to commit the crime.'" *United States v. Long*, 574 F.2d 761, 766 (3d Cir.), cert. denied, 439 U.S. 985 (1978). *See also United States v. Daraio*, 445 F.3d 253, 263 (3d Cir. 2006) (confirming that admission of 404(b) evidence is favored); *United States v. Johnson*, 199 F.3d 123, 128 (3d Cir. 1999) (noting that rules favor admission). The court has also stated that "the Government has broad latitude to use 'other acts' evidence to prove a conspiracy." *United States v. Cross*, 308 F.3d 308, 324 (3d Cir. 2002). However, improper use of other act evidence may be reversible error. *See United States v. Morena*, 547 F.3d 191 (3d Cir. 2008) (reversing conviction where government exceeded limited purpose for which other act evidence was admissible by repeatedly injecting prejudicial references to defendant's drug use and collateral drug transactions in firearms case).

The proponent of evidence of prior acts "must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged." *United States v. Morley*, 199 F.3d 129, 133 (3d Cir. 1999); *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994). The district court should articulate its reasoning, explaining the permissible inference, unless the purpose of the evidence is "plainly obvious," and balancing the probative value of the evidence against any prejudicial impact. *Daraio*, 445 F.3d at 263. *See also Scarfo*, 850 F.2d at 1019 (noting that one factor under Rule 403 balance is government's genuine need for the evidence which the court must balance against the risk that the other act evidence will influence the jury to convict on improper grounds).

In *United States v. Green,* --- F.3d ----, 2010 WL 3081444 (3d Cir. 2010), the Third Circuit considered whether evidence that the defendant had threatened to kill an undercover officer was properly admitted as intrinsic evidence of the charged offense in the defendant's trial for attempted narcotics possession. The court noted that labeling evidence as intrinsic serves only to deprive the defendant of the procedural protections that accompany admission under Rule 404(b): notice from the prosecution and a limiting instruction from the court. In determining whether the evidence was intrinsic to the charged offense, the Third Circuit rejected as unhelpful the "inextricably intertwined" test used in some other circuits. Instead, the court adopted a limited definition of intrinsic evidence, applying it to only two categories of evidence: 1) evidence that directly proves the charged offense and thus does not fall in the realm of "other crimes, wrongs, or acts" governed by Rule 404(b); and 2) uncharged acts performed contemporaneously with the charged crime provided the uncharged act facilitates the commission of the charged crime. The court held that the threat evidence in *Green* was not intrinsic to the charged offense but was properly admissible as proof of motive under Rule 404(b) or as proof of bias.

The trial court's ruling under Rule 404(b) will be reviewed for an abuse of discretion. *United States v. Balter*, 91 F.3d 427, 437 (3d Cir. 1996). However, if the trial court does not explain its grounds for ruling on an objection under Rules 404(b) and 403, the Third Circuit will not defer to the ruling unless the reasons are apparent from the record. *See Becker v. ARCO Chemical Co.*, 207 F.3d 176, 181 (3d Cir. 2000). If the record does not provide a basis for reviewing the trial court's exercise of discretion, the court "may undertake to examine the record and perform the required balancing [itself]." 207 F.3d at 181.

The instruction to the jury explaining other acts evidence is most helpful if it explains the precise role of the evidence. In *Scarfo*, the Court approved the trial court's instructions.

> The trial judge charged the jury: 'Mr. Scarfo is not on trial here for any murders, for any gambling or any other kind of illegal activities.... [T]hose kinds of offenses would be dealt with in other tribunals than this.... I think you can understand that it would be utterly improper for you to take them into account in this case in the sense of saying to yourselves: 'Well, maybe he didn't do this extortion; but he did a lot of other stuff. So it doesn't much matter whether they prove this case. I am going to find him guilty anyway.' That obviously would be totally improper.'
>
> In instructing on the proper use of other crimes evidence, the judge explained that the testimony could be used to assess the nature of the relationship among Caramandi, DelGiorno, and defendant.
>
> > 'It is a position of the Government that Caramandi and DelGiorno were subordinates within this carefully organized and structured organization; that they did Mr. Scarfo's bidding; [that] they never would dream of doing anything this large without his approval; and that the tapes and other evidence in the case corroborate their testimony to the effect that he was involved and did approve.'
>
> The judge also told the jurors that they could use the evidence to decide whether defendant adopted a standardized scheme or mode of operation, to determine whether he had knowledge of or an intent to participate in the conspiracy, as well as to evaluate the witnesses' motives for cooperating with the government. Finally, the judge stated that the government had the

> right to reveal the witnesses' unsavory criminal records 'so as not to be accused of trying to hoodwink the jury by pretending that people like Caramandi and DelGiorno were Boy Scouts.'
>
> These clear, frank, and comprehensive instructions did all that was possible under the circumstances to place the other crimes evidence in proper perspective.

850 F.2d at 1020-21. For other Third Circuit decisions approving instructions on other act evidence, *see United States v. Ferguson*, 2010 WL 3638928 (3d Cir. 2010) (non-precedential); United States v. Cruz, 326 F.3d 392 (3d Cir. 2003); *United States v. Givan*, 320 F.3d 452, 460-61 (3d Cir. 2003); *United States v. Butch*, 256 F.3d 171 (3d Cir. 2001); *United States v. Palma-Ruedas*, 121 F.3d 841, 852 n.11 (3d Cir. 1997); *United States v. Major,* 293 Fed.Appx. 160, 2008 WL 4229933 (3d Cir. 2008) (approving admission of other act evidence to prove intent and approving limiting instruction). *But see United States v. Morena*, 547 F.3d 191 (3d Cir. 2008) (concluding that court's instruction was not adequate and reversing conviction).

In *United States v. Carter*, 401 F.2d 748 (3d Cir. 1968), the court held that failure to instruct on the limited purpose of other act evidence was not plain error. *See also Graham, Handbook of Federal Evidence*, § 404.5 at 364 (5th ed. 2001).

This instruction should not be given when the other act evidence was admitted under Rule 413 or 414 of the Federal Rules of Evidence. Those rules allow the prosecution to introduce evidence of similar acts in prosecutions for sexual assault or child molestation. The evidence of prior conduct admitted under those rules "may be considered for its bearing on any matter to which it is relevant." As a result, no limiting instruction should be given.

(revised 11/10)

## 2.24 Impeachment of Defendant - Prior Bad Acts (F.R.E. 608(b))

**Alternative 1:**

**You have heard evidence that the defendant *(name)* on a previous occasion committed (*describe bad act elicited on cross-examination of defendant*). You may consider that evidence only to help you decide whether to believe *(name)*'s testimony and how much weight to give it. That evidence does not mean that *(name)* committed the crime charged here, and you must not use that evidence as any proof of the crime charged in this case.**

***[This evidence may not be used in any way at all in connection with the other defendant(s)].***

**Alternative 2** ***(to be given if the defendant denies the bad act):***

**You heard the prosecutor ask *(name)* whether on a previous occasion *(he)(she)* committed (*describe bad act elicited on cross-examination of defendant*). You also heard *(name)* deny committing that act. I remind you that questions by the lawyers are not evidence. It is the answer of the witness that provides evidence. There is therefore no evidence that *(name of witness*) committed *(describe act)*.**

### Comment

This instruction is derived from Eighth Circuit §2.16.

This instruction should be used when the prosecution is permitted to cross-examine the defendant under Rule 608(b) of the Federal Rules of Evidence concerning prior bad acts that did not result in conviction. Rule 608(b) of the Federal Rules of Evidence provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of

truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

If the court permits the prosecutor to cross-examine the defendant concerning prior bad acts under Rule 608(b), the court should instruct the jury concerning the cross-examination, whether or not requested, after consultation with the defendant. The appropriate instruction depends on whether the defendant admits or denies the prior conduct in response to the questions asked on cross-examination. Alternative 1 should be given if the defendant admits committing those acts. The instruction simply limits the jury's consideration of the prior acts to the defendant's believability. The Third Circuit has not determined whether failure to give the instruction if requested is reversible error or whether failure to give the instruction if the defendant does not request it is plain error. The bracketed language in Alternative 1 should be given in a multi-defendant case.

Alternative 2 should be given if the prosecutor asks about the prior acts on cross-examination and the defendant denies committing the prior acts. Rule 608(b) precludes the introduction of extrinsic evidence to complete the impeachment with bad acts. As a result, if the prosecutor is permitted to ask about the prior bad acts on cross-examination and the defendant denies committing the acts, the prosecution can go no further with the subject. *See United States v. McNeill*, 887 F.2d 448, 453 (3d Cir. 1989); *United States v. Anderson,* 859 F.3d.1171, 1178 (3d Cir. 1988).

Caution: This instruction should not be given when the defendant has been impeached with a prior conviction under Rule 609 of the Federal Rules of Evidence. *See* Instruction 2.25 (Impeachment of Defendant - Prior Conviction (F.R.E. 609)). Nor should this instruction be given when evidence of other crimes has been admitted to prove motive, opportunity, intent or the like under Rule 404(b) of the Federal Rules of Evidence. Instead, the jury should be specifically instructed on the purpose for which such evidence was admitted. *See* Instruction 2.23 (Defendant's Prior Bad Acts or Crimes (F.R.E. 404(b))). If evidence of the defendant's prior conduct or conviction has been admitted under Rule 404(b) or Rule 609 *and* the defendant is impeached with prior bad acts under Rule 608(b), this instruction should be given in conjunction with Instructions 2.23 and 2.25, respectively. If evidence has been admitted under all three rules, all three instructions should be given, highlighting the difference in relevance for the jury.

Rule 608(b) permits inquiry only concerning prior acts that are probative of untruthful conduct. To fall within the rule, the acts "will normally involve dishonesty or false statement as employed in Rule 609(a)(2)." Graham § 608.4 at 146-47. The Third Circuit has held that Rule 609(a)(2) applies only to crimes that "bear on the witness' propensity to testify truthfully." *See United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004). In *United States v. Irizarry*, 341 F.3d 273 (3d Cir. 2003), the court noted that the trial court properly allowed the prosecutor to cross-examine the defendant about his possession of identification in someone else's name and about his possession of blank Social Security cards. *Id.* at 312. The Third Circuit stated that the evidence tended to show deceit and therefore fell within Rule 608(b).

The Third Circuit has also held that the decision whether to allow cross-examination under Rule 608(b) falls within the trial court's discretion. *See United States v. McNeill*, 887 F.2d 448, 453 (3d Cir. 1989). In *Johnson v. Elk Lake School District*, 283 F.3d 138 (3d Cir. 2002), the court held that the trial court acted within its discretion when it precluded plaintiff's counsel from cross-examining a key witness concerning a

lie on his resume. *Id.* at 145 n.2. The court noted that the trial court's ruling was reviewed under an abuse of discretion standard with "substantial deference" to the trial court. The court stated that "the trial court was within its discretion to conclude that Stevens' lying on his resume, although duplicitous and wrong, was not so indicative of moral turpitude as to be particularly probative of his character for untruthfulness." *Id.* This result is criticized in Graham who states that "the exercise of discretion should very rarely if ever be exercised to exclude an undisputed act of 'lying'" such as that in *Johnson*. Graham § 608.4 n.5.

The inquiry under Rule 608(b) should focus on the actual acts that suggested untruthfulness and not any third party action, such as suspension from a job, that resulted from those acts. *See United States v. Davis*, 183 F.3d 231, 257 n.12 (3d Cir. 1999). The court may preclude inquiry concerning prior acts if they are remote in time. *See Johnson v. Elk Lake School District*, 283 F.3d 138, 145 n.2 (3d Cir. 2002).

Cross-examination may be limited by the Fifth Amendment; Rule 608(b) provides that no witness, including the accused, waives the Fifth Amendment privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness. *See United States v. Hudson*, 422 F.Supp. 395 (E.D.Pa. 1976), *aff'd* 556 F.2d 566, *aff'd* 556 F.2d 569, *cert. denied*, 431 U.S. 922, *cert. denied*, 434 U.S. 839 (1977). The Third Circuit appears not to have addressed this aspect of the rule.

## 2.25 Impeachment of Defendant - Prior Conviction (F.R.E. 609)

**You *(are about to hear)(heard)* evidence that the defendant *(name)* was previously convicted of *(a)* crime*(s)*. You may consider evidence of *(name)*'s previous conviction of a crime only to help you decide whether to believe *(name)*'s testimony and how much weight to give it. That evidence does not mean that *(name)* committed the crime charged here, and you must not use that evidence as any proof of the crime charged in this case.**

***[This evidence may not be used in any way at all in connection with the other defendant(s)].***

### Comment

This instruction is derived from Eighth Circuit 2.16. For variations, *see* 1A O'Malley et al., supra, §§ 11.12 and 15.08; Sand et al., supra, 7-13; Federal Judicial Center § 41; First Circuit §2.04; Fifth Circuit § 1.11; Sixth Circuit §7.05A; Seventh Circuit § 3.05; Ninth Circuit § 4.6; and Eleventh Circuit §6.4.

This instruction should be used when the defendant's prior conviction will be or has been admitted to attack the defendant's credibility under Rule 609 of the Federal Rules of Evidence. If evidence of the prior conviction is elicited during cross-examination of the defendant, the word "heard" should be substituted for "are about to hear."

As amended effective December 1, 2006, Rule 609(a) provides:

> (a) General rule.--For the purpose of attacking the character for truthfulness of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

*See United States v. Gilmore*, 553 F.3d 266, 272-73 (3d Cir. 2009) (discussing application of Rule 609).

It is important to distinguish between the two subsections of Rule 609(a). Rule 609(a)(1) permits impeachment with felony conviction in the judge's discretion. The Rule allows impeachment by convictions of crimes punishable by death or imprisonment greater than one year if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." *See Government of the Virgin Islands v. Bedford*, 671 F.2d 758 (3d Cir. 1982).

Rule 609(a)(2) applies to crimes of dishonesty or false statement and makes admission of the evidence mandatory. If the crime falls within (a)(2), the trial court must admit the prior conviction. *See United States v. Wong*, 703 F.2d 65, 68 (3d Cir.), *cert. denied*, 464 U.S. 842 (1983). Rule 609(a)(2) is interpreted narrowly and does not include crimes such as theft that do not "bear on the witness' propensity to testify truthfully." *See United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004) (quoting from the Conference Committee notes). As amended, the rule precludes inquiry into the manner in which a crime was committed to establish that it was a crime of dishonesty or false statement. Instead, the nature of the crime must be readily determined.

Rule 609 also includes a time restriction. If more than ten years has passed since the date of conviction or release, the prior conviction is not admissible unless the proponent gives written notice and "the court determines, in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect." F.R.E. 609(b).

Ordinarily, evidence of the defendant's prior conviction is admissible only for the limited purpose of attacking credibility. As a result, the defendant is entitled, upon request, to an instruction limiting the jury's consideration of the conviction to the purpose for which it was admitted. The Third Circuit has not addressed the question of whether it is plain error not to give this instruction if the defendant fails to request it. Professor Graham opines that failure to give the instruction "will more likely result in plain error where the conviction is similar." Graham, Handbook of Federal Evidence § 609.6 at 227-28 (5th ed. 2001).

In some cases, a defendant's prior criminal record is introduced for other purposes. In those cases, this instruction should not be given. Instead, the jury should be specifically instructed on the purpose for which the evidence was admitted. A prior conviction may be required to establish an element of the offense charged, as when the defendant is charged under 18 U.S.C. § 922(g) or (h). *See* Instruction 2.13 (Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C.A. § 922 (g))). Evidence of other crimes may also be admitted to prove motive, opportunity, intent or the like under Rule 404(b) of the Federal Rules of Evidence. *See* Instruction 2.23 (Defendant's Prior Bad Acts or Crimes (F.R.E. 404(b))). *See also United States v. Gilmore*, 553 F.3d 266, 271-72 (3d Cir. 2009) (approving use of prior conviction to impeach defendant by contradiction).

The bracketed language should be given in a multi-defendant case.

(revised 12/09)

## 2.26 Impeachment of Defendant - Prior Inconsistent Statement Taken in Violation of Miranda

**Alternative 1:** **You just heard the defendant, *(name)*, testify on *(his)(her)* own behalf. You also heard evidence that *(name)* made *(a statement)(certain statements)* before trial. *(Name)* admitted making *(this)(these)* statement*(s)*. *(This)(These)* earlier statement*(s)(is)(are)* brought to your attention only to help you decide if you believe what the defendant testified to here in court. You may consider *(this)(these)* statement*(s)* as you decide if what *(name)* said here in court was true. You must not, however, consider the earlier statement*(s)* as evidence of *(name)*'s guilt. The government must use other evidence to prove, beyond a reasonable doubt, that the defendant committed the crime.**

**Alternative 2:** **You will recall that the defendant, *(name)*, testified on *(his)(her)* own behalf. You are about to hear evidence that *(name)* made *(a statement)(certain statements)* before trial. *(This)(These)* earlier statement*(s)* by *(name) (is)(are)* brought to your attention only to help you decide if you believe what the defendant testified to here in court. *(Name)* has denied making *(this)(these)* statement*(s)*. If you find that *(name)* made statement*(s)* before trial that are different from *(name)*'s testimony here at trial, then you may consider *(this)(these)* statement*(s)* as you decide if what *(name)* said here in court was true. You must not, however, consider the earlier statement*(s)* as evidence of *(name)*'s guilt. The government must use other evidence to prove, beyond a reasonable doubt, that the defendant committed the crime.**

**Comment**

This instruction is derived from Federal Judicial Center § 42. For variations, *see* 1A O'Malley §11.13, Eighth Circuit § 2.17.

Normally, prior statements of the defendant are admissible without limitation under Rule 801(d)(2)(A) of the Federal Rules of Evidence. If the defendant's prior statement is admitted without limitation, no instruction is necessary. However, if a statement is obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and the defendant successfully moves to suppress it, the statement is not admissible substantively, but may nevertheless be admitted to impeach the defendant if the defendant elects to testify. *Harris v. New York*, 401 U.S. 222 (1971).

One of these instructions should then be used during the trial either before or immediately after the statement is introduced, to restrict the statement to its limited role. In addition, Instruction 4.37 (Impeachment of Defendant - Prior Inconsistent Statement Taken in Violation of Miranda) should be given as part of the final instructions.

Which alternative to use depends on the procedure followed at trial as well as the defendant's testimony. Rule 613 of the Federal Rules of Evidence provides that extrinsic evidence of the prior statement "is not admissible unless the witness is afforded an opportunity to explain or deny" the statement. Therefore, it is likely that the prosecution will question the defendant concerning the statement on cross-examination in order to lay the foundation for introducing extrinsic evidence of the statement during rebuttal. The court should use Alternative 1 if the defendant is asked about the prior statement on direct or cross-examination and admits making the statement(s). The instruction should be given immediately after the defendant testifies concerning the statement(s). The court should use Alternative 2 if the defendant denies making the statement(s) and the prosecution introduces extrinsic evidence of the statement(s) in rebuttal. In that case, the court should give the instruction immediately before the prosecution introduces its evidence that the defendant made the statement(s).

If other prior statements of the defendant have been introduced without limitation, the court should give Instruction 2.11 (Limited Admissibility: Evidence Admitted for a Limited Purpose) with this instruction to emphasize the difference in the relevance of the two sets of statements.

## 2.27 Prior Statement of Defendant – Single Defendant on Trial

**The government has introduced evidence that the defendant** *(name of defendant)* **made a statement to** *(name of person who took statement).* **You must decide whether** *(name of defendant)* **did in fact make the statement. If you find that** *(name of defendant)* **did make the statement, then you must decide what weight, if any, you feel the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning** *(name of defendant)(himself)(herself)* **and the circumstances under which the statement was made.**

*[If, after considering the evidence, you determine that a statement, was made voluntarily, you may give it such weight as you feel it deserves under the circumstances. On the other hand, if you determine that the statement was not made voluntarily, you must disregard it. In determining whether any alleged statement was made voluntarily, you should consider (name of defendant)'s age, training, education, occupation, and physical and mental condition, and (his)(her) treatment while in custody or under interrogation as shown by the evidence in the case. Also consider all other circumstances in evidence surrounding the making of the alleged statement.]*

**Comment**

This instruction was derived from Seventh Circuit § 3.02 and 1A O'Malley et al., supra, § 14.03.

This instruction should not ordinarily be given during trial. Instead, the subject will be covered in the final instructions. *See* 4.32 (Prior Statement of Defendant - Single Defendant on Trial).

If the court held a pretrial proceeding on a motion to suppress the defendant's statement, the court may be aware of the issues that will be raised concerning the voluntariness of the defendant's statement or the weight it should be accorded. The court may choose to give the instruction during the trial if the prosecution introduces a defendant's confession or similar statement and the defendant raises questions about the weight that the jury should accord that evidence. The bracketed language should be included if the defendant raises a colorable question of whether the statement was given voluntarily. In *Crane v. Kentucky*, 476 U.S. 683 (1986), the Supreme Court noted that the pretrial determination that the defendant's confession is voluntary is not conclusive and held that the trial court violated the defendant's constitutional rights when it precluded the defendant from introducing evidence relating to the circumstances of the confession at trial. The evidence "will often be germane to its probative weight, a matter that is exclusively for the jury to assess." *Id.* at 688. Congress has spoken to this issue in 18 U.S.C. § 3501(a), which provides in part:

> [T]he 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.

In *Government of the Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974), the Third Circuit held that the trial court properly instructed the jury to consider the voluntariness of the defendant's confessions and to disregard them if they were not given voluntarily. If a question of voluntariness is raised, the trial court must admit the relevant evidence and instruct the jury on the question.

## 2.28 Prior Statement of a Defendant – Multi-Defendant Trial

**The government has introduced evidence that the defendant** *(name of defendant)* **made a statement to** *(name of person who took statement)*. **I caution you that you may consider** *(name of defendant)***'s statement only in resolving the case against** *(name of defendant)***. You must not consider or discuss this evidence in any way with respect to** *(name of co-defendant, if there is only one)(any of the other defendants on trial)*.

*[You must decide whether (name of defendant) did in fact make the statement. If you find that (name of defendant) did make the statement, then you must decide what weight, if any, you feel the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning (name of defendant)(himself)(herself) and the circumstances under which the statement was made.]*

*[If, after considering the evidence, you determine that a statement, was made voluntarily, you may give it such weight as you feel it deserves under the circumstances. On the other hand, if you determine that the statement was not made voluntarily, you must disregard it. In determining whether any alleged statement was made voluntarily, you should consider (name of defendant)'s age, training, education, occupation, and physical and mental condition, and (his)(her) treatment while in custody or under interrogation as shown by the evidence in the case. Also consider all other circumstances in evidence surrounding the making of the alleged statement.]*

**Comment**

This instruction is derived from Seventh Circuit § 3.02 and Sand et al, supra, 5-20. For variations, *see* 1A O'Malley et al., supra, §14.04; Fifth Circuit § 1.27; Eighth Circuit § 2.15; and Eleventh Circuit § 2.2.

This instruction should be given during the trial in a multiple defendant trial when one defendant's confession which names or implicates the other defendant(s) is admitted in a joint trial unless it is clear that the confessing defendant will testify. A defendant is deprived of his right under the Confrontation Clause when a nontestifying co-defendant's incriminating confession is introduced at their joint trial even if the jury is instructed to consider that confession only against the co-defendant. Limiting instructions are normally inadequate to protect the defendant against the risk that the jury will misuse the co-defendant's confession and consider it as evidence against the defendant. *See Bruton v. United States*, 391 U.S. 123 (1968); *see also Cruz v. New York*, 481 U.S. 186, 194 (1987) (holding protection applies even if the defendant also confessed). However, if the prosecution adequately redacts the co-defendant's statement, removing language that the jury could understand as referring to the defendant without further evidentiary linkage, the co-defendant's confession may be admitted in a joint trial. *See Richardson v. Marsh*, 481 U.S. 200 (1987)(holding redaction adequate to protect defendant); *Priester v. Vaughn*, 382 F.3d 394 (3d Cir. 2004)(concluding redaction provided adequate protection); *but see Gray v. Maryland*, 523 U.S. 185 (1998) (holding redaction inadequate); *United States v. Richards*, 241 F.3d 335 (3d Cir. 2001) (holding redaction inadequate). When such a confession is admitted, this instruction is necessary to protect the defendant's rights under the Confrontation Clause.

The language in the bracketed paragraphs may be given if appropriate. The first bracketed paragraph may be appropriate if the defendant raises a question concerning whether the statement was made or the circumstances under which it was made. The second bracketed paragraph should be included if the defendant raises a colorable question of whether the statement was given voluntarily.

## 2.29 Photographs, Inflammatory

**This photograph** *(these photographs) (was)(were)* **admitted in evidence for the purpose of helping you understand the testimony by** *(describe purpose, e.g., showing you the conditions at the alleged scene of the crime, showing the nature of the wounds received by the deceased, showing you what (name of witness) was referring to.)* **It is not a pleasant photograph to look at. You should not let it stir up your emotions to the prejudice of the defendant. Your verdict must be based on a rational and fair consideration of all the evidence and not on passion or prejudice against the defendant, the government, or anyone else connected with this case.**

**Comment**

This instruction is derived from Pennsylvania Suggested Standard Jury Instructions - Criminal § 3.18.

Photographs may be admitted even though they are inflammatory if their probative value is sufficient. *See United States v. Lopez*, 271 F.3d 472, 482 (3d Cir. 2001); *Government of Virgin Islands v. Albert*, 241 F.3d 344 (3d Cir. 2001). Before admitting a potentially inflammatory photograph the trial court must determine (1) that it is relevant and (2) that the need for the picture and its probative value are not substantially outweighed by the likelihood of unfair prejudice to the defendant. When admitting a photograph the court should take measures to minimize the risk of prejudice, such as masking portions and limiting the time the jury is allowed to look at it.

This instruction reduces the likelihood of improper use or influence of the photograph. It directs the jurors' attention to the purpose for which the photograph was admitted and cautions them not to permit it to stir up their emotions to the defendant's prejudice. Although it appears that a limiting instruction may not be required, the court should provide a limiting instruction to minimize the prejudicial impact of the evidence. *See Government of Virgin Islands v. Albert*, 89 F.Supp. 2d 658, 665 (D.V.I. 2000) (upholding conviction even though the trial court admitted a gruesome videotape of the murder scene and gave no limiting instruction other than to direct the jury not to listen to the audio narration on the tape, but expressing concern about the risk of unfair prejudice and possible reversal).

## 2.30 Photograph of Defendant ("Mug Shots")

*[Select whichever of the following applies:*

*((Name of witness) testified that (he)(she) viewed a photograph of (name of defendant) which was shown to (him)(her) by the (police)(law enforcement agents).)*

*(You were shown a picture of (name of defendant) that was taken by (the government).)]*

**The government collects pictures of many people from many different sources and for many different purposes. The fact that the government had** *(name of defendant)***'s picture does not mean that** *(he)(she)* **committed this or any other crime, and it must have no effect on your consideration of the case.**

**Comment**

This instruction is derived from Eighth Circuit § 2.21.

This instruction may be given if the jury sees or learns of a law enforcement booking photograph – mug shot – of the defendant. The committee recommends that this instruction not be given unless specifically requested by the defense.

In some cases, the jury will learn that law enforcement had a mug shot of the defendant before the defendant was charged with the offense for which the defendant is on trial. For example, if identification is an issue in the trial, the jury may hear testimony concerning pre-charge photo identification of the defendant using a mug shot. *See United States v. Hines*, 470 F.2d 225 (3d Cir. 1973). The decision about whether to admit the evidence should be approached with caution. If the defendant's mug shot is introduced in evidence or if the jury is informed that law enforcement had a photograph of the defendant, the jury may conclude that the defendant has a criminal record. *United States v. Hines*, 470 F.2d 225, 227-28 (3d Cir. 1973). Nevertheless, the evidence is properly admitted if its probative value outweighs the risk of unfair prejudice. *See United States v. Dunbar*, 767 F.2d 72 (3d Cir. 1985); *United States v. Gimelstob*, 475 F.2d 157 (3d Cir. 1973). One way to reduce the risk of unfair prejudice is to redact the photograph, removing indications that it is a mug shot.

A cautionary instruction may also reduce the risk of unfair prejudice. In *United States v. Amorosa*, 167 F.2d 596, 599 (3d Cir. 1948), the Third Circuit concluded that the defendant had not been prejudiced by the government's use of two F.B.I. photographs of the defendant. The court commented on the trial court's instruction to the jury:

> The trial judge in his charge instructed the jury as to the F.B.I. number on the picture, 'You are not to infer because of that number that the defendant is guilty of this crime or of any other crime. In other words, you are to predicate no finding of fact on the mere fact that on the front of the picture there appears this F.B.I. number. You will, for the purpose of this case, completely disregard the fact that one of the pictures bears a number.'

Nevertheless, it does not appear that a cautionary instruction is required. The Third Circuit has rejected arguments based on the prejudicial impact of the defendant's mug shot without considering whether the trial court gave a cautionary instruction. *See United States v. Gimelstob*, 475 F.2d 157 (3d Cir. 1973); *United States v. Hines*, 470 F.2d 225, 227-28 (3d Cir. 1973).

## 2.31 Dismissal During Trial of Some Charges Against Single Defendant

**At the beginning of the trial, I described the charges against the defendant. At this time, the charge***(s)* **of** *(describe dismissed count(s))* *(is)(are)* **no longer before you. You should not be concerned with nor should you speculate about the reason the charge***(s) (is)(are)* **no longer part of this trial.**

**The defendant is on trial only for the charge***(s)* **of** *(remaining count(s))*. **You may consider the evidence presented in the case only as it relates to the remaining charge***(s)*.

### Comment

This instruction is derived from Ninth Circuit § 2.12. For variations, *see* Sand et al, supra, 2-20 and Eighth Circuit § 2.11.

This instruction may be given during the trial when charges are dismissed, most likely after the close of the government's case-in-chief. If those charges were called to the jury's attention in the preliminary instructions or opening statements, or if evidence was introduced that relates only to those charges, the jury may expect the defendant to respond to the charges or to the evidence offered to establish the charges. This instruction explains to the jury that the charges are no longer part of the trial and thereby lets the jurors know why there will be no response to those aspects of the government's case. If more than one defendant is on trial, Instruction 2.32 (Disposition During Trial of All Charges Against One or More Co-Defendant(s)) should be given instead.

If evidence is stricken as a result of the dismissal of charges, the court may want to instruct the jury on that point. The Eighth Circuit suggests the following language: "The following evidence is now stricken by me, and is thus no longer before you and may not be considered by you: (Describe stricken evidence)." When describing the stricken evidence, the court risks being either over inclusive or under inclusive. The Committee therefore suggests that, if the court elects to give such an instruction, it do so only if the parties agree to the description of the stricken evidence.

## 2.32 Disposition During Trial of All Charges Against One or More Co-Defendant(s)

**The co-defendant***(s)(name(s)) (is)(are)* **no longer on trial and you are not being asked to reach a verdict as to** *(name(s)).* **You are not to be concerned with nor are you to speculate about why** *(he)(she)(they) (is)(are)* **no longer part of this trial. This fact should not affect or influence your verdict with respect to the remaining defendant***(s).* **You must base your verdict as to** *(name(s) of remaining defendant(s))* **solely on the basis of the evidence or lack of evidence against** *(him)(her)(them).*

### Comment

This instruction is derived from Sand et al, supra, 2-19. For variations, *see* 1A O'Malley et al, supra, §§ 11.14 and 12.16; Eighth Circuit § 2.12; and Ninth Circuit § 2.13.

When charges against a co-defendant are disposed of after the jury has been empaneled, the court should instruct the jury that the co-defendant's case is no longer before them and caution the jury not to draw any inference from that fact. *See United States v. Gambino*, 926 F.2d 1355, 1364 (3d Cir. 1991)(concluding that trial court's instruction to jurors that they should infer nothing from absence of defendant who had pleaded guilty adequately protected remaining defendants from prejudicial inference). The disposition of charges may result from causes as different as the entry of a judgment of acquittal on grounds of insufficient evidence or the entry of a conviction based on a guilty plea. The jury should not normally be informed of the reason. *See United States v. Restaino*, 369 F.2d 544 (3d Cir. 1966)(concluding trial court's cautionary instructions adequately protected defendant when court informed jury that co-defendants had pleaded guilty). This instruction avoids any reference to the reason for the disposition of the co-defendant's case.

In *United States v. Ragbir*, 2002 WL 1273657 at *2 (3d Cir. 2002), a non-precedential decision, the Third Circuit approved the following instruction after a co-defendant pleaded guilty partway through the trial:

> You'll notice that neither Mr. Robert Kosch nor his attorney, Mr. DeGroot, are seated at the defense table. They will be absent from this court for the remainder of the trial. I instruct you that the charges against Robert Kosch are no longer part of the Government's case and they are not to be considered by you at the time of your deliberations. You should not speculate or concern yourselves about the reason for the absence of Mr. Kosch.

> You are not to consider his absence in any way when you hear the rest of this case or when you deliberate on a verdict as to Mr. Ragbir. The Government has an absolute obligation under the United States Constitution to prove every element of every offense charged against Mr. Ragbir beyond a reasonable doubt. Again I instruct you emphatically that in considering the evidence as to Mr. Ragbir, you shall not take into account the absence of Mr. Kosch. To do otherwise would be to violate your oaths as jurors.

If some, but not all, charges against a defendant in a multi-defendant case are dropped, an instruction may be unnecessary, since the defendant will still be before the jury. If the court chooses to give an instruction in such a case, the court should adjust the language of the instruction accordingly. *See* Eighth Circuit § 2.13 for suggested language.

If evidence is stricken as a result of the dismissal of charges, the court may want to instruct the jury on that point. The Eighth Circuit suggests the following language: "The following evidence is now stricken by me, and is thus no longer before you and may not be considered by you: (Describe stricken evidence)." When describing the stricken evidence, the court risks being either over inclusive or under inclusive. The Committee therefore suggests that, if the court elects to give such an instruction, it do so only if the parties agree to the description of the stricken evidence.

## 2.33 Previous Proceeding (Trial) of Defendant

**You** *(will hear)*(*have heard)* **that there was a prior proceeding** *(trial)* **in this case. You should not, however, concern yourself with this fact.**

**Your verdict must be based solely on the evidence in the present trial in accordance with the Court's instructions without any regard to what may have occurred earlier.**

**Comment**

This instruction is based on 1A O'Malley et al, supra, § 10.08.

This instruction should only be given if it is clear that the jury will, for some reason, learn of an earlier trial. When used, this instruction should be given at the time of the first reference to the earlier trial or proceeding.

It is preferable to refer to the earlier trial simply as a proceeding. The Committee recommends that the court suggest to the attorneys in the case that they should avoid references to a prior "trial" and that they so instruct their witnesses. The attorneys should, if necessary, instruct the witnesses to refer to the prior trial as a "prior proceeding." If reference is made to a prior trial, the language of the instruction should be adapted accordingly.

In some cases, it will be difficult or impossible not to let the jury know that the case has been previously tried. For example, in *United States v. Hykel*, 463 F.2d 1192, 1194 (3d Cir. 1972), the trial followed an earlier trial that ended in a mistrial. A number of witnesses had testified at the first trial and were likely to mention that fact. The prosecutor therefore mentioned to the jury that the trial would be the defendant's second one for the same offense. The defendant argued to the Third Circuit that these remarks prejudiced his case. In *United States v. Hykel*, 461 F.2d 721, 726 (3d Cir.1972), the Third Circuit affirmed and commented favorably on the trial court's instruction:

> The remarks, which do not appear on the record, were brought to the attention of the District Court, which cautioned the 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.
>
> We believe that the District Court's cautionary words were sufficient to cure whatever prejudice, if any, the prosecutor's remarks may have caused in the absence of the caution.

## 2.34 Disruptive Defendant

**Inappropriate verbalization: You just** *[describe behavior; e.g., heard the defendant speak to the witness]***. The defendant's statements are not evidence in this case. You must disregard any statement that the defendant makes in this courtroom unless** *(he)(she)* **is testifying as a witness.**

**Inappropriate conduct requiring restraint of defendant: You may notice that the defendant** *[describe restraints; e.g., is wearing handcuffs in the courtroom]***. You must not consider this fact in deciding the issues in this case. It is not evidence in the case and should not be discussed by you in your deliberations. It has no bearing on defendant's guilt or innocence.**

**Inappropriate conduct requiring removal of defendant: You may notice that the defendant is no longer in the courtroom. The defendant's absence is unrelated to** *(his)(her)* **guilt or innocence and is not evidence in the case. You must not consider this fact in deciding the issues in this case.**

### Comment

Defendants sometimes disrupt the orderly process of trial with inappropriate verbal or physical conduct. The Benchbook for U.S. District Court Judges suggests a protocol for handling disruptive defendants. Benchbook for U.S. District Court Judges § 5.01 (March 2000 rev.). Whether and how to instruct the jury will depend on the type and severity of the defendant's misconduct as well as the court's response to that misconduct.

First, in the case of a verbal outburst, the court may simply want to direct the jury to disregard it. For example, in *Norde v. Keane*, 294 F.3d 401, 405 (2d Cir. 2002), the Second Circuit quoted from the state court's caution to the jury after the defendant's outburst:

> Now ladies and gentlemen, you just heard the defendant yell out in the courtroom. He's been instructed by me not to do that. And I am going to instruct you to disregard any statements that the defendant makes in this courtroom[] other than if he should take the stand and testify. Just disregard it.

In *Norde*, the Second Circuit held that the defendant's rights had been protected, but disapproved the trial court's further elaboration to the jury discussing the defendant's expressed desire to be represented by a different lawyer. 294 F.3d at 412.

Second, in some cases, the defendant's conduct may prompt the court to order the disruptive defendant restrained. Such action does not necessarily violate the defendant's rights, but it may prejudice the defendant in the eyes of the jury. *See Szuchon v. Lehman*, 273 F.3d 299 (3d Cir. 2001); *United States v. Brantley*, 2009 WL 2618811 (3d Cir. 2009) (non-precedential) (expressing concern about shackling but upholding conviction and discussing steps trial court must take before ordering defendant shackled); *see also* Deck v. Missouri, 544 U.S. 622 (2005); *Illinois v. Allen*, 397 U.S. 337 (1970). To the extent possible, the court should rely on restraints not visible to the jury. In *Wilson v. McCarthy*, 770 F.2d 1482 (9th Cir. 1985), the Ninth Circuit held that the trial court was not required to instruct the jury concerning the shackles used on the defendant in the absence of a defense request. Nevertheless, an instruction may be helpful. In *Szuchon*, the Third Circuit noted that the trial court had "carefully instructed the jury to remain focused solely on the evidence." 273 F.3d at 315. *See also United States v. Taylor*, 562 F.2d 1345 (2d Cir. 1977)(noting that the trial court had cured possible prejudice after jurors inadvertently observed the defendants in manacles through cautionary instruction "pointing out that the reason for some defendants (not identified by the court) being in custody while others were not was that some defendants were able to afford bail and others were not and that the jury was to draw no inference from whether or not a defendant was able to afford bail"); *United States v. Larkin*, 417 F.2d 617 (1st Cir. 1969)(noting that trial court gave cautionary instruction after jurors observed the defendant being transported in handcuffs, directing jury to disregard the fact that defendant was in custody and "that such custody was not unusual in this kind of case and had no bearing on defendant's guilt or innocence").

Finally, in some cases, the defendant's disruptive behavior may be so severe and persistent that the trial court removes the defendant from the courtroom. *See* Benchbook, § 5.01. The court should then instruct the jury that the absence is not related to the defendant's guilt on the charges and is not evidence in the case. The court must permit the absent defendant to communicate with counsel, either directly during the proceedings or at least at frequent intervals. In addition, if possible, the court should arrange a connection – video or at least audio – to allow the absent defendant to observe the court proceedings.

(revised 12/09)

## 2.35 Discharge of Defense Counsel During Trial

**Even though** *(name of defendant)* **was represented by a lawyer when this trial began,** *(he)(she)* **has decided to continue the trial representing** *(himself)(herself)* **and not to use the services of a lawyer.** *(He)(She)* **has a constitutional right to do that.** *(His)(Her)* **decision has no bearing on whether** *(he)(she)* **is guilty or not guilty, and it must not affect your consideration of the case.**

**Because** *(name of defendant)* **has decided to act as** *(his)(her)* **own lawyer, you will hear** *(him)(her)* **speak at various times during the trial.** *(He)(She)* **may make** *(a)(an) (opening statement and)* **closing argument.** *(He)(She)* **may ask questions of witnesses, make objections, and argue to the court. I want to remind you that when** *(name of defendant)* **speaks in these parts of the trial** *(he)(she)* **is acting as a lawyer in the case, and** *(his)(her)* **words are not evidence. The only evidence in the case is the testimony of witnesses under oath and exhibits admitted into evidence.**

### Comment

This instruction is derived from Eighth Circuit § 2.22 and Federal Judicial Center § 6.

This instruction should be given when a defendant exercises the constitutional right under *Faretta v. California*, 422 U.S. 806 (1975), to waive the Sixth Amendment right to assistance of counsel and proceed pro se. In order to assure that the waiver is valid, the court should engage in a colloquy with the defendant such as the one suggested in § 1.02 of the Benchbook for U.S. District Court Judges (4th ed. 2000).

The instruction informs the jury of the defendant's choice to proceed pro se. In addition, it directs the jury to treat the words spoken by the defendant while functioning as counsel like those of any other lawyer and not to treat them as evidence in the case.

The court may appoint standby counsel to assist the pro se defendant. A pro se defendant is not constitutionally entitled to standby counsel or to hybrid representation, in which the defendant shares the role of counsel with standby counsel. *See McKaskle v. Wiggins*, 465 U.S. 168 (1984). Nevertheless, the trial court has discretion to permit either and may even appoint standby counsel over the defendant's objection. *See McKaskle*, 465 U.S. at 182-83; *Faretta*, 422 U.S. at 834 n.46. If the court appoints standby counsel, the court may wish to inform the jury of standby counsel's role in the case. *See also United States v. Bankoff*, 613 F.3d 358 (3d Cir. 2010) (holding trial court responded appropriately to defendant's request to proceed pro se made after commencement of trial; court deferred consideration of request until end of first day of trial, conducted full colloquy and then allowed defendant to conduct some aspects of trial and to rely on stand-by counsel for others).

(revised 11/2010)

## 2.36 Prejudicial Publicity During Trial

**I am advised that reports about this trial are appearing *(in the newspapers) and/or (on radio and television) and/or (on the Internet)*. The reporter responsible for the story may not have listened to all of the testimony as you have and may be getting information from people who will not testify under oath and subject to cross-examination in this trial. In addition, the reporter may emphasize an unimportant point or may simply be wrong.**

**As I have instructed you *(throughout)(previously during)* this trial, you must avoid listening to or reading any media accounts of this trial on the radio, television or the internet and in the newspaper. You are required to disregard any and all reports which you have *[(read)(seen)(heard)] [(in the newspapers) and/or (on radio and television) and/or (on the Internet)]* and any statements or inferences contained therein. Such information is not part of the evidence in this case. You must not permit such information to influence your judgment in arriving at a true verdict in this case.**

**Do not read anything or listen to anything or watch anything with regard to this trial. If you are exposed to any publicity about this case, you must not discuss anything which you have seen, heard, or read with your fellow jurors at any time during the trial or your deliberations. The case must be decided by you solely and exclusively on the evidence which will be received here in court.**

**Comment**

This instruction is derived from 1A O'Malley et al., supra, § 11.08, Sand et al., supra, 2-16 (Publicity--Reminder (Alternate Form)), and *United States v. DeLarosa*, 450 F.2d 1057 (3d Cir. 1971), *cert. denied,* 419 U.S. 1120 (1975).

The preliminary charge instructs the jury to consider only evidence deemed competent by the court and disregard any form of media coverage outside the courtroom. *See* Instruction 1.10 (Credibility of Witnesses). If jurors are later exposed to prejudicial publicity during the trial, the fairness of the trial has not necessarily been compromised, and the trial court has broad discretion to determine whether the defendant's right to a fair trial has been impaired. *United States v. DeLarosa*, 450 F.2d 1057 (3d Cir. 1971) *cert. denied,* 419 U.S. 1120 (1975). Typically, the trial court will voir dire the jury concerning exposure to the prejudicial publicity and give a cautionary instruction.

The Third Circuit addressed the appropriate measures in *United States v. DeLarosa*, 450 F.2d 1057 (3d Cir. 1971). In *DeLarosa*, two local newspapers reported on the second day of trial that shots were fired into the home of the government's chief witness. 450 F.2d at 1061. Upon learning of the publicity, the trial court conducted a voir dire and discovered that four jurors had seen the articles. *Id.* The court then asked: "'With the knowledge that you have of that article, do you feel that you are able to continue as a juror in this case, and decide the facts, and bring in a verdict based solely upon the facts you have heard in the courtroom and the evidence which has been adduced in the courtroom without being influenced . . . [by the articles].'" *Id.* at 1062. When the jurors responded in the affirmative and assured the court that they had not shared the contents of the article with other jury members, the trial court denied motions for a mistrial. *Id.*

In determining whether the trial court abused its discretion, the Third Circuit considered the cautionary instruction given by the court. *Id.* Defense counsel had requested the following instruction:

> You must disregard any and all reports which you have read, seen or heard in or through the news media; any statements or inferences contained therein. Such matters are not facts in evidence in this case because they are not relevant, competent or material to the issues which have been developed in this Courtroom. You must not permit such matters to influence your judgment in arriving at a true verdict in this case. *Id.* at 1062 n.3.

The trial court denied the request and, instead, instructed the jury:

> You would violate your sworn duty if you base your verdict on anything but the evidence heard in the courtroom and these instructions on the law. *Id.* at 1062.

The Third Circuit held that the combination of the voir dire and the instruction was sufficient to dispel any prejudice, but nevertheless remarked that "[I]t would have been better practice to give the charge requested [by counsel], which unmistakably prohibited consideration by the jury of information obtained from the news media." *Id.*

Similarly, in *United States v. Jackson*, 649 F.2d 967 (3d Cir. 1981), the Third Circuit held that the steps taken by the trial court adequately responded to the prejudicial publicity. In *Jackson*, many news reports concerning the case were circulating, and the unsequestered jury was on weekend recess. *Id.* at 974. When the trial resumed, defense counsel asked the court to inquire into whether the individual jurors had seen or heard news coverage of the

case during the recess. *Id.* The trial court observed that it had "specifically, on more than one occasion, instructed the jury that they were not to read any newspaper accounts concerning the trial or listen to any radio or television accounts," and agreed to "inquire as to whether any of them have (read or listened to newspaper, radio and TV reports)," but would conduct an individual voir dire of only those jurors who said they had been exposed to publicity about the case. *Id.* at 974-75. The court addressed the jurors as follows:

> Members of the jury, I want to again instruct you that during the course of the trial you must not discuss the case in any manner among yourselves or with anyone else, and you must not permit anyone to attempt to discuss it with you or in your presence, and insofar as the lawyers are concerned as well as others whom you may come to recognize as having some connection with the case, you are instructed that in order to avoid even the appearance of impropriety you should have no conversation whatever with those persons while you are serving on the jury.
>
> You must also avoid reading any newspaper articles that might be published about the case now that the trial is in progress, and you must also avoid listening to or observing any broadcast news program on either television or radio because of the possibility that mention might be made of this case during such a broadcast.
>
> The reasons for these cautions, of course, lies (sic) in the fact that it will be your duty to decide this case solely on the basis of the testimony and evidence presented during the trial without consideration of any other matters whatsoever.
>
> If at any time during the trial you read or hear something outside the courtroom that you think will influence your decision, please bring it to my attention through the bailiff, Mrs. Flaherty.
>
> Have any members of the jury since the beginning of this trial read any newspaper accounts or heard or listened to any radio or television accounts concerning this case and this trial?

*Id.* at 975. There was no response, and the trial proceeded. The Third Circuit upheld the trial court's actions, stating:

> To require the trial court to conduct an individual voir dire of all of the jurors, who have been repeatedly and properly instructed regarding news media reports, whenever there are prejudicial news media reports, rather than to limit the voir dire to jurors, if any, who have seen or heard such reports, is not consistent with the 'large discretion' needed by the court to move the trial along both expeditiously and fairly.

*Id.* at 975-76. Thus, the district court's general inquiry concerning the effect of media coverage on the bias of the jury, coupled with proper limiting instructions, did not amount to an abuse of discretion by the court. *Id.* at 976.

If a juror acknowledges being exposed to publicity regarding the trial, the court should question that juror individually in the presence of counsel and the defendant. At that time, the court should consider including the following questions and admonition:

1. What publicity about the case have you read, seen or heard?

2. As a result of what you (read)(saw)(heard), have you been influenced in this case in any way?

3. As a result of what you have (read)(seen)(heard), have you formed an opinion as to the guilt or innocence of the defendant?

4. Can you disregard the publicity which you (read)(saw)(heard) and decide the case based solely on the evidence presented in court?

5. Have you discussed this publicity or your feelings about it with any of the other jurors? If so, what did you say to them and what response did you receive from them?

6. Do not discuss the publicity which you (read)(saw)(heard) or anything with reference to this discussion with any of the other jurors.

In combination with the suggested cautionary instruction, this inquiry and admonition should protect the trial from the effect of the prejudicial publicity.

## 2.37 Instructions Prior to Closing Arguments

**Members of the jury, you have heard and seen all the evidence in this case. The lawyers now have the opportunity to present their closing arguments. Under the Rules of Criminal Procedure, the government will argue first, then the defense will present its closing argument*(s)*, and finally the government may, if it chooses, argue in response or in rebuttal to the defense's argument*(s)*.**

**Closing arguments are designed to present to you the parties' theories about what the evidence has shown and what conclusions may be drawn from the evidence. Remember, what is said in closing arguments is not evidence. You have already heard and seen all the evidence in this case.**

**After the lawyers present their closing arguments, I will give you my final instructions concerning the law that you must apply to the evidence in reaching your verdict. Although the lawyers may mention points of law in their closing arguments, the law that you must follow in reaching your verdict is the law that I will give you in my final instructions. If there is any difference between what the lawyers say about the law and what I tell you in my final instructions, you must follow my instructions.**

### Comment

Neither O'Malley nor any of the other Circuits suggest model instructions to be given before closing arguments. This instruction is included here for trial judges who may want to explain again the nature, purpose, and limits of closing arguments. The points covered are also covered in certain preliminary and final instructions. *See* Instructions 1.02 (Role of the Jury), 1.07 (Description of Trial Proceedings), 1.08 (Evidence(What Is)), 3.01 (Role of the Jury), and 3.02 (Evidence). This instruction should be modified if final instructions will be given before closing arguments.

## Chapter 3. Final Instructions: General

**3.01 Role of Jury**

**Members of the jury, you have seen and heard all the evidence and the arguments of the lawyers. Now I will instruct you on the law.**

**You have two duties as a jury. Your first duty is to decide the facts from the evidence that you have heard and seen in court during this trial. That is your job and yours alone. I play no part in finding the facts. You should not take anything I may have said or done during the trial as indicating what I think of the evidence or what I think about what your verdict should be.**

**Your second duty is to apply the law that I give you to the facts. My role now is to explain to you the legal principles that must guide you in your decisions. You must apply my instructions carefully. Each of the instructions is important, and you must apply all of them. You must not substitute or follow your own notion or opinion about what the law is or ought to be. You must apply the law that I give to you, whether you agree with it or not.**

**Whatever your verdict, it will have to be unanimous. All of you will have to agree on it or there will be no verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up his or her own mind. This is a responsibility that each of you has and that you cannot avoid.**

**Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. You should also not be**

**influenced by any person's race, color, religion, national ancestry, or gender** *(, sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community).*

**Comment**

*See* Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A *Federal Jury Practice and Instructions* (6th ed. 2006) [hereinafter O'Malley et al] § 12.01. For variations in other Circuits, *see* First Circuit § 3.01; Fifth Circuit §§ 1.03,1.04; Seventh Circuit § 1.01; Eighth Circuit §§ 3.01, 3.02; Ninth Circuit § 3.01.

One or more of the characteristics listed in the bracketed language in the last paragraph should be mentioned also, if it appears that there may be a risk that jurors could be influenced by those characteristics in a particular case. The trial judge may need to mention other characteristics that are not listed if it appears that they might influence jurors in a particular case.

**3.02 Evidence**

**You must make your decision in this case based only on the evidence that you saw and heard in the courtroom. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.**

**The evidence from which you are to find the facts consists of the following:**

**(1) The testimony of the witnesses;**

**(2) Documents and other things received as exhibits; and**

**(3) Any fact or testimony that was stipulated; that is, formally agreed to by the parties.**

*((4) Any facts that have been judicially noticed--that is, facts which I say you may accept as true even without other evidence.)*

**The following are not evidence:**

**(1) The indictment;**

**(2) Statements and arguments of the lawyers for the parties in this case;**

**(3) Questions by the lawyers and questions that I might have asked;**

**(4) Objections by lawyers, including objections in which the lawyers stated facts;**

**(5) Any testimony I struck or told you to disregard; and**

**(6) Anything you may have seen or heard about this case outside the courtroom.**

**You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience and common sense tells you that certain evidence reasonably leads to a conclusion, you may reach that conclusion.**

**As I told you in my preliminary instructions, the rules of evidence control what can be received into evidence. During the trial the lawyers objected when they thought that evidence was offered that was not permitted by the rules of evidence. These objections simply meant that the lawyers were asking me to decide whether the evidence should be allowed under the rules.**

**You should not be influenced by the fact that an objection was made. You should also not be influenced by my rulings on objections or any sidebar conferences you may have overheard. When I overruled an objection, the question was answered or the exhibit was received as evidence, and you should treat that testimony or exhibit like any other. When I allowed evidence (testimony or exhibits) for a limited purpose only, I instructed you to consider that evidence only for that limited purpose and you must do that.**

**When I sustained an objection, the question was not answered or the exhibit was not received as evidence. You must disregard the question or the exhibit entirely. Do not think about or guess what the witness might have said in answer to the question; do not think about or guess what the exhibit might have shown.**

**Sometimes a witness may have already answered before a lawyer objected or before I ruled on the objection. If that happened and if I sustained the objection, you must disregard the answer that was given.**

**Also, if I ordered that some testimony or other evidence be stricken or removed from the record, you must disregard that evidence. When you are deciding this case, you must not consider or be influenced in any way by the testimony or other evidence that I told you to disregard.**

**Although the lawyers may have called your attention to certain facts or factual conclusions that they thought were important, what the lawyers said is not evidence and is not binding on you. It is your own recollection and interpretation of the evidence that controls your decision in this case. Also, do not assume from anything I may have done or said during the trial that I have any opinion about any of the issues in this case or about what your verdict should be.**

**Comment**

*See* 1A O'Malley et al, supra, §§ 12.03, 12.07, 12.08. For variations in other Circuits, *see* First Circuit §§ 3.04, 3.08; Fifth Circuit § 1.06; Sixth Circuit § 1.04; Eighth Circuit § 3.03; Ninth Circuit §§ 3.03, 3.04.

The bracketed instruction (4) under what is evidence should be given only when the court has taken judicial notice of facts during the trial.

**3.03 Direct and Circumstantial Evidence**

**Two types of evidence may be used in this trial, "direct evidence" and "circumstantial (or indirect) evidence." You may use both types of evidence in reaching your verdict.**

**"Direct evidence" is simply evidence which, if believed, directly proves a fact. An example of "direct evidence" occurs when a witness testifies about something the witness knows from his or her own senses — something the witness has seen, touched, heard, or smelled.**

**"Circumstantial evidence" is evidence which, if believed, indirectly proves a fact. It is evidence that proves one or more facts from which you could reasonably find or infer the existence of some other fact or facts. A reasonable inference is simply a deduction or conclusion that reason, experience, and common sense lead you to make from the evidence. A reasonable inference is not a suspicion or a guess. It is a reasoned, logical decision to find that a disputed fact exists on the basis of another fact.**

**For example, if someone walked into the courtroom wearing a wet raincoat and carrying a wet umbrella, that would be circumstantial or indirect evidence from which you could reasonably find or conclude that it was raining. You would not have to find that it was raining, but you could.**

**Sometimes different inferences may be drawn from the same set of facts. The**

**government may ask you to draw one inference, and the defense may ask you to draw another. You, and you alone, must decide what reasonable inferences you will draw based on all the evidence and your reason, experience and common sense.**

**You should consider all the evidence that is presented in this trial, direct and circumstantial. The law makes no distinction between the weight that you should give to either direct or circumstantial evidence. It is for you to decide how much weight to give any evidence.**

**Comment**

*See* 1A O'Malley et al, supra, § 12.04; Hon. Leonard Sand, John S. Siffert, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal* (2003) [hereinafter, Sand et al.] 74-2. For variations in other Circuits, *see* Fifth Circuit § 1.07; Sixth Circuit § 1.06; Seventh Circuit § 1.05; Eighth Circuit §§ 1.03 & 1.04; Ninth Circuit § 1.6.

This instruction provides a general explanation of what the terms direct and circumstantial evidence, infer and inference mean in the context of a trial. This instruction should be given in most cases since it is likely that the lawyers will use these terms.

In *Woodson v. Scott Paper Co.*, 109 F.3d 913 (3d Cir. 1997), the Third Circuit defined "direct evidence" as "evidence that proves an ultimate fact in a case without any process of inference, save inferences of credibility." Direct evidence is evidence given by a witness as to a fact which the witness has observed or perceived. In contrast to direct evidence, circumstantial evidence is offered to prove an ultimate fact, but an inferential step by the fact finder is required to reach that fact. *See United States v. Casper*, 956 F.2d 416 (3d Cir. 1992). It is essential that there be a logical and convincing connection between the facts established and the conclusion inferred. *See, e.g., County Court v. Allen*, 442 U.S. 140 (1979); *United States v. Soto*, 539 F.3d 191, 194 (3d Cir. 2008 ) (quoting *United States v. Cartwright,* 359 F.3d 281, 287 (3d Cir.2004)). The fact that evidence is circumstantial does not mean that it has less probative value than direct evidence. *See Lukon v. Pennsylvania R. Co.*, 131 F.2d 327 (3d Cir. 1942). Also *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

**Permissive Inferences not Presumptions.** In criminal cases, the Constitution mandates the use of permissive inferences rather than presumptions. *See Sandstrom v. Montana*, 442 U.S. 510, 515-17 (1979). The court should avoid the use of the term presume because it may suggest to the jury that the defendant has the burden of proof (persuasion) on an element, which is unconstitutional.
(revised 12/09)

**3.04 Credibility of Witnesses**

**As I stated in my preliminary instructions at the beginning of the trial, in deciding what the facts are you must decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses. Credibility refers to whether a witness is worthy of belief: Was the witness truthful? Was the witness' testimony accurate? You may believe everything a witness says, or only part of it, or none of it.**

**You may decide whether to believe a witness based on his or her behavior and manner of testifying, the explanations the witness gave, and all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection. In deciding the question of credibility, remember to use your common sense, your good judgment, and your experience.**

**In deciding what to believe, you may consider a number of factors:**

**(1) The opportunity and ability of the witness to see or hear or know the things about which the witness testified;**

**(2) The quality of the witness' knowledge, understanding, and memory;**

**(3) The witness' appearance, behavior, and manner while testifying;**

**(4) Whether the witness has an interest in the outcome of the case or any motive, bias, or prejudice;**

**(5) Any relation the witness may have with a party in the case and any effect the verdict may have on the witness;**

**(6) Whether the witness said or wrote anything before trial that was different from the witness' testimony in court;**

**(7) Whether the witness' testimony was consistent or inconsistent with other evidence that you believe** *[alternative: how believable the witness' testimony was when considered with other evidence that you believe]***; and**

**(8) Any other factors that bear on whether the witness should be believed.**

**Inconsistencies or discrepancies in a witness' testimony or between the testimony of different witnesses may or may not cause you to disbelieve a witness' testimony. Two or more persons witnessing an event may simply see or hear it differently. Mistaken recollection, like failure to recall, is a common human experience. In weighing the effect of an inconsistency, you should also consider whether it was about a matter of importance or an insignificant detail. You should also consider whether the inconsistency was innocent or intentional.**

**You are not required to accept testimony even if the testimony was not contradicted and the witness was not impeached. You may decide that the witness is not worthy of belief because of the witness' bearing and demeanor, or because of the inherent improbability of the testimony, or for other reasons that are sufficient to you.**

**After you make your own judgment about the believability of a witness, you can then attach to that witness' testimony the importance or weight that you think it deserves.**

**The weight of the evidence to prove a fact does not necessarily depend on the**

**number of witnesses who testified or the quantity of evidence that was presented. What is more important than numbers or quantity is how believable the witnesses were, and how much weight you think their testimony deserves.**

**Comment**

*See* 1A O'Malley et al, supra, § 15.01 (Credibility of Witnesses--Generally). For variations in other Circuits, *see* First Circuit § 3.06; Eighth Circuit § 3.04; Ninth Circuit § 3.09.

This instruction should be given in the final instructions at the end of the trial. In preliminary instructions at the beginning of trial, Instruction No. 1.10 should be given. The last paragraph of the instruction may be given usefully in a case in which more witnesses testify or more evidence is presented on one side than on the other.

Some judges may want to explain the factors in this instruction by presenting them as questions that the jurors should ask themselves. *See* Sixth Circuit § 1.07.

**Instructions Regarding Specific Types of Witnesses and Evidence.** Chapter 4 contains several instructions explaining weight and credibility with respect to specific types of witnesses and evidence, as well as specific instructions on types of impeachment evidence. *See* Instructions 4.15 (Eyewitness Identification of the Defendant); 4.17 (Child Witness); 4.18 (Credibility of Witnesses – Law Enforcement Officer); 4.19 (Credibility of Witnesses - Witness Who Has Pleaded Guilty to Same or Related Offense, Accomplices, Immunized Witnesses, Cooperating Witnesses); 4.20 (Credibility of Witnesses - Testimony of Informer); 4.21 (Credibility of Witnesses - Testimony of Addict or Substance Abuser); 4.22 (Impeachment of Witness – Prior Inconsistent Statement for Credibility Only); 4.23 (Impeachment - Bad Character for Truthfulness (F.R.E. 608(a)); 4.24 (Impeachment of Witness - Prior Bad Acts (F.R.E. 608(b)); 4.25 (Impeachment of Witness - Prior Conviction (F.R.E. 609)); 4.26 (False in One, False in All (*Falsus in Uno, Falsus in Omnibus*)); 4.35 (Impeachment of Defendant - Prior Bad Acts (F.R.E. 608(b)); 4.36 (Impeachment of Defendant - Prior Conviction (F.R.E. 609)); 4.37 (Impeachment of Defendant - Prior Inconsistent Statement Taken in Violation of Miranda); 4.38 (Impeachment of Defendant - Prior Inconsistent Statement Not Taken in Violation of Miranda); 4.39 (Defendant's Character Evidence); 4.40 (Impeachment of Defendant's Character Witness).

**When Defendant Does, Does Not Testify.** When the defendant testifies, Instruction 4.28 (Defendant's Testimony) should also be given, while Instruction 4.27 (Defendant's Choice Not to Testify or present Evidence) should be given when the defendant does not testify.

### 3.05 Not All Evidence, Not All Witnesses Needed

**Although the government is required to prove the defendant guilty beyond a reasonable doubt, the government is not required to present all possible evidence related to the case or to produce all possible witnesses who might have some knowledge about the facts of the case. In addition, as I have explained, the defendant is not required to present any evidence or produce any witnesses.**

*[In this case, the (name of defendant) [presented evidence] [produced witnesses]. (Name) is not required to present all possible evidence related to the case or to produce all possible witnesses who might have some knowledge about the facts of the case.]*

**Comment**

As a general matter, there is no requirement that all witnesses or evidence be presented, and ordinarily no inference can be drawn from the failure to present all witnesses or evidence. However, in the rare case in which the government could have called an important witness, but failed to do so, Instruction 4.16 (Missing Witness) may be considered. Also, if the defendant has argued that the government's case is deficient because of the failure to use one or more specific investigative techniques, Instruction 4.14 (Specific Investigation Techniques Not Required) should be considered.

The bracketed second paragraph should be used if the defendant produced witnesses or presented evidence.

**3.06 Presumption of Innocence; Burden of Proof; Reasonable Doubt**

**The defendant** *(name)* **pleaded not guilty to the offense***(s)* **charged.** *(Name)* **is presumed to be innocent.** *(He) (She)* **started the trial with a clean slate, with no evidence against** *(him) (her)*. **The presumption of innocence stays with** *(name)* **unless and until the government has presented evidence that overcomes that presumption by convincing you that** *(name)* **is guilty of the offense***(s)* **charged beyond a reasonable doubt. The presumption of innocence requires that you find** *(name)* **not guilty, unless you are satisfied that the government has proved guilt beyond a reasonable doubt.**

**The presumption of innocence means that** *(name)* **has no burden or obligation to present any evidence at all or to prove that** *(he) (she)* **is not guilty. The burden or obligation of proof is on the government to prove that** *(name)* **is guilty and this burden stays with the government throughout the trial.**

**In order for you to find** *(name)* **guilty of the offense***(s)* **charged, the government must convince you that** *(name)* **is guilty beyond a reasonable doubt. That means that the government must prove each and every element of the offense***(s)* **charged beyond a reasonable doubt. A defendant may not be convicted based on suspicion or conjecture, but only on evidence proving guilt beyond a reasonable doubt.**

**Proof beyond a reasonable doubt does not mean proof beyond all possible doubt or to a mathematical certainty. Possible doubts or doubts based on**

**conjecture, speculation, or hunch are not reasonable doubts. A reasonable doubt is a fair doubt based on reason, logic, common sense, or experience. It is a doubt that an ordinary reasonable person has after carefully weighing all of the evidence, and is a doubt of the sort that would cause him or her to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the lack of evidence, or from the nature of the evidence.**

**If, having now heard all the evidence, you are convinced that the government proved each and every element of the offense charged beyond a reasonable doubt, you should return a verdict of guilty for that offense. However, if you have a reasonable doubt about one or more of the elements of the offense charged, then you must return a verdict of not guilty of that offense.**

**Comment**

*See* 1A O'Malley et al, supra, § 12.10. For variations in other Circuits, *see* First Circuit § 3.02; Eighth Circuit §§ 3.05-3.08, 3.11; Ninth Circuit §§ 3.2, 3.5.

It is imperative that the trial judge accurately define the government's burden of proof and the meaning of "beyond a reasonable doubt." As long as these concepts are accurately conveyed to the jury, there are no specific words that must be used. *See, e.g., United States v. Dufresne*, 58 Fed. Appx. 890 (3d Cir. 2003); *United States v. Hernandez*, 176 F.3d 719 (3d Cir. 1999). This instruction mirrors the instructions the Third Circuit approved in these cases. In *United States v. Hoffecker*, 530 F.3d 137, 174-75 (3d Cir. 2008), the Third Circuit cited this instruction stating, "we had approved the District Court's reasonable doubt instruction. *See United States v. Hernandez,* 176 F.3d 719, 728-35 (3d Cir.1999) (mirroring our model instruction, Third Circuit Model Criminal Jury Instructions § 3.06)."

**"Two Inference" Instruction Disapproved.** In *United States v. Issac*, 134 F.3d 199 (3d Cir. 1998), the Third Circuit considered a challenge to the district court's

instructions on reasonable doubt. Specifically, the district court gave the so-called "two inference" instruction, as follows: "So if the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, the jury should, of course, adopt the conclusion of innocence." 134 F.3d at 202. The Third Circuit in *Issac* first noted that in *United States v. Jacobs,* 44 F.3d 1219, 1226 & n. 9 (3d Cir.), *cert. denied,* 514 U.S.1101 (1995), it "urged trial courts to heed the Second Circuit's criticism of the "two-inference" instruction when it is specifically brought to their attention." (The Court's reference to the Second Circuit was to *United States v. Inserra,* 34 F.3d 83, 91 (2d Cir.1994), which held that the "two-inference" instruction is improper because it "may mislead a jury into thinking that the government's burden is somehow less than proof beyond a reasonable doubt," quoting *United States v. Khan,* 821 F.2d 90, 93 (2d Cir.1987)). The Third Circuit in *Issac* continued, "Although we disapproved of the "two-inference" instruction in *Jacobs,* we did not hold that the instruction was so constitutionally deficient *per se* that it infected the entire instruction on reasonable doubt. 44 F.3d at 1226." Ultimately, the Third Circuit upheld the instruction in *Issac*, because "this deficiency was rectified by the remainder of the reasonable doubt instruction." 134 F.3d at 202. Courts are, nevertheless, advised to instruct in accordance with the instruction above and to refrain from using the "two-inference" instruction.

**Modification of Instruction When Defendant Raises an Affirmative Defense.** If the defense raises an affirmative defense (*i.e.,* a defense that does not seek to refute an element of the offense(s) charged) as to which the law places the burden of persuasion on the defense, the second and third paragraph of this instruction should be modified to read as follows:

> The prosecution always has the burden or obligation to prove each and every element of the offense*(s)* charged beyond a reasonable doubt. The defendant*(s) (name)* is *(are)* presumed to be innocent of the charge*(s)*. The law does not impose on the *(name)* the burden of proving *(his) (her) (their)* innocence or of disproving any of the elements of the offense*(s)* charged.
>
> The defendant*(s) (name)* in this case has *(have)*, however, raised the defense of *(state the affirmative defense that the defendant(s) asserted).* This is what the law calls an "affirmative defense." This affirmative defense does not require *(name)* to disprove any element of the offense*[s]* charged, but it does require the defense to prove certain other facts that the law recognizes as a sufficient reason to find *(name)* not guilty.
>
> You must consider the evidence presented by *(name)* in deciding if the government has proved the elements of the offense beyond a reasonable doubt. If you find that the government has proved each and every element of the offense*(s)*

charged beyond a reasonable doubt, and only after you have made that finding, then you should decide whether *(name)* has proved the facts necessary to establish *(his) (her)* affirmative defense of *(state the affirmative defense raised).* To find that *(name)* has proved this affirmative defense, you must find that *(name)* has proved the elements of that defense by *(state the burden of proof by which the defendant must prove the specific affirmative defense raised in this case).*

*See, e.g.*, *Patterson v. New York*, 432 U.S. 197, 206 (1977) ("In convicting Patterson under its murder statute, New York did no more than *Leland v. Oregon*, 343 U.S. 790 (1952) and *Rivera [v. Delaware*, 429 U.S. 877 (1976)] permitted it to do without violating the Due Process Clause. Under those cases, once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence.").

For model instructions on affirmative defenses and commentary discussing burdens of proof on defenses, *see* Chapter 7 (Defenses and Theories of Defense).

(revised 12/09)

### 3.07 Nature of the Indictment

**As you know, the defendant *(name)* is charged in the indictment with violating federal law, specifically *(state the offense(s) charged)*. As I explained at the beginning of trial, an indictment is just the formal way of specifying the exact crime*(s)* the defendant is accused of committing. An indictment is simply a description of the charge*(s)* against a defendant. It is an accusation only. An indictment is not evidence of anything, and you should not give any weight to the fact that *(name)* has been indicted in making your decision in this case.**

**Comment**

*See* 1A O'Malley et al, supra, §13.04. For variations in other Circuits, *see* Seventh Circuit § 2.01; Eighth Circuit §§ 3.05-3.08; Ninth Circuit § 3.2.

**Trial Court Discretion to Allow Jury to Have Indictment During Deliberations.** In *United States v. Todaro*, 448 F.2d 64, 66 (3d Cir. 1971), cert. denied, 404 U.S. 1040 (1972), the Third Circuit held that "the District Judge did not err in allowing the jurors to have a copy of the indictment with them during their deliberations. This is a matter within the discretion of the District Judge, subject to a limiting instruction that the indictment does not constitute evidence, but is an accusation only." Also *see, e.g., United States v. Stitt*, 380 F. Supp. 1172, 1175 (W.D.Pa.1974), aff'd mem., 510 F.2d 971 (3d Cir.), cert. denied, 421 U.S. 962 (1975). Many judges do not send the indictment out with the jury unless the parties request it. If the trial judge does allow the jurors to have the indictment, he or she may need to redact it to eliminate any charges that have been dismissed or any irrelevant allegations.

### 3.08 On or About

**You will note that the indictment charges that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.**

**Comment**

This instruction is derived from Eleventh Circuit § 9.1. For variations, *see* 1A O'Malley et al, supra, § 13.05; Sand et al, supra, 3-12; Fifth Circuit § 1.18; Sixth Circuit § 2.04; and Seventh Circuit § 4.04.

**Variances.** In *United States v. Somers*, 496 F.2d 723 (3d Cir. 1974), the Third Circuit detailed the approach to variances between charges and proof as to the time of the offense.

> [I]n evaluating variances, we must first determine whether there has been a modification in the elements of the crime charged. If such a modification exists, we will apply the per se rule of *Stirone* [reversal without inquiry into prejudice to the defendant] so as to preserve the shielding function of the grand jury. If, on the other hand, the variance does not alter the elements of the offense charged, we will focus upon whether or not there has been prejudice to the defendant . . . .

496 F.2d at 744 (citations omitted). The court noted also that when "the grand jury speaks in more general terms, . . . [b]y the use of the qualifying phrase 'on or about', the grand jury indicates its unwillingness to pinpoint the date of the offense charged." 496 F.2d at 745. *See also United States v. Schurr*, 775 F.2d 549, 558 (3d Cir. 1985) (noting that "in a case involving an alibi defense, a variance in proof of a date is not material in the absence of some specific evidence of prejudice"); *United States v. Frankenberry*, 696 F.2d 239, 245 (3d Cir. 1982) (concluding that exact date of firearm possession was critical in light of prosecution theory that defendant possessed two firearms simultaneously).

**3.09 Venue**

**The indictment alleges that some act in furtherance of the offense charged occurred here in** *(name of venue)***. There is no requirement that** *(all aspects of the offense charged) (the entire conspiracy)* **take place here in** *(name of venue)***. But for you to return a guilty verdict, the government must convince you that** *(some act in furtherance of the crime charged) (either the agreement, or one of the overt acts)***, took place here in** *(name of venue)***.**

**Unlike all the elements that I have described, this fact only has to be proved by a preponderance of the evidence. This means the government only has to convince you that it is more likely than not that** *(some act in furtherance of the crime charged)(part of the conspiracy)* **took place here.**

**Remember that the government must prove all the elements I have described beyond a reasonable doubt.**

**Comment**

This instruction is derived from Sixth Circuit §3.07. For variations, *see* Sand et al, supra, § 3-11 and Eighth Circuit § 3.13.

Venue is a question of fact for the jury. While generally described as an element of the offense, venue need only be established by a preponderance of the evidence. *United States v. Perez*, 280 F.3d 318, 329-30 (3d Cir. 2003).

If venue is in issue in the case, it may be error to refuse to instruct the jury concerning the requirement that the government prove venue. However, the instruction is not otherwise required, and is normally not given. In *Perez*, 280 F.3d 318, 327 (3d Cir. 2003), the Third Circuit held that:

> [W]here the indictment alleges venue without a facially obvious defect, the failure to instruct the jury to determine whether that venue is proper is reversible error only when (1) the defendant objects to venue prior to or at the close of the prosecution's case-in-chief, (2) there is a genuine issue of material fact with regard to proper venue, and (3) the defendant timely requests a jury instruction. Because the first and second prerequisites were unmet here, the District Court did not err in failing to instruct the jury on venue.

*See also United States v. Schofield,* 80 Fed. Appx. 798, 805 (3d Cir. 2003) (holding that venue was not in issue under *Perez*).

### 3.10 Elements of the Offense(s) Charged

**The defendant** *(name)* **is charged in the indictment with committing the offense of** *(state the offense charged)*. **This offense has** *(state number of)* **essential elements, which are:**

**First:** *(State the first element)***;**

**Second:** *(State the second element)***;**

**Third:** *(State the third element)***; and**

*(State each additional element)***.**

*(Name)* **is also charged with committing the offense of** *(state any additional offense charged)*. **The elements of that offense are:**

*(State the elements of any additional offense, as above.)*

**In order to find** *(name)* **guilty of** *(this) (these)* **offense***(s)***, you must all find that the government proved each of these elements beyond a reasonable doubt, as I will explain in more detail shortly.**

**Comment**

*See* 1A O'Malley et al, supra, § 13.03. For variations in other Circuits, *see* Seventh Circuit § 4.01; Eighth Circuit § 3.09.

**Chapter 6 (Elements of Offenses)** of these Instructions includes specific instructions on the elements of the most commonly charged federal offenses. If the defendant is charged with an offense included within that Chapter, the instructions there should be given. The instruction above should be used for offenses not specifically covered in Chapter 6.

The relevant statutory provision defining the offense and any controlling case law

should be examined to determine the essential elements of the offense. The trial judge should describe and define the elements in this instruction, using language that is as plain and simple as possible. It may be necessary to explain to the jury what these elements mean. Chapter 5 (Mental States), Chapter 7 (Additional Bases of Criminal Responsibility), and Chapter 8 (Defenses and Theories of Defense) should also be consulted and used where appropriate.

If the indictment contains multiple counts or if there are multiple defendants who are being tried together, *see* Instructions 3.12 -3.15.

### 3.11 Lesser Included Offenses

**I have just explained what the government has to prove for you to find** *(name)* **guilty of the offense***(s)* **charged in Count** *(no.)* **of the indictment,** *(e.g., committing a bank robbery in which someone was exposed to risk of death by the use of a dangerous weapon)*. **The law also permits the jury to decide whether the government has proven** *(name)* **guilty of another, lesser offense which is, by its very nature, necessarily included in the offense of** *(state offense)* **that is charged in Count** *(no.)* **the indictment.**

**The offense of** *(state offense)*, **that is charged in Count** *(no.)* **the indictment, necessarily includes the lesser offense***(s)* **of** *(state lesser included offense(s))*. **In order to find** *(name)* **guilty of this** *(these)* **lesser included offense***(s)*, **the government must prove the following elements beyond a reasonable doubt:**

**First:** *(State the first element)*;

**Second:** *(State the second element)*;

**Third:** *(State the third element)*; **and**

*(State each additional element)*.

**The difference between the offense charged in Count** *(no.)* **the indictment and the lesser offense***(s)* **that** *(is) (are)* **included within it is that for the offense charged in Count** *(no.)* **the indictment, the government must prove** *(state the additional element(s) that must be proved for the charged offense but not for the lesser included offense)*, **but it does not have to do so to prove the lesser included offense***(s)*.

**If you find unanimously that the government has proved beyond a reasonable doubt each of the elements of the offense of** *(state offense)* **charged in Count** *(no.)* **the indictment, then you should find** *(name)* **guilty of that offense and your foreperson should write "guilty" in the space provided on the verdict form for that offense** *(for that defendant)***. Your consideration of that offense** (*for that defendant*) **is then concluded.**

**However, if you find unanimously that the government has not proved beyond a reasonable doubt each element of the offense of** *(state offense)* **charged in Count** *(no.)* **the indictment, then you must find** *(name)* **not guilty of that offense and your foreperson should write "not guilty" in the space provided for that offense** *(for that defendant)* **on the verdict form. You should then consider whether the government has proved beyond a reasonable doubt all the elements of the lesser offense***(s)* **of** *(name of offense(s))* **that** *(is) (are)* **included in the offense of** *(state offense)* **charged in Count** *(no.)* **the indictment.**

**If you find unanimously that the government has proved beyond a reasonable doubt each of the elements of** *(this) (these)* **lesser included offense***(s)***, then you should find** *(name)* **guilty of** *(this) (these)* **lesser included offense***(s)* **and your foreperson should write "guilty" in the space provided for** *(this) (these)* **lesser included offense***(s) (for that defendant)* **on the verdict form. However, if you find unanimously that the government has not proved beyond a reasonable doubt each element of** *(this) (these)* **lesser included offense***(s)***, then you must find** *(name)* **not guilty of** (this)

*(these)* **offense***(s)* **and your foreperson should write "not guilty" in the space provided for** *(this) (these)* **lesser included offense***(s) (for that defendant)* **on the verdict form.**

**You should remember that the burden is always on the government to prove, beyond a reasonable doubt, each and every element of the offense charged in the indictment or of any lesser included offense.**

**Comment**

*See* 1A O'Malley et al, supra, § 20.05. For variations in other Circuits, *see* Sixth Circuit § 8.07; Seventh Circuit § 7.02; Eighth Circuit § 11.02.

**Rule 31(c) of the Federal Rules of Criminal Procedure** provides: "The defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right." The rule restates prior law, *see Berra v. United States*, 351 U.S. 131 (1956), and permits the jury to find the defendant guilty of a lesser included offense even though it was not explicitly charged in the indictment.

**What is a Lesser Included Offense.** In *Schmuck v. United States*, 489 U.S. 705 (1989), the Supreme Court concluded that, "one offense is not 'necessarily included' in another [under Rule 31(c)] unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)." 489 U.S. at 716. Thus, under the elements only test, an offense is a lesser included offense only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the greater offense. An offense is not a lesser included offense if it contains an additional statutory element that is not included in the greater offense. *See also United States v. Peterson*, – F.3d – , 2010 WL 3817087 (3d Cir. 2010).

**When to Give Lesser Included Offense Instruction.** A lesser included offense instruction is not automatic merely because legally there is a lesser included offense. First, ordinarily a lesser included offense instruction must be requested by one of the parties. Second, an instruction for a lesser included offense is proper only if the evidence would permit a rational jury to find guilt for the lesser offense and acquit on the greater offense that is charged in the indictment; *i.e.*, only if under a reasonable view, the evidence is sufficient to establish guilt of the

included offense and also leave a reasonable doubt as to some particular element of the charged offense. Thus, an instruction for a lesser included offense is proper only when conviction of the charged offense requires that the jury find a disputed fact which is not an element of the included offense. "[A] lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses.... In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater." *Sansone v. United States*, 380 U.S. 343, 349-50 (1965).

In *United States v. Peterson*, – F.3d – , 2010 WL 3817087 (3d Cir. 2010), defendant argued that he could not be convicted of a lesser included offense unless the trial judge gave the jury a lesser included offense instruction. Noting that other circuits are split on whether this is permissible, the Third Circuit concluded that in the particular case, in which the trial court used special verdict forms that asked the jury to rule separately on the greater and the lesser included offenses, the failure to instruct on the lesser offense was not error and, even if it was, defendant had not properly objected and it was not plain error.

**Verdict Form When Jury Instructed on Lesser Included Offenses.** When the jury is instructed on lesser included offenses of the offense charged in the indictment, the verdict form should accurately reflect the choices presented to the jury. *See* Instruction 3.17 (Verdict Form). This is important to avoid the type of ambiguous verdict that prompted the Third Circuit to reverse in *United States v. Barrett*, 870 F.2d 953 (3d Cir. 1989). In *Barrett*, the trial judge instructed the jury that it might find the defendant guilty as charged, guilty of a lesser included offense, or not guilty, but the verdict slip only provided places to mark guilty or not guilty. Thus, the jury's mark of guilty on the verdict slip could have meant it convicted defendant either of the charged offense or the lesser included offense, and thus amounted to a fatal ambiguity in the verdict constituting reversible error. The Third Circuit stated that the problem should be avoided by providing verdict forms to the jury that leave no doubt as to what the jury has determined. 870 F.2d at 954-55, citing 1 F. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 18.05, at 584 (3d ed. 1977). The Third Circuit also rejected the government's argument that the trial judge could use special interrogatories to clarify the ambiguous verdict (*see* the Comment to Instruction 3.18 (Special Verdict Form; Special Interrogatories)), but noted that the trial judge could have sent the jury back for further deliberations to clarify the ambiguity before accepting the verdict. 870 F.2d at 955, 955 n.1. Also *see* James A. Strazzella & James A. Shellenberger, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. 1, 180-83 ("Submitting Verdict Options to the Jury and Receiving the Verdicts").

O'Malley suggests alternative language in the lesser included offense instruction, "[*If, after reasonable efforts have been unsuccessful, the jury is unable to reach a verdict as to whether or not the government has proven each element of the offense charged in [*Count ___ of*] the indictment, the jury should then consider whether or not Defendant _____ is guilty or not guilty of the [*less serious*] [*other*] crime of _____ which is necessarily included in the offense of _____ charged in [*Count ___ of*] the indictment.*]" O'Malley, § 20.05. Other Circuits include similar alternative language. *See, e.g.,* Sixth Circuit § 8.07; Seventh Circuit § 7.02; Eighth Circuit § 11.02. This alternative is not included in the above instruction because it might

encourage jurors not to agree on a verdict. Also, although retrial is permitted after a mistrial has been properly declared because of a hung jury, Fed. R. Crim P. 31(b)(3); *Richardson v. United States*, 468 U.S. 317 (1984), it is not clear whether a conviction on a lesser included offense might preclude retrial on the charged offense on which the jury could not agree.

(Revised 11/10)

### 3.12 Separate Consideration – Single Defendant Charged with Multiple Offenses

**The defendant** *(name)* **is charged with** *(more than one offense) (several offenses)***; each offense is charged in a separate count of the indictment.**

**The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. You must separately consider the evidence that relates to each offense, and you must return a separate verdict for each offense. For each offense charged, you must decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of that particular offense.**

**Your decision on one offense, whether guilty or not guilty, should not influence your decision on any of the other offenses charged. Each offense should be considered separately.**

**Comment**

*See* 1A O'Malley et al, supra, §§ 12.11-12.14. For variations in other Circuits, *see* Eighth Circuit §§ 3.05-3.08; Ninth Circuit §§ 3.12-3.14; Eleventh Circuit §§ 10.1-10.04.

### 3.13 Separate Consideration – Multiple Defendants Charged with a Single Offense

**The defendants *(names)* are all charged with one offense. In our system of justice, however, guilt or innocence is personal and individual. You must separately consider the evidence against each defendant, and you must return a separate verdict for each defendant. For each defendant, you must decide whether the government has proved that particular defendant guilty beyond a reasonable doubt.**

**Your decision on one defendant, whether guilty or not guilty, should not influence your decision on any of the other defendants. Each defendant should be considered individually.**

**Comment**

*See* 1A O'Malley et al, supra, §§ 12.11-12.14. For variations in other Circuits, *see* Eighth Circuit §§ 3.05-3.08; Ninth Circuit §§ 3.12-3.14; Eleventh Circuit §§ 10.1-10.04.

### 3.14 Separate Consideration – Multiple Defendants Charged with the Same Offenses

**The defendants** *(names)* **are all charged with** *(more than one offense) (several offenses)***; each offense is charged in a separate count of the indictment. The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. Also, in our system of justice, guilt or innocence is personal and individual. You must separately consider the evidence against each defendant on each offense charged, and you must return a separate verdict for each defendant on each offense. For each defendant and offense, you must decide whether the government has proved beyond a reasonable doubt that the particular defendant is guilty of the particular offense.**

**Your decision on any one defendant or any one offense, whether guilty or not guilty, should not influence your decision on any of the other defendants or offenses. Each offense and each defendant should be considered separately.**

**Comment**

*See* 1A O'Malley et al, supra, §§ 12.11-12.14. For variations in other Circuits, *see* Eighth Circuit §§ 3.05-3.08; Ninth Circuit §§ 3.12-3.14; Eleventh Circuit §§ 10.1-10.04.

### 3.15 Separate Consideration – Multiple Defendants Charged with Different Offenses

**The defendants *(names)* are charged with different offenses. I will explain to you in more detail shortly which defendants are charged with which offenses. Before I do that, however, I want to emphasize several things.**

**The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. Also, in our system of justice, guilt or innocence is personal and individual. You must separately consider the evidence against each defendant on each offense charged, and you must return a separate verdict for each defendant for each offense. For each defendant and each offense, you must decide whether the government has proved beyond a reasonable doubt that a particular defendant is guilty of a particular offense.**

**Your decision on any one defendant or any one offense, whether guilty or not guilty, should not influence your decision on any of the other defendants or offenses. Each offense and each defendant should be considered separately.**

**Comment**

*See* 1A O'Malley et al, supra, §§ 12.11-12.14. For variations in other Circuits, *see* Eighth Circuit §§ 3.05-3.08; Ninth Circuit §§ 3.12-3.14; Eleventh Circuit §§ 10.1-10.04.

**3.16 Election of Foreperson; Unanimous Verdict; Do Not Consider Punishment; Duty to Deliberate; Communication with Court**

**That concludes my instructions explaining the law regarding the testimony and other evidence, and the offenses charged. Now let me explain some things about your deliberations in the jury room, and your possible verdicts.**

**First: The first thing that you should do in the jury room is choose someone to be your foreperson. This person will speak for the jury here in court. He or she will also preside over your discussions. However, the views and vote of the foreperson are entitled to no greater weight than those of any other juror.**

**Second: I want to remind you that your verdict, whether it is guilty or not guilty, must be unanimous. To find** *(name of defendant)* **guilty of an offense, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves each element of that offense beyond a reasonable doubt. To find** *(name)* **not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt.**

**Third: If you decide that the government has proved** *(name)* **guilty, then it will be my responsibility to decide what the appropriate punishment should be. You should never consider the possible punishment in reaching your verdict.**

**Fourth: As I have said before, your verdict must be based only on the evidence received in this case and the law I have given to you. You should not take anything I may have said or done during trial as indicating what I think of the**

**evidence or what I think your verdict should be. What the verdict should be is the exclusive responsibility of the jury.**

**Fifth: Now that all the evidence is in, the arguments are completed, and once I have finished these instructions, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong. But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that--your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience. Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.**

**No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. You should all feel free to speak your minds.**

*[Remember, if you elected to take notes during the trial, your notes should be used only as memory aids. You should not give your notes greater weight than your independent recollection of the evidence. You should rely upon your own independent recollection of the evidence or lack of evidence and you should not be unduly influenced*

*by the notes of other jurors. Notes are not entitled to any more weight than the memory or impression of each juror.]*

**Sixth: Once you start deliberating, do not talk about the case to the court officials, or to me, or to anyone else except each other. If you have any questions or messages, your foreperson should write them down on a piece of paper, sign them, and then give them to the court official who will give them to me. I will first talk to the lawyers about what you have asked, and I will respond as soon as I can. In the meantime, if possible, continue with your deliberations on some other subject.**

*[If you want to see any of the exhibits that were admitted in evidence, you may send me a message and, if I can legally do so, I will have those exhibits provided to you.]*

**One more thing about messages. Do not ever write down or tell anyone how you or any one else voted. That should stay secret until you have finished your deliberations. If you have occasion to communicate with the court while you are deliberating, do not disclose the number of jurors who have voted to convict or acquit on any offense*(s)*.**

**Comment**

*See* 1A O'Malley et al, supra, § 20.01. For variations in other circuits, *see* First Circuit §§ 6.01-6.03, 6.05; Fifth Circuit §§ 1.24, 1.20; Sixth Circuit §§ 8.01, 8.03-8.05, 8.09-8.10; Seventh Circuit §§ 7.01-7.02, 7.05-7.06; Eighth Circuit § 3.12; Ninth Circuit §§ 7.1-7.4, 7.6; Eleventh Circuit §§ 11-12.

The bracketed paragraph with respect to the use of juror's notes should be used if the jurors were permitted to take notes during trial. *See* Instruction No. 1.05 (Note-Taking by Jurors).

"Court official' in paragraph "Sixth" includes the court personnel who are responsible for caring for the jury during their deliberations.

**District Practice.** This instruction should be modified if necessary to be consistent with the practice within the district. For example, with respect to the "First" paragraph, the trial judge selects the jury foreperson in the District of Delaware.

**Discretion to Send Exhibits, Indictment Out With Jury.** Whether to send exhibits out with the jury is within the trial court's discretion and practice varies widely. *See* O'Malley § 20.04. Some judges send out the exhibits routinely in all cases, others do so only with the agreement of the lawyers, others leave it to the jury to ask for the exhibits. As for allowing the jurors to have the indictment during deliberations, *see* Comment to Instruction 3.07 (Nature of the Indictment).

### 3.17 Verdict Form

**A verdict form has been prepared that you should use to record your verdict*(s)*.**

**Take this form with you to the jury room. When you have reached your unanimous verdict*(s)*, the foreperson should write the verdict*(s)* on the form, date and sign it, return it to the courtroom and give the form to my courtroom deputy to give to me. If you decide that the government has proved *(name)* guilty of any or all of the offenses charged beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. If you decide that the government has not proved *(name)* guilty of some or all of the offenses charged beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form.**

**Comment**

*See* 1A O'Malley et al, supra, § 20.01. For variations in other circuits, *see* First Circuit § 6.04; Sixth Circuit § 8.06; Seventh Circuit § 7.01-7.02; Eighth Circuit §§ 3.12, 11.01-11.03; Ninth Circuit § 7.5; Eleventh Circuit § 12.

**Districts, Trial Judges Practices.** The trial judge should review the verdict form with counsel before submitting it to the jury. This instruction and the verdict form will need to be modified to reflect different practices among the districts and trial judges. For example, in the Western District of Pennsylvania each juror signs the verdict form, not only the foreperson. If that practice is followed, it should be explained to the jury. (*E.g.*, "When you have reached your unanimous verdict*(s)*, the foreperson should write the verdict*(s)* on the form and date it. Each juror should then sign the verdict form in the spaces provided at the end. When you return to the courtroom, the foreperson will give the form to my courtroom deputy to give to me.") Also, different judges may have different practices with respect to presenting the verdict form to the jury. Some judges may read the form to the jury, others may hand it out and then orally review it with the jurors, others may refer to the verdict form throughout their instructions on the offense*(s)*.

**Lesser Included Offenses Verdict Form.** When the jury has been instructed on lesser included offenses of the offense charged in the indictment, the verdict form should accurately reflect the choices presented to the jury. *See* Instruction 3.11 (Lesser Included Offenses ).

## 3.18 Special Verdict Form; Special Interrogatories

*No instruction recommended*

**Comment**

**Special Interrogatories Generally Disfavored; If Used, Answered Only After Jury Finds of Guilt.** The Third Circuit has stated that special interrogatories are disfavored in criminal cases, but they may be used in the discretion of the trial court. If special interrogatories are used, the trial court should make it clear that the jury should answer the special interrogatories only after it has already found the defendant guilty. Thus, in *United States v. Hedgepeth*, 434 F.3d 609, 613 (3d Cir 2006), the Third Circuit stated that:

> "Although special interrogatories are disfavored in criminal trials, this court has established no per se rule against them." *United States v. Palmeri,* 630 F.2d 192, 202 (3d Cir.1980), *cert. denied,* 450 U.S. 967 (1981) (citations omitted). "Nevertheless, there are circumstances where the use of special findings may be necessary," including "where a determination of certain facts will be crucial to the sentence...." *United States v. Desmond,* 670 F.2d 414, 418 (3d Cir.1982); *see also United States v. Barrett,* 870 F.2d 953, 955 (3d Cir.1989) ("sharply contrast[ing]" use of special interrogatories "to assist in sentencing" with their impermissible use "to clarify an ambiguous verdict").
>
> The "disfavor with which courts view special interrogatories in criminal cases results from interrogatories that lead the jury in a step-by-step progression to a verdict of guilty." *Palmeri,* 630 F.2d at 202. Therefore, our Court has held that, when special findings are necessary for sentencing purposes, "the appropriate information may be obtained by submitting special interrogatories to the jury after a guilty verdict has been returned." *Desmond*, 670 F.2d at 418.

The Third Circuit also noted in *Hedgepeth* that, "[a] special interrogatory has been submitted 'after' a guilty verdict has been returned when jurors are instructed on a single form to answer the special interrogatory only after filling out a verdict of guilty or not guilty." *United States v. Hegepeth*, 434 at 613 fn 2. In *Hedgepeth*, the verdict slip was structured so that it instructed the jury to determine first whether the defendant was guilty of possession of a firearm by a felon and, only after making that determination, to consider the special interrogatories. The Third Circuit reasoned that the "danger of prejudice to Hedgepeth was thus alleviated, as we cannot say that the jury was led step-by-step to a guilty verdict when the special findings followed the guilt determination," *id.* citing *United States v. Console*, 13 F.3d 641, 663 (3d Cir. 1993). The court concluded,

"As we have held that special interrogatories are appropriate in the sentencing context when they are considered by the jury after a guilty verdict has been rendered, it was not an abuse of discretion for the District Court to allow the Government to submit the special verdict form to the jury." 434 F.3d at 614.

**Potential Need for Special Interrogatories in View of *Apprendi v. New Jersey*.** The Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny emphasize the need for specific jury findings for sentencing purposes and the potential use of special interrogatories after a guilty verdict. *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Also *see Blakely v. Washington*, 542 U.S. 296, 303 (2004) ("the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."); *Washington v. Recuenco*, 548 U.S. 212 (2006) (government conceded error by trial judge's imposing "firearm" enhancement to defendant's sentence, but Supreme Court remanded for determination whether the error was harmless, where the jury answered a special verdict form that defendant convicted of assault in the second degree was armed with a "deadly weapon" at the time of the offense, but nothing in the verdict form required jury specifically to find that defendant had used a "firearm").

**Special Interrogatories and RICO.** In *United States v. Console*, 13 F.3d 641, 663 (3d Cir. 1993), the issue was whether the trial judge should have submitted to the jury special interrogatories with respect to the elements of a RICO charge. The Third Circuit stated, "A defendant has no right to a verdict on the elements of an offense. *United States v. Riccobene,* 709 F.2d at 228. The district court has discretion in determining whether to submit special interrogatories to the jury regarding the elements of an offense. *Riccobene,* 709 F.2d at 228. '[E]ven where the opposing party does not object, the court is not required to submit special questions to the jury.' *Id.*" In *Console*, the court found no evidence that the district court abused its discretion in denying defendant's request for special interrogatories, "as the jury already was faced with the difficult task of resolving multiple RICO and mail fraud counts against multiple defendants. Moreover, even when special interrogatories regarding RICO predicates are submitted to the jury, the court is permitted to give an instruction to the jury to answer the interrogatories *only after it votes to convict*, thereby alleviating the danger of prejudice to the defendant." 13 F.3d at 663 (emphasis added).

**Other Offenses.** In addition to RICO and firearms cases, special interrogatories may also be useful in narcotics cases in which the potential sentence may depend on the quantity and type of drug proved by the evidence. *See* Instructions 6.18.922G-1 (Felon in Possession of Firearm (18 U.S.C. § 922(g) (bifurcated proceeding)); 6.18.1962C-10

(RICO – Verdict Form and Special Interrogatories); 6.21.841C (Controlled Substances – Special Interrogatories and Verdict Forms With Respect to Weight).

## 4. Final Instructions: Consideration of Particular Kinds of Evidence

## 4.01 Stipulated Testimony

**The parties have agreed what** (*name of witness*)**'s testimony would be if called as a witness. You should consider that testimony in the same way as if it had been given here in court by the witness.**

**Comment**

*See* Ninth Circuit § 2.3. For variations, *see* Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal Volumes* (Matthew Bender 2003) [hereinafter, Sand et al., supra] , 5-7 and Eighth Circuit § 2.02.

When the parties stipulate to what a witness would testify to if called, it is error to instruct the jury that it must consider the stipulated testimony as true. *See United States v. Bennally*, 756 F.2d 773 (10th Cir. 1985). *See* Instruction 4.02 (Stipulation of Fact) if the stipulation is as to an issue of fact.

## 4.02 Stipulation of Fact

**The Government and the defendant***(s)* **have agreed that** *(set forth stipulated fact(s)) (is)(are)* **true. You should therefore treat** *(this fact)(these facts)* **as having been proved. You are not required to do so, however, since you are the sole judge of the facts.**

**Comment**

*See* Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A *Federal Jury Practice and Instructions* [hereinafter O'Malley et al., supra] § 12.03; Sand, et al., supra, 5-6, and Ninth Circuit § 2.4. For variations, *see* Ninth Circuit (Criminal) § 2.4 and Federal Judicial Center § 12.

In a criminal case, the jury is not necessarily bound by a stipulation between the parties. In *United States v. Cornish*, 103 F.3d 302 (3d Cir. 1997), the defendant unsuccessfully argued that the trial court's instruction gave too binding an effect to the stipulation concerning the defendant's prior conviction. The trial court simply instructed the jury that "it's been agreed that on April 16th, 1994, defendant had been previously convicted of such a crime." The Court of Appeals concluded that the instruction was not plain error. Nevertheless, the court appeared to express a preference for instructions that tell the jurors they "should" treat stipulated facts as having been proved, commenting that such instructions "avoid the hazard, apparent or not, of directing a verdict on a factual issue and would be shielded from constitutional challenge." *Id.* at 306-07.

In cases where a stipulation may amount to an admission to an element of the offense, the judge may wish to exercise caution. The Third Circuit has yet to address the question, but the judge may wish to ascertain that the defendant understands the contents of the stipulation and agrees to it.

## 4.03 Judicial Notice (F.R.E. 201)

**I have taken judicial notice of certain facts.** *(State the fact(s) that are being judicially noticed.)* **I believe** *(this fact is )(these facts are) (of such common knowledge) (can be so accurately and readily determined from (name accurate source))* **that it cannot reasonably be disputed. You may accept this fact as proven, but are not required to do so. As with any fact the final decision whether or not to accept it is for you to make and you are not required to agree with me.**

**Comment**

*See* Eighth Circuit § 2.04. For variations, *see* O'Malley et al., supra, § 12.03; Sand et al., supra, 5-5; Sixth Circuit § 7.19; Seventh Circuit § 1.02; and Ninth Circuit § 2.5.

Rule 201 of the Federal Rules of Evidence governs judicial notice of adjudicative facts. Rule 201(b) defines the kinds of facts that may be judicially noticed:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Judicial notice may be taken at any stage of the proceedings, but generally only after the parties have been afforded an opportunity to be heard on the matter. An instruction on judicial notice should be given at the time that notice is taken. It may also be given at the time the jury is charged at the close of the evidence.

Rule 201(g) directs that "[i]n a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." In this regard, the rule for criminal cases differs from the rule for civil cases, in which the jury has no discretion to reject judicially noticed facts. The Third Circuit has noted with approval instructions that adhere to the language of the rule for criminal cases. *See United States v. Mitchell*, 365 F.3d 215, 251 n.28 (3d Cir. 2004); *United States v. Saada*,

212 F.3d 210, 223 (3d Cir. 2000). While approving the trial court's instructions in both *Mitchell* and *Saada*, the court did not include the text of either instruction. As a result, it is not clear whether the court tracked the language of the rule exactly.

## 4.04 Audio/Video Recordings - Consensual

**During the trial you heard** *(audio)(video)* **recordings of conversations with the defendant***(s)* **made without** *(his)(her)(their)* **knowledge. These recordings were made with the consent and agreement of** *(name)***, one of the other parties to the conversations.**

**The use of this procedure to gather evidence is lawful and the recordings may be used by either party.**

**Comment**

*See* Sand et al., supra, 5-10.

This instruction addresses the jurors' possible concern about the legality of recordings offered in evidence. It should not be given routinely, but should be given if there is reason to believe the jury would be concerned and if it is requested by either party.

## 4.05 Audio/Video Recordings - Non-consensual

**During the trial, you heard recordings of conversations with the defendant*(s)* which were made without the knowledge of the parties to the conversations, but with the consent and authorization of the court. These recordings *(sometimes referred to as wiretaps)* were lawfully obtained.**

**The use of this procedure to gather evidence is lawful and the recordings may be used by either party.**

**Comment**

*See* Sand, et al., supra, 5-11.

This instruction addresses the jurors' possible concern about the legality of recordings offered in evidence. It should not be given routinely, but should be given if there is reason to believe the jury would be concerned and if it is requested by either party.

## 4.06 Audio/Video Recordings - Transcripts

**You have heard** *(audio)(video)* **recordings that were received in evidence, and you were given written transcripts of the recordings.**

**Keep in mind that the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The recordings themselves are the evidence. If you noticed any differences between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of the recordings you must ignore the transcripts as far as those parts are concerned.**

*[The transcripts name the speakers. But remember, you must decide who you actually heard speaking in the recording. The names on the transcript were used simply for your convenience.]*

**Comment**

*See* Sixth Circuit § 7.17 and Eighth Circuit § 2.06. For variations, *see* O'Malley, et al., supra, § 14.09; Sand, et al., supra, 5-9; First Circuit § 2.08; Fifth Circuit § 1.42; Seventh Circuit § 3.17; and Ninth Circuit § 2.17.

Audio and video recordings are generally admissible "'[u]nless the unintelligible portions of the tapes are so substantial as to render the recordings as a whole untrustworthy.'" *United States v. Salvo*, 34 F.3d 1204, 1220 (3d Cir. 1994) (citing *United States v. Arango-Correa*, 851 F.2d 54, 58 (2d Cir. 1988) (quoting *Monroe v. United States*, 234 F.2d 49, 55 (D.C. Cir.), *cert. denied*, 352 U.S. 873 (1956))).

The trial judge has discretion to admit transcripts for use with the recordings. In *United States v. Adams*, 759 F.2d 1099, 1115 (3d Cir.), *cert. denied*, 474 U.S. 906 (1985),

the court upheld the admission of a tape recording and transcript, noting that "the judge instructed the jury that the tape recording controlled over the transcript in case of error or ambiguity." *See also Salvo*, 34 F.3d at 1220 (concluding that trial court's instruction that tape controlled and transcript was not evidence protected against unfairness).

Instruction 2.07 (Audio/Video Recordings - Transcripts) should be given when the recording is played. This instruction should be included in the final charge.

[The bracketed paragraph should be included only if there is a dispute about the identity of the speakers in the recording. *Government of the Virgin Islands v. Martinez*, 847 F.2d 125, 128 (3d Cir. 1988). When such a dispute arises, the preferred solution is to use neutral designations, such as "Speaker 1" and "Speaker 2" rather than names. *Id.* at 129.]

If defense counsel contests the accuracy of a government transcript, and the court therefore admits two alternative versions, the court should replace the second paragraph of this instruction with the following instruction, based on the instruction suggested by Sand in the notes to Instruction 5-9:

> You have been handed two separate transcripts. One contains the government's interpretation of what appears on the tape recording; the other contains the defense interpretation. Both of these versions of the transcript have been given to you as a guide to assist you in listening to the tapes. Neither transcript is evidence. Rather, it is the tape recording which is the evidence and the transcripts are only guides. Therefore, you must listen to the tapes themselves very carefully. You alone should make your own interpretation of what appears on the tapes from what you hear. You may use both the government version and the defense version of the transcripts to assist you in this task. If you think you hear something differently than the government or the defense has interpreted on their versions of the transcripts, then you are to follow your own interpretation. You may agree partially with each, and you may accept those portions you agree with and reject those portions you disagree with. You need not select between the two versions, and you may come up with your own findings of what appears on the tapes.

## 4.07 Transcript of Recording In Foreign Language

**During the trial, you listened to a tape recording in** (*language used*)**. Each of you was given a transcript of the recording which was admitted into evidence. The transcript was a translation of the foreign language tape recording.**

**Although some of you may know the** (*language used*)**, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation contained in the transcript and disregard any different meaning.**

**Comment**

*See* Ninth Circuit § 2.8.

This instruction should be given when recordings in a foreign language were admitted.

When foreign language recordings are introduced, the court should first encourage the parties to agree on a transcript. *United States v. Zambrana*, 841 F.2d 1320, 1335-36 (7th Cir. 1988). If the parties cannot agree on a transcript, then each party may produce its own version either of the entire transcript or of disputed portions of the transcript and also present evidence to establish the accuracy of its transcript. In addition, each party may introduce evidence to challenge the accuracy of the other party's transcript. *Zambrana*, 841 F.2d at 1336. In the event of a dispute, the court should add the following language to the instruction:

> Whether a transcript is an accurate translation, in whole or in part, is for you to decide. In considering whether a transcript is an accurate translation of a conversation, you should consider the testimony presented to you regarding how, and by whom, the transcript was made. You may consider the knowledge, training, and experience of the translator, as well as the nature of the conversation and the reasonableness of the translation in light of all the evidence in the case.

*See United States v. Gutierrez*, 367 F.3d 733, 736 (8th Cir. 2004); Seventh Circuit § 3.18.

The Committee on Federal Criminal Jury Instructions of the Seventh Circuit also suggests that, if the jury views a visual recording of the conversation, the court should instruct the jury that "You may consider the actions of a person, the facial expressions and lip movements that you can observe on videotapes to help you to determine the identity of speakers." *See* Seventh Circuit § 3.18 (comment).

**4.08 Opinion Evidence (Expert Witnesses)**

**The rules of evidence ordinarily do not permit witnesses to state their own opinions about important questions in a trial, but there are exceptions to these rules.**

**In this case, you heard testimony from** *(state the name of the person(s) who offered an opinion)*. **Because of** *(his)(her)(their)* **knowledge, skill, experience, training, or education in the field of** *(state the witness(es)'s field)*, *(Mr.)(Ms.)(Dr.) (name) (was)(were)* **permitted to offer a***(n)* **opinion***(s)* **in that field and the reasons for** *(that)(those)* **opinion***(s)*.

**The opinion***(s) (this)(these)* **witness***(es)* **state***(s)* **should receive whatever weight you think appropriate, given all the other evidence in the case. In weighing this opinion testimony you may consider the witness' qualifications, the reasons for the witness' opinions, and the reliability of the information supporting the witness' opinions, as well as the other factors discussed in these instructions for weighing the testimony of witnesses. You may disregard the opinion***(s)* **entirely if you decide that** *(Mr.)(Ms.)(Dr.) (name)*'**s opinion***(s) (is)(are)* **not based on sufficient knowledge, skill, experience, training, or education. You may also disregard the opinion***(s)* **if you conclude that the reasons given in support of the opinion***(s)* **are not sound, or if you conclude that the opinion***(s) (is)(are)* **not supported by the facts shown by the**

**evidence, or if you think that the opinion*(s) (is)(are)* outweighed by other evidence.**

**Comment**

*See* Fed. R. Evid. 702; O'Malley et al., supra, § 14.01. For model or pattern instruction from other Circuits regarding expert or opinion testimony in criminal cases, *see* First Circuit § 2.06; Fifth Circuit § 1.17; Sixth Circuit § 7.03; Eighth Circuit § 4.10; Ninth Circuit § 4.16; Eleventh Circuit § 7.

This instruction should be given if a witness was permitted to give an opinion under F.R.E. 702. For a comparable instruction that should be given at the time the witness testifies, *see* Instruction 2.09 (Opinion Evidence (Expert Witnesses)). Instruction 2.10 (Opinion Evidence (Lay Witnesses)) addresses lay opinion testimony. If both expert and lay witnesses were permitted to give opinion testimony, both sets of instructions should be given.

The instruction avoids labeling the witness as an "expert." If the court refrains from designating the witness as an "expert" this will "ensure[] that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and will protect against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials,* 154 F.R.D. 537, 559 (1994). *See also* Fed. R. Evid. 702 advisory committee's note (2000) (cautioning against instructing the jury that the witness is an "expert").

Before the beginning of trial, the judge should discuss with counsel that they should also avoid using the word "expert" to refer to the witnesses. However, if counsel refers to witnesses as "experts," the trial judge should modify the instruction by telling the jury what an "expert" is. Therefore, the court should include, after the first paragraph of the model instruction set forth above, the following additional paragraph:

> The defendant's lawyer/the prosecutor called *(Mr.)(Ms.)(Dr.) (name)* an expert witness. Someone who is called an expert witness is simply a witness who, because of his or her knowledge, skill, experience, training, or education, may have become knowledgeable in some technical, scientific, or specialized field and therefore is permitted to state an opinion about that field. You should not give any greater weight or credit to *(Mr.)(Ms.)(Dr.) (name)*'s testimony merely because he or she was called an

expert witness by the lawyers.

*See* O'Malley et al., supra, § 14.01, 248-49.

Fed. R. Evid. 703 provides that facts or data which are the basis for an expert's opinion but are otherwise inadmissible may nonetheless be disclosed to the jury if the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. In that situation, the comment to the 2000 amendments to the rule states: "If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes." *See Pineda v. Ford*, 520 F. 3d 237, 247 n. 14 (3d Cir. 2008) (civil case discussing Rule 703 limiting instruction); *United States v. Gradys*, 357 Fed.Appx. 481, 482-83 (3d Cir.2009) (non-precedential) (finding that the defendant's Rule 703 argument was not raised in the trial court and was not plain error).

(Revised 11/10)

## 4.09 Opinion Evidence (Lay Witnesses) (F.R.E. 701)

**Witnesses are not generally permitted to state their personal opinions about important questions in a trial. However, a witness may be allowed to testify to his or her opinion if it is rationally based on the witness' perception and is helpful to a clear understanding of the witness' testimony or to the determination of a fact in issue.**

**In this case, I permitted** *(name)* **to offer** *(his)(her)* **opinion based on** *(his)(her)* **perceptions. The opinion of this witness should receive whatever weight you think appropriate, given all the other evidence in the case and the other factors discussed in these instructions for weighing and considering whether to believe the testimony of witnesses.**

**Comment**

Federal Rule of Evidence 701 provides that "if the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." F.R.E. 701. *See generally Hirst v. Inverness Hotel Corp.*, 544 F.3d 221 (3d Cir. 2008) (discussing requirements for admission of lay opinion); *United States v. Hoffecker*, 530 F.3d 137, 170-71 (3d Cir. 2008) (discussing Rule 701).

Whether to give this instruction on lay witness opinion testimony is within the trial judge's discretion. Ordinarily, the instruction will not be necessary, but is provided in the event one of the lawyers requests it or the trial judge otherwise considers it necessary in the case on trial. The instruction should not be given routinely for "run of the mill" lay opinion testimony, such as "he looked angry" or "she was driving fast." The instruction should be given when the lay opinion is more like an "expert" opinion or when there is also expert opinion testimony given in the same trial, to avoid the confusion

that might result because Instruction 4.08 (Opinion Evidence (Expert Witnesses)) states that opinion testimony is generally not permitted.

If the trial judge decides that an instruction on lay opinion testimony is necessary, the above instruction can be given at the time the witness is giving his or her opinion testimony. For a comparable instruction that should be given during the trial, *see* Instruction 2.10 (Opinion Evidence (Lay Witnesses)).

(revised 12/09)

## 4.10 Summaries – Not Admitted

*(The parties)(The government)(The defendant)* **presented certain** *(charts)(summaries)* **in order to help explain the facts disclosed by the** *(describe the admitted evidence that provided the basis for the summaries; e.g., books, records, documents)* **which were admitted as evidence in the case. The** *(charts)(summaries)* **are not themselves evidence or proof of any facts. If the** *(charts)(summaries)* **do not correctly reflect the evidence in the case, you should disregard them and determine the facts from the underlying evidence.**

**Comment**

*See* Ninth Circuit § 4.18.

This instruction should be given when charts or summaries of admitted evidence are presented to the jury but not themselves admitted in evidence. The instruction reminds the jury that the admitted exhibits and testimony constitute the evidence in the case and that the chart or summary itself does not.

The instruction is not appropriate when the summaries and charts have been introduced into evidence and the underlying documents or records have not been introduced into evidence as permitted under Federal Rule of Evidence 1006. *See* Instruction 4.11 (Summaries – Admitted).

## 4.11 Summaries – Admitted (F.R.E 1006)

**Certain** *(charts)(summaries)* **offered by** *(the parties)(the government)(the defendant)* **were admitted as evidence. You may use those** *(charts)(summaries)* **as evidence, even though the underlying documents and records have not been admitted into evidence.**

*[However, the (accuracy)(authenticity) of those (charts)(summaries) has been challenged. You must decide how much weight, if any, you will give to them. In making that decision, you should consider the testimony you heard about the way in which the (charts)(summaries) were prepared.]*

**Comment**

*See* Eighth Circuit § 4.12.

This instruction may be given when summaries or charts are admitted under Rule 1006 of the Federal Rules of Evidence and the underlying records are not admitted. Rule 1006 provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

The Third Circuit has upheld the use of summaries under Rule 1006. *See* , e.g., *United States v. Worrells*, 94 F. App'x. 927 (3d Cir. 2004); *United States v. Syme*, 276 F.3d 131, 151 (3d Cir. 2002). The court has not addressed the question of whether and how to instruct the jury concerning the summaries.

Under the rule, the summaries or charts should be based on admissible evidence.

The party relying on the summary must establish its accuracy to the court's satisfaction. *See Graham, Handbook of Federal Evidence* § 1006.1 (5th ed. 2001). In *S.E.C. v. Hughes Capital Corp.*, 124 F.3d 449, 456 (3d Cir. 1997), the Third Circuit held that the trial court acted within its discretion when it refused to admit summaries of documents that the trial court held inadmissible as insufficiently trustworthy. The court stated that the trial court "did not abuse its discretion by refusing to admit a summary based on inadmissible evidence." 124 F.3d at 456. Nevertheless, in some cases, the opposing party may challenge the accuracy or authenticity of the summary. The bracketed portion of this instruction should be given if the accuracy or authenticity has been challenged.

## 4.12 Chain of Custody

**The defense has raised the issue of defects in the chain of custody of** *(describe evidence in question; e.g., the firearm, the drugs)***. You may consider any defects in determining the authenticity of this evidence and what weight to give it. The government must prove beyond a reasonable doubt that the** *(describe evidence in question) (is)(are)* **the same as the** *(describe evidence) (alleged in the indictment)(introduced during the trial)***.**

**Comment**

This instruction may be given if a colorable question is raised at trial concerning the authentication of a critical item of evidence.

Chain of custody is initially a question for the court. In order to admit certain items of evidence, the court must determine that there is sufficient evidence of their authentication to satisfy Rule 901 of the Federal Rules of Evidence. Rule 901(a) provides:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

The mere fact that there is enough evidence of authentication to support admitting the evidence does not foreclose the possibility that a question of authenticity may also be raised at trial. For example, in *United States v. Dent*, 149 F.3d 180 (3d Cir. 1998), the defendant argued that the government had failed to establish a reliable chain of custody. The Third Circuit stated that "[t]o establish a chain of custody, the government need only show that it took reasonable precautions to preserve the evidence in its original condition," and need not exclude all possibility of tampering. 149 F.3d at 188. A defect in the chain of custody goes to the weight of the evidence, not its admissibility. *See United States v. Briley*, 319 F.3d 360, 363 (8th Cir. 2003); *United States v. Gorman*, 312 F.3d 1159, 1163 (10th Cir. 2002); *United. States v. Rodriguez*, 162 F.3d 135, 144 (1st Cir. 1998). Thus questions about the chain of custody might cause the jury to acquit even

though the evidence was properly admitted.

If the defendant offers evidence that must be authenticated, the same principles govern. The court must assure adequate evidence of authenticity to satisfy the rules of evidence. Even if the evidence is properly admitted, the government may argue to the jury that it is not actually authentic. Of course, the defendant has no burden of proof, but the government may persuade the jury that the defendant's evidence has no probative value.

## 4.13 Fingerprints, Handwriting, and DNA Evidence

**When the identity of the person who committed a crime is in question, the parties may introduce** *(fingerprint)(DNA)(handwriting)* **evidence to try to prove who committed the crime. To do this, a party may present a "known" sample of a person's** *(fingerprint)(DNA)(handwriting)***, one that is** *(proved)(admitted)* **to come from that person. This known** *(fingerprint)(DNA)(handwriting)* **sample is then compared with any** *(fingerprint)(DNA)(handwriting)* **being introduced to prove who committed the crime. In this case** *(describe evidence produced; e.g., the "known" sample is the fingerprint card and testimony produced by the government which, if believed, establishes that the fingerprints on the card are the defendant's and the disputed evidence is the fingerprint that was found at the scene of the crime.)*

*[In this case you also heard the testimony of a witness who claims special qualification in the field of (fingerprint identification)(DNA analysis)(handwriting identification). The witness was allowed to express an opinion in order to help you decide whether the disputed (fingerprint)(DNA)(handwriting) connected to the crime in question is (the defendant)(name of suspect other than defendant)'s (fingerprint)(DNA)(handwriting). You may therefore consider the witness' opinion in reaching your independent decision on this issue.]*

**Comment**

*See* O'Malley et al., supra, § 14.12 and Sand et al., supra, 7-22.

The instruction may be given if either the government or the defense introduces evidence of handwriting, fingerprints, or DNA in an effort to establish the identity of the perpetrator. Usually, the party will also introduce the testimony of an opinion witness to help establish that the known sample of handwriting, fingerprints, or DNA matches the sample that is connected to the crime. In that case, the court should include the bracketed language and should also give Instruction 4.08 (Opinion Evidence (Expert Witnesses)).

If the defendant submits handwriting exemplars that are disguised, the court may consider giving Sand et al., supra, Instruction 6-13 on Consciousness of Guilt From Disguised Handwriting :

> There has been evidence that the defendant submitted examples of his handwriting to the government for analysis and comparison with the handwriting on other documents in evidence. In this connection, there has been testimony from a handwriting expert that the handwriting exemplars submitted by the defendant were not true samples of the defendant's handwriting.
>
> If you find that the defendant disguised his handwriting you may, but you need not, infer that the defendant believed that he was guilty. You may not, however, infer on the basis of this alone, that the defendant is, in fact, guilty of the crime for which he is charged.
>
> Whether or not evidence that the defendant disguised his handwriting shows that the defendant believed that he was guilty and the significance, if any, to be given to such evidence, are matters for you, the jury, to decide.

Other acts that evidence a consciousness of guilt are addressed in Instruction 4.30 (Consciousness of Guilt (Flight, Concealment, Use of an Alias, etc.)).

## 4.14 Specific Investigation Techniques Not Required

**During the trial you heard testimony of witnesses and argument by counsel that the government did not use specific investigative techniques such as** *(mention omitted techniques that have been addressed in testimony or argument; e.g., fingerprint analysis, DNA analysis, the use of recording devices)***. You may consider these facts in deciding whether the government has met its burden of proof, because as I told you, you should look to all of the evidence or lack of evidence in deciding whether the defendant is guilty. However, there is no legal requirement that the government use any of these specific investigative techniques or all possible techniques to prove its case. There is no requirement to** *(mention omitted techniques; e.g., attempt to take fingerprints or offer fingerprint evidence, gather DNA evidence or offer DNA analysis, or use recording devices or offer recordings in evidence)***.**

**Your concern, as I have said, is to determine whether or not the evidence admitted in this trial proves the defendant's guilt beyond a reasonable doubt.**

**Comment**

*See* Sand et al., supra, 4-4.

Jurors may arrive at the trial with preconceptions about the use of specific investigative techniques and may expect the government to present evidence such as

fingerprint, fiber or DNA analysis to help resolve the case. As a result, they may be reluctant to rely on other types of evidence, particularly witness testimony, either to convict or to acquit. These expectations should not be permitted to prejudice the government. If the defendant has argued that the government's case is deficient because of the failure to use one or more specific investigative techniques, this instruction may be appropriate. If the court decides to give this instruction, the court must be careful not to place its imprimatur on the investigative choices of either party.

The Third Circuit has not addressed the propriety of an instruction of this nature. However, in *United States v. Saldarriaga*, 204 F.3d 50, 51-52 (2d Cir. 2000), the Second Circuit approved a similar instruction. In *Saldarriaga*, defense counsel had highlighted the government's failure to employ certain investigative techniques. The Second Circuit rejected the defendant's challenge to the instruction and characterized the instruction as "legally sound."

In rare cases, a question may arise concerning the defendant's failure to employ specific investigative techniques. The court should not instruct on this question unless the defendant consents. Any comment may interfere with the defendant's right not to present evidence.

If the missing evidence that is highlighted is the testimony of an absent witness, the court should not give this instruction. Instead, the court should consider whether to give Instruction 4.16 (Missing Witness).

## 4.15 Eyewitness Identification of the Defendant

**One of the (***most important)* **issues in this case is whether** *(name of defendant)* **is the same person who committed the crime***(s)* **charged in** *(Count(s) ___ of)* **the indictment. The government, as I have explained, has the burden of proving every element, including identity, beyond a reasonable doubt. Although it is not essential that a witness testifying about the identification** *(himself)(herself)* **be free from doubt as to the accuracy or correctness of the identification, you must be satisfied beyond a reasonable doubt based on all the evidence in the case that** *(name of defendant)* **is the person who committed the** ***crime****(s)* **charged. If you are not convinced beyond a reasonable doubt that** *(name of defendant)* **is the person who committed the crime***(s)* **charged in** *(Count(s) ___ of)* **the indictment, you must find** *(name of defendant)* **not guilty.**

**Identification testimony is, in essence, the expression of an opinion or belief by the witness. The value of the identification depends on the witness' opportunity to observe the person who committed the crime at the time of the offense and the witness' ability to make a reliable identification at a later time based on those observations.**

**You must decide whether you believe the witness' testimony and whether you find beyond a reasonable doubt that the identification is correct.**

**You should evaluate the testimony of a witness who makes an identification in the same manner as you would any other witness. In addition, as you evaluate a witness' identification testimony you should consider the following questions as well as any other questions you believe are important** *(include only those called for by the facts of the case)***:**

> *(First)***, you should ask whether the witness was able to observe and had an adequate opportunity to observe the person who committed the crime charged. Many factors affect whether a witness has an adequate opportunity to observe the person committing the crime; the factors include the length of time during which the witness observed the person, the distance between the witness and the person, the lighting conditions, how closely the witness was paying attention to the person, whether the witness was under stress while observing the person who committed the crime, whether the witness knew the person from some prior experience, whether the witness and the person committing the crime were of different races, and any other factors you regard as important.**

*(Second)*, **you should ask whether the witness is positive in the identification and whether the witness' testimony remained positive and unqualified after cross-examination. If the witness' identification testimony is positive and unqualified, you should ask whether the witness' certainty is well-founded.**

*[(Third), you should ask whether the witness's identification of (name of defendant) after the crime was committed was the product of the witness' own recollection. You may take into account both the strength of the later identification and the circumstances under which that identification was made. You may wish to consider how much time passed between the crime and the witness' later identification of the defendant. You may also consider (whether the witness gave a description of the person who committed the crime) (how the witness' description of the person who committed the crime compares to the defendant). (You may also consider whether the witness was able to identify other participants in the crime.) If the identification was made under circumstances that may have influenced the witness, you should examine that identification with great care. Some circumstances which may influence a witness'*

*identification are whether the witness was presented with more than one person or just (name of defendant); whether the witness made the identification while exposed to the suggestive influences of others; and whether the witness identified (name of defendant) in conditions that created the impression that (he)(she) was involved in the crime.]*

*[(Fourth), you should ask whether the witness failed to identify (name of defendant) at any time, identified someone other than (name of defendant) as the person who committed the crime, or changed his or her mind about the identification at any time.]*

*[The court should also give the following admonition if the witness' opportunity to observe was impaired or if the witness' identification is not positive, was shaken on cross-examination, or was weakened by a prior failure to identify the defendant or by a prior inconsistent identification:*

*You should receive the identification testimony with caution and scrutinize it with care.]*

**If after examining all of the evidence, you have a reasonable doubt as to whether** *(name of defendant)* **is the individual who committed the crime***(s)* **charged, you must find** *(name of defendant)* **not guilty.**

**Comment**

This instruction is derived from O'Malley et al., supra, § 14.10, which is based on the instruction recommended in *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (set out below), which the Third Circuit cited with approval in *United States v. Wilford*, 493 F.2d 730, 734 n.9 (3d Cir. 1974).

This instruction should be given in any case in which eyewitness identification of the defendant is an issue. The Third Circuit has recognized the problems with eyewitness identification testimony as well as the important role of expert testimony in helping jurors evaluate eyewitness identification of the defendant in a criminal case. *See United States v. Brownlee*, 454 F.3d 131 (3d Cir. 2006); *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985). In *Brownlee*, the court held that the exclusion of portions of the defense expert's proffered testimony on eyewitness identification required reversal of the defendant's conviction even though the trial court permitted the expert to testify as to some factors that challenged the government's identification witnesses. 454 F.3d at 144. The court emphasized that "jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable." 454 F.3d at 142 (quoting Rudolph Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 Cornell Law Review 1097, 1099 n.7 (2003)).

In *United States v. Barber*, 442 F.2d 517 (3d Cir. 1971), the Third Circuit addressed the importance of instructing the jury on identification testimony:

> [W]e recognize a compelling need for guidelines which will obviate skeletal, pattern instructions and assure the essential particularity demanded by the facts surrounding each identification. Accordingly, we approve for use in this circuit the approach taken by the Pennsylvania courts concerning jury instructions on identification, and require, for prospective application only, that such instructions satisfy the following:
>
> In any case raising the question whether the defendant was in fact the criminal actor, the jury will be instructed to resolve any conflict or uncertainty on the issue of identification. The jury will be instructed that identification may be made through the perception of any of the witness' senses, and that it is not essential that the witness himself be free from doubt as to the correctness of his opinion. The identification testimony may be treated by the jury as a statement of fact by the witness: (1) if the witness had the opportunity to observe the accused; (2) if the witness is positive in his identification; (3) if the witness' identification testimony is not weakened by prior failure to identify or by prior inconsistent identification; and (4) if, after cross-examination, his testimony remains positive and unqualified. In the absence of any one of these four conditions, however, the

jury will be admonished by the court that the witness' testimony as to identity must be received with caution and scrutinized with care. The burden of proof on the prosecution extends to every element of the crime charged, including the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime for which he stands charged.

442 F.2d at 528 (citations omitted).

In *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972), the D.C. Circuit, building on *Barber*, recommended that the following instruction be adapted to the facts of the case and given in any case where eyewitness identification of the defendant is an issue:

*Appendix: Model Special Instructions on Identification*

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of proving identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later. In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past. [In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight-but this is not necessarily so, and he may use other senses.]

(2)Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances

under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]

(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.
I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

*See United States v. Wilford*, 493 F.2d 730, 734 n.9 (3d Cir. 1974) (citing with approval *Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

## 4.16 Missing Witness

**You have heard evidence about** *(name of missing witness)***, who has not been called to testify. The defense has argued that** *(name of missing witness)***'s testimony could have been important to this case and that** *(name of missing witness)* **was available as a witness only to the government and not to the defense.**

**If you find that the government could have called** *(name of missing witness)* **as a witness and that** *(name of missing witness)* **would have given important new testimony, and you also find that** *(name of missing witness)* **was available as a witness only to the government and not to the defense and that the government failed to call** *(name of missing witness)***, you are permitted, but you are not required, to infer that** *(name of missing witness)***'s testimony would have been unfavorable to the government.**

**You must decide whether you believe that** *(name of missing witness)* **would have testified unfavorably to the government. You should not draw such a conclusion if the witness was equally available to both parties or if the witness' testimony would have merely repeated the testimony of other witnesses or evidence already presented in the case.**

**Comment**

This instruction is derived from Sand et al., supra, 6-5.

Ordinarily, the inference to be drawn from failure to call a witness should be left to argument of counsel and should not be a topic of instruction. When the question arises during trial, the court should inquire whether the witness is equally available to either party. If the government agrees to make a witness within its control available to the defendant yet neither party calls the witness, the instruction should not be given. This instruction should never be given to call attention to the defendant's failure to call a witness.

> Several requirements must be satisfied before this instruction is appropriate:
> The witness was available to one party and not the other;
> The party to whom the witness is available does not call the witness and provides no explanation for that failure;
> The witness is not prejudiced against that party; and
> The witness would give relevant and non-cumulative testimony.

*See United States v. Ariza-Ibarra*, 651 F.2d 2, 15-16 (1st Cir. 1981).

In *Ariza-Ibarra*, the First Circuit explained the rationale and application of the missing witness instruction:

> In the absence of a satisfactory explanation, when a party fails to call a witness whom that party would ordinarily produce if the facts known by the witness were favorable to that party, the jury may infer that the absent witness's testimony would have been adverse to that party. This adverse inference may not reasonably be drawn, however, unless the evidence shows that the witness is available to testify on behalf of the party, that the testimony of the witness would be relevant and noncumulative, and that the witness is not prejudiced against the nonproducing party. Because the occasion for drawing such an inference arises when both parties have failed to call a material witness, if the jury is to attribute negative consequences to only one party's failure to do so, it must determine which of the parties is likely to be withholding damaging testimony. Thus, the jury may draw an inference adverse to a party toward whom the missing witness is "favorably disposed," because the party would normally be expected to produce such a witness. In addition, the jury may draw an adverse inference when a party fails to produce a material witness who is peculiarly available to that party. [A] party's ability to produce a witness is often dependent on the witness's predisposition toward that party. However, when a party having exclusive control over a witness who could provide relevant, noncumulative testimony fails to produce the witness, it is permissible to draw an adverse inference from that party's failure to do so, even in the absence of any showing of the witness's predisposition

> toward the party. Typically, what is referred to as "an absent witness" or "missing witness" instruction deals only with "control," not with "predisposition."

651 F.2d at 15-16 (citations omitted). In *Ariza-Ibarra*, the court concluded that the instruction was not appropriate because the witness was equally available to both parties. 651 F.2d at 16. If the witness is technically available to both parties but can be expected to be hostile to one party because of the witness' connection to the other party or some other reason, the instruction is not warranted based on the party's failure to call a hostile witness. *See United States v. Wilson*, 322 F.3d 353, 363 n.14 (5th Cir. 2003).

In *United States v. Drozdowski*, 313 F.3d 819, 825 n.3 (3d Cir. 2002), the Third Circuit remarked that "the 'absent witness' jury instruction is to be given in a case where the government fails to produce evidence, and the instruction tells the jury that the failure to produce this evidence creates a presumption that the evidence would be favorable to the defendant" but concluded that the instruction was not appropriate where the witness had fled and was therefore unavailable to both parties. 313 F.3d at 825 n.3 (citing *Graves v. United States*, 150 U.S. 118 (1893)).

It is not clear whether the defendant is entitled to a missing witness instruction or whether the trial court has discretion to determine whether to give the instruction. However, the Third Circuit has noted that a party may decide not to call a witness for a wide range of reasons. *See United States v. Busic*, 587 F.2d 577, 586 (3d Cir. 1978), *rev'd on other grounds*, 446 U.S. 398 (1980). As a result, the better course seems to be to treat the question as falling within the court's discretion.

## 4.17 Child Witness

**You have heard the testimony of** *(child's name)*. **A child may be permitted to testify even though** *(he)(she)* **is very young. You must determine, as with any witness, whether you believe** *(child's name)***'s testimony and how much weight, if any, you think it deserves. Did** *(he)(she)* **understand the questions? Did** *(he)(she)* **accurately perceive the events? Does** *(he)(she)* **have a good memory? Does** *(he)(she)* **understand** *(his)(her)* **duty to tell the truth?**

**It is up to you to decide whether** *(child's name)* **understood the seriousness of** *(his)(her)* **appearance as a witness at this criminal trial. In addition, is up to you to decide whether** *(child's name)* **understood the questions asked of** *(him)(her)* **and was truthful.**

**Comment**

*See* Federal Judicial Center § 28. For variations, *see* O'Malley et al., supra, § 15.13; Sixth Circuit § 7.10; Seventh Circuit § 1.03; and Ninth Circuit § 4.15 (recommending no instruction be given).

A child is not rendered incompetent to testify merely because of age. In addition to Rule 601 of the Federal Rules of Evidence, which provides that all witnesses are competent, Section 3509(c) of title 18 governs the competency examination of a witness under the age of eighteen who is a victim of physical abuse, sexual abuse, or exploitation or is a witness to a crime committed against another person. 18 U.S.C.A. § 3509(a) and (c). Section 3509(c)(2) provides that a child is presumed to be competent. Sections 3509(c)(3) and (4) provide that a child can be examined for competency only after written notice, an offer of proof of incompetency, and a determination by the court that there are compelling reasons other than the child's age for the examination. Section 3509(c) then sets out the requirements for the competency examination:

(5) Persons permitted to be present.--The only persons who may be permitted to be present at a competency examination are--

(A) the judge;
(B) the attorney for the Government;
(C) the attorney for the defendant;
(D) a court reporter; and
(E) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.

(6) Not before jury.--A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.

(7) Direct examination of child.--Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.

(8) Appropriate questions.--The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.

Finally, the statute precludes psychological and psychiatric examinations to assess the competency of the child witness absent a showing of compelling need. 18 U.S.C.A. § 3509(c)(9).

In *United States v. Allen J.,* 127 F.3d 1292 (10th Cir. 1997), the Tenth Circuit concluded that the trial court properly allowed a young witness to testify. The witness had not responded to the court's questions concerning truth-telling, but the prosecutor conducted the following examination:

> The prosecutor began with simple questions ("[W]hat is your last name?", "How old are you?", and "Where do you live?"), which the victim answered. After about thirty questions along these lines, almost all of which the victim was able to answer correctly, the prosecutor shifted to questions relating to the difference between the truth and lies. Among other questions, the prosecutor asked the victim if she understood she had promised to tell the truth in court, to which the victim responded affirmatively. After this series of questions, which established the victim

> knew the difference between a truth and a lie, knew she was to tell the truth in court, and knew she would be punished if she told a lie, the court directed the prosecutor to proceed to the heart of her case.

The court held that this questioning satisfied the requirement of Rule 603 of the Federal Rules of Evidence that the witness understand and affirm the obligation to testify truthfully and established the witness' competence.

One source recommends the following questions to determine whether the child understands the obligation to tell the truth:

> THE COURT: Were you here in this courtroom last week? (Or any other obvious misstatement of past fact.)
> THE CHILD: No, I've never been here before.
> THE COURT: Is that the truth?
> THE CHILD: Yes.
> THE COURT: If you told me you were here last week, when you really were somewhere else, would that be a lie?
> THE CHILD: Yes.
> THE COURT: We will be depending on you today to tell us the truth about what you remember. Can we count on you to tell the truth?
> THE CHILD: Yes.

*Lucy S. McGough, Child Witnesses: Fragile Voices in the American Legal System*, 117 (1994)

When a child testifies, the court may want to instruct the jury concerning how to approach the task of assessing this witness' credibility. The Third Circuit has not addressed the question of an instruction on the credibility of a child witness. Other circuits have held that the trial court has discretion to determine whether to give such an instruction. *See United States v. Pacheco*, 154 F.3d 1236, 1239 (10th Cir. 1998); *Guam v. McGravey*, 14 F.3d 1344, 1348 (9th Cir. 1995). In *Joseph v. Government of the Virgin Islands*, 2005 U.S. Dist. LEXIS 11039 (D.V.I. 2005), the court rejected the defendant's argument that the trial court erred by refusing to give an instruction on the credibility of the child victim. Citing *McGravey*, the court noted that the trial court had properly instructed the jury concerning "the appropriate weight of each witness's testimony" and held that the trial court has the discretion to determine both whether and how to instruct the jury regarding the credibility of a child witness. *Joseph*, 2005 U.S. Dist. LEXIS 11039 (D.V.I., 2005).

In *United States v. Butler*, 56 F.3d 921 (8th Cir. 1995), the court gave the following instruction:

> As with other witnesses, you are the sole judge of the credibility of

> a child who testifies. You may consider not only the child's age, but the demeanor on the stand, the capacity to observe facts and to recollect them, the ability to understand questions put to the child and to answer them intelligently, whether the child impresses you as having an accurate memory and recollection, whether the child impresses you as a truth-telling individual, and any other facts and circumstances which impress you as significant in determining the credibility of the child. You may give the child's testimony such weight, if any, as you feel it deserves.

The Eighth Circuit held that the trial court had acted within its discretion in giving the instruction and that the instruction did not improperly highlight or bolster the testimony of the child witness.

## 4.18 Credibility of Witnesses – Law Enforcement Officer

**You have heard the testimony of a*(n)* law enforcement officer*(s)*. The fact that a witness is employed as a law enforcement officer does not mean that *(his)(her)* testimony necessarily deserves more or less consideration or greater or lesser weight than that of any other witness.**

*[At the same time, it is quite legitimate for defense counsel to try to attack the believability of a law enforcement witness on the ground that (his)(her) testimony may be colored by a personal or professional interest in the outcome of the case.]*

**You must decide, after reviewing all the evidence, whether you believe the testimony of the law enforcement witness and how much weight, if any, it deserves.**

**Comment**

*See* Sand et al., supra, 7-16.

In *United States v. Bethancourt*, 65 F.3d 1074, 1080 n.3 (3d Cir. 1995), *cert. denied,* 516 U.S. 1153 (1996), the trial court gave this instruction. The Third Circuit noted with approval that the trial court had instructed the jury that "the government witnesses' testimony was not entitled to any greater consideration because of their federal employment," in addition instructing the jurors that they were the sole judges of credibility. These two instructions persuaded the court that the prosecutor's improper argument that the government's law enforcement witnesses did not lie was harmless error.

## 4.19 Credibility of Witnesses – Witness Who Has Pleaded Guilty to Same or Related Offense, Accomplices, Immunized Witnesses, Cooperating Witnesses

**You have heard evidence that** *(name of witness) [Include as many of the following that apply:*

*is an alleged (accomplice)(co-conspirator), someone who says (he)(she) participated in the crime charged; or*

*has made a plea agreement with the government; or*

*has received a promise from the government that (he)(she) will not be prosecuted; or*

*has received a promise from the government that (his)(her) testimony will not be used against (him)(her) in a criminal case; or*

*received a benefit from the government in exchange for testifying.]*

*(His)(Her)* **testimony was received in evidence and may be considered by you. The government is permitted to present the testimony of someone who has** *(describe the witness' situation, e.g., reached a plea bargain with the government, received a benefit from the government)* **in exchange for** *(his)(her)* **testimony, but you should consider the testimony of** *(name of witness)* **with great care and caution. In evaluating** *(name of witness)***'s testimony, you**

**should consider this factor along with the others I have called to your attention. Whether or not** *(his)(her)* **testimony may have been influenced by the** *(plea agreement)(government's promise)(alleged involvement in the crime charged)* **is for you to determine. You may give** *(his)(her)* **testimony such weight as you think it deserves.**

*[You must not consider (name of witness)'s guilty plea as any evidence of (name of defendant)'s guilt. (His)(her) decision to plead guilty was a personal decision about (his)(her) own guilt. Such evidence is offered only to allow you to assess the credibility of the witness; to eliminate any concern that (the defendant) (any of the defendants) has been singled out for prosecution; and to explain how the witness came to possess detailed first-hand knowledge of the events about which (he)(she) testified. You may consider (name of witness)'s guilty plea only for these purposes.]*

**Comment**

*See* Sand et al., supra, Instruction 7-10, Eighth Circuit § 4.04, and Ninth Circuit § 4.9.

This instruction should be used when a government witness has made a plea agreement with the government, has received immunity (a promise that the witness will not be prosecuted or that the witness' testimony will not be used against the witness), or has received any other benefit from the government in exchange for testifying. If the witness is an informant who received benefits for providing information, Instruction 4.20 (Credibility of Witnesses - Testimony of Informer) should be given instead.

There are two aspects to this instruction. First, it instructs the jury to view with caution the testimony of a witness who has received a benefit from the government for

testifying or who has entered a plea agreement with the government. Second, the bracketed language instructs the jury that an accomplice's guilty plea is not evidence of the defendant's guilt.

The government may introduce the testimony of accomplices or co-conspirators, and the uncorroborated testimony of such witnesses is sufficient to sustain a conviction. *See United States v. Perez*, 280 F.3d 318 (3d Cir. 2002). However, when the prosecution calls a witness who has entered into a plea agreement with the government, received formal or informal immunity, or received some other benefit in exchange for testifying, the court should instruct the jury to view the witness' testimony with caution. In *Caminetti v. United States*, 242 U.S. 470, 495 (1917), the Supreme Court held it was not reversible error to deny the defendant's request to instruct the jury that "the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case." Nevertheless, the Court noted that "it [is] the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence." Similarly, in *United States v. Isaac*, 134 F.3d 199, 204-05 (3d Cir. 1998), the Third Circuit held that it was not reversible error to deny the defendant's request to instruct the jury to weigh the testimony of two witnesses "with greater care" because they were accomplices and had been immunized, but noted that it "may well be the better practice to give an instruction if requested." The court also commented that "warning the jury to consider the testimony of an accomplice with great care and caution before relying on it is appropriate," but concluded that other instructions adequately addressed credibility concerns. *Id.* Whether to give the instruction is entrusted to the discretion of the trial court. *Id.* at 205. *See also United States v. Wilson*, 347 F. App'x. 778 (3d Cir. 2009) (non-precedential) (refusal to give accomplice instruction not abuse of discretion).

The bracketed language should be included in the instruction if the jury has learned that an accomplice or co-conspirator pleaded guilty. The government may be permitted to prove the guilty plea to help the jury evaluate the witness' credibility, to show that the defendant was not singled out for prosecution, or to explain how the witness has knowledge of the events. *See United States v. Universal Rehabilitation Services, Inc.,* 205 F.3d 657, 667 (3d Cir. 2000) (en banc). However, neither the witness' guilty plea nor the plea agreement may be considered as evidence of the defendant's guilt. *See Universal Rehabilitation Services,* 205 F.3d at 668; *United States v. Gaev*, 24 F.3d 473, 476 (3d Cir. 1994); *United States v. Gambino*, 926 F.2d 1355, 1363 (3d Cir. 1991). The prejudicial effect of the witness' guilty plea should be addressed through a curative instruction to the jury. *See Universal Rehabilitation Services.,* 205 F.3d at 668; *Gaev*, 24 F.3d at 478. In *Gaev*, the Third Circuit approved the court's instructions. 24 F.3d at 475-76. At the time the witness testified, the trial court gave the following instruction:

> [Y]ou have just heard evidence that this witness has pled guilty to a charge of conspiring to fix prices with the defendant now on trial in this case.

> I caution you that although you may consider this evidence in assessing the credibility and testimony of this witness, giving it such weight as you feel it deserves, you may not consider this evidence against the defendant on trial, nor may any inference be drawn against him by reason of this witness' plea.

In the final charge to the jury, the trial court further instructed the jury as follows:

> I instruct you, as I previously instructed you after the conclusion of each of their testimony or direct examination, that you are instructed that you are to draw no conclusions or inferences of any kind about the guilt of the defendant on trial from the facts that a prosecution witness pled guilty to similar charges. That witness' decision to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant on trial here.

The trial court also instructed the jury concerning the testimony of accomplices and admitted felons who had entered into plea agreements with the government.

> In *Universal Rehabilitation Services,* the Third Circuit further stated: The jury in such cases should be instructed that it may not consider the guilty plea and/or plea agreement as evidence that the defendant is guilty of the offenses with which he/she is charged, but rather that such evidence is offered only to allow the jury to assess the witness's credibility, to eliminate any concern that the defendant has been singled out for prosecution, or to explain how the witness possessed detailed first-hand knowledge regarding the events about which he or she testifies.

205 F.3d at 668.

(revised 11/10)

## 4.20 Credibility of Witnesses – Testimony of Informer

**You have heard evidence that** *(name of witness)* **has an arrangement with the government under which** *(he)(she) (gets paid)(receives) (describe benefit)* **for providing information to the government.** *(Name of witness)***'s testimony was received in evidence and may be considered by you. The government is permitted to present the testimony of someone who** *(gets paid)(receives) (describe benefit)* **for providing information to the government, but you should consider the testimony of** *(name of witness)* **with great care and caution. In evaluating** *(name of witness)***'s testimony, you should consider this factor along with the others I have called to your attention. You may give the testimony such weight as you think it deserves. It is for you to determine whether or not** *(name of witness)***'s information or testimony may have been influenced by** *(his)(her)* **arrangement with the government.**

**Comment**

*See* Eighth Circuit § 4.06.

The government may lawfully employ paid informers to assist in the investigation of crime and may call an informer as a witness at trial. *See Hoffa v. United States*, 385 U.S. 293, 312 (1966); *United States v. Harris*, 210 F.3d 165 (3d Cir. 2000). The court should instruct the jury to approach the informer's testimony with caution. In *Hoffa*, the Court noted favorably that the trial court had given the jury the following instruction:

> You should carefully scrutinize the testimony given and the circumstances under which each witness has testified, and every matter in evidence

> which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, his motives, state of mind, his demeanor and manner while on the witness stand. Consider also any relation each witness may bear to either side of the case * * *. All evidence of a witness whose self-interest is shown from either benefits received, detriments suffered, threats or promises made, or any attitude of the witness which might tend to prompt testimony either favorable or unfavorable to the accused should be considered with caution and weighed with care.

385 U.S. at 312 n.14. The Third Circuit has not decided whether it is error to refuse the instruction when requested. *See United States v. Isaac*, 134 F.3d 199, 204 (3d Cir. 1998). Failure to give the instruction if not requested is not plain error. *See United States v. Wright*, 921 F.2d 42, 47 (3d Cir. 1990).

## 4.21 Credibility of Witnesses - Testimony of Addict or Substance Abuser

**Evidence was introduced during the trial that** *(name of witness) [(was (using drugs)(addicted to drugs)(abusing alcohol) when the events took place) (was abusing (drugs)(alcohol) at the time of trial)]*. **There is nothing improper about calling such a witness to testify about events within** *(his)(her)* **personal knowledge.**

**On the other hand,** *(his)(her)* **testimony must be considered with care and caution. The testimony of a witness who** *(describe circumstances)* **may be less believable because of the effect the** *(drugs)(alcohol)* **may have on** *(his)(her)* **ability to perceive, remember, or relate the events in question.**

**After considering** *(his)(her)* **testimony in light of all the evidence in this case, you may give it whatever weight, if any, you find it deserves.**

**Comment**

*See* Sand et al., supra, Instruction 7-9.1.

This instruction may be given if a witness is shown to be an addict or an abuser of drugs or alcohol. The Third Circuit recommends instructing the jury "to receive the testimony of an addict-informant witness with caution and to scrutinize it with care." *United States v. Miele*, 989 F.2d 659, 666 (3d Cir. 1993); *see also Government of the Virgin Islands v. Hendricks*, 476 F.2d 776, 779-80 (3d Cir. 1973). Nevertheless, the court is not required to give the instruction. *See United States v. Miles*, 2002 WL 31501847 (3d Cir. 2002) (noting that the court "has never held in a published opinion that a district court is required to give a special cautionary instruction regarding the testimony of a drug addict, even when the defendant requests such an instruction"). This instruction addresses the concern that drugs or alcohol may impair the witness' perception, memory,

and narrative ability. If the witness has received some benefit, such as an agreement not to prosecute or a reduced sentence, the court should give Instruction 4.20 (Credibility of Witnesses - Testimony of Informer).

Of course, the instruction is only necessary if there is evidence that the witness is an addict or an abuser of drugs or alcohol. In *United States v. Urian*, 858 F.2d 124, 127 n.2 (3d Cir. 1988), the Third Circuit noted that the trial court properly refused the requested instruction where other instructions advised the jury to evaluate their testimony with caution and there was no evidence that the witnesses were addicted at the time of trial. In *Urian*, the evidence established only that the witnesses were addicted at the time of the criminal transactions. The court may want to give this instruction even as to a witness who is no longer abusing substances simply to call to the jury's attention the possible impact of the substance abuse on the witness' perception and memory. In determining whether to give an instruction addressing a witness' addiction, courts also consider the extent to which the witness' testimony is corroborated. *See United States v. Miles*, 2002 WL 31501847 (3d Cir. 2002).

In *Hendricks*, the Third Circuit emphasized that the instruction should "set out the rationale for examining the testimony of such a witness with special caution." 476 F2d. at 780. This instruction calls the jury's attention to the reason for examining the testimony with care – that the substance abuse may impair the witness' perception or memory. Concerns of bias and self-interest are addressed in Instructions 4.19 (Credibility of Witnesses - Witness Who Has Pleaded Guilty to Same or Related Offense, Accomplices, Immunized Witnesses, Cooperating Witnesses) and 4.20 (Credibility of Witnesses - Testimony of Informer).

**4.22 Impeachment of Witness –**

**Prior Inconsistent Statement for Credibility Only**

**You have heard the testimony of certain witnesses** *(if only one witness was impeached with a prior inconsistent statement, include name of witness)***. You have also heard that before this trial** *(they)(he)(she)* **made** *(statements)(a statement)* **that may be different from** *(their)(his)(her)* **testimony in this trial. It is up to you to determine whether** *(these statements were)(this statement was)* **made and whether** *(they were)(it was)* **different from the witness***(es)***' testimony in this trial.** *(These earlier statements were)(This earlier statement was)* **brought to your attention only to help you decide whether to believe the witness***(es)***' testimony here at trial. You cannot use it as proof of the truth of what the witness***(es)* **said in the earlier statement***(s)***. You can only use it as one way of evaluating the witness***(es)***' testimony in this trial.**

*[You also heard evidence that (this witness)(certain witnesses) made statements before this trial that were (describe condition satisfying Federal Rules of Evidence, Rule 801(d)(1)(A); e.g., made under oath, given before the grand jury) and that may be different from (his)(her) testimony at trial. When a statement is (describe condition; made under oath, made before the grand jury), you may not only use it to help you decide whether you believe the witness' testimony in this trial but you may also use it as evidence of the truth of what the witness(es) said in the earlier statement(s). But when a*

*statement is (describe condition; e.g., not made under oath, not given before the grand jury), you may use it only to help you decide whether you believe the witness' testimony in this trial and not as proof of the truth of what the witness(es) said in the earlier statement(s) .]*

**Comment**

*See* Sixth Circuit § 7.04 and Seventh Circuit § 3.09. For variations, *see* Sand et al., supra, 7-19; First Circuit § 2.02; Fifth Circuit § 1.10; Eighth Circuit § 3.04; and Eleventh Circuit § 6.1.

This instruction should be given when a prior inconsistent statement is admitted only for the purpose of impeaching a witness. If the witness being impeached is the defendant, *see* Instructions 4.37 (Impeachment of Defendant - Prior Inconsistent Statement Taken in Violation of Miranda) and 4.38 (Impeachment of Defendant - Prior Inconsistent Statement Not Taken in Violation of Miranda).

Prior inconsistent statements of witnesses may be admitted for two different purposes. First, a witness' statements may be admitted substantively – to prove the truth of the matters asserted. Second, a witness' statements may be admitted for the limited purpose of impeaching the witness.

Rule 801(d)(1)(A) of the Federal Rules of Evidence allows a prior inconsistent statement to be used substantively as well as to impeach if it was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." If the prior inconsistent statement falls within Rule 801(d)(1)(A), this instruction should not be given. A key characteristic of statements falling within Rule 801(d)(1)(A) is that they were made under oath. However, even a sworn statement does not fall within the rule and may be used only to impeach if it was not given at a proceeding.

Prior inconsistent statements that do not fall within the rule may still be admissible to impeach the witness. Such a statement is not hearsay because it is not admitted for the truth of the matter asserted, but only for the purpose of impeaching the witness. This instruction should be given to inform the jury of this limited purpose. The defendant is entitled to a limiting instruction at the time of the testimony as well as at the conclusion of the trial. *United States v. Palumbo*, 639 F.2d 123, 128 (3d Cir. 1981); cross reference. The court should give the instruction if the defendant requests it. Failure to give the instruction is not necessarily plain error. *United States v. Corson*, 389 F.2d 563 (3d Cir. 1968). To minimize uncertainty concerning the role of inconsistent statements

and the need for an instruction, the court may want to advise counsel at the beginning of the trial that they must request a limiting instruction at the time a statement is admitted if they want the jury informed of the limited purpose of the statement.

The bracketed language should be used if both types of prior inconsistent statements have been admitted in the trial – some only to impeach and others for substantive use as well. The court may want to include the bracketed language to emphasize the distinction for the jury.

Some judges may prefer the following variation, based on O'Malley et al., supra, § 15.06:

> The testimony of a witness may be attacked by showing that the witness previously made statements which are different than the witness' testimony here in court. The earlier statements are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during this trial. You must determine whether to believe a witness who has made prior inconsistent statements.
>
> [*If a witness is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of the witness concerning other matters. You may reject all of the testimony of that witness or give it such weight as you determine it deserves*].

## 4.23 Impeachment - Bad Character for Truthfulness (F.R.E. 608(a))

**<u>Reputation evidence:</u> You heard evidence concerning the reputation for truthfulness or untruthfulness of** *(name of witness being impeached)***. You may consider this evidence in deciding whether or not to believe** *(name of witness being impeached)***. You should give this evidence whatever weight you decide is appropriate.**

**<u>Opinion evidence:</u> You heard opinion evidence concerning whether** *(name of witness being impeached)* **is a truthful or an untruthful person. You may consider this evidence in deciding whether or not to believe** *(name of witness being impeached)***. You should give this evidence whatever weight you decide is appropriate.**

**Comment**

*See* Sand et al., supra, 5-17 and 5-18. For variations, *see* O'Malley et al., supra, § 15.09; Seventh Circuit § 3.12; Eighth Circuit § 4.02; Ninth Circuit § 4.7; and Eleventh Circuit § 6.7.

Rule 608 of the Federal Rules of Evidence provides:
(a) Opinion and reputation evidence of character.
The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of

> the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Any witness, including the defendant, may be impeached with evidence of bad character for truthfulness. *See United States v. Lollar*, 606 F.2d 587, 588 (3d Cir. 1979). The character witness may testify to the reputation of or an opinion concerning the bad character for truthfulness of the witness being impeached. F.R.E. 405; *Lollar*, 606 F.2d at 589. If a witness' character for truthfulness is attacked, evidence of the witness' good character for truthfulness is then admissible.

In *Renda v. King*, 347 F.3d 550 (3d Cir. 2003), the Third Circuit discussed the application of Rule 608(a). The court noted:

> Evidence of a witness's good character for truthfulness is not admissible absent an attack on the witness's character for truthfulness due to the cost of engaging in a fruitless "swearing match," particularly in light of the fact that a witness is presumed to tell the truth until his character for truthfulness is attacked. Under Rule 608(a), whether a witness's credibility has been attacked depends on the nature of the opponent's impeaching evidence. Direct attacks on a witness's veracity in the particular case do not open the door for evidence of the witness's good character. For example, evidence of bias or prior inconsistent statements generally does not open the door for evidence of good character for truthfulness. The reason that evidence of bias does not open the door for evidence of good character for truthfulness is because evidence of bias only relates to a motive to lie in the particular case, not a general predisposition to lie. Similarly, prior inconsistent statements do not open the door for evidence of good character for truthfulness because there can be a number of reasons for the error, such as defects in knowledge or memory, a bias or interest to lie in this particular instance, or a general character trait for untruthfulness. Thus, although the inconsistency may be due to a dishonest character, it is not necessarily, or even probably, due to this cause. Thus, the relatively minor value of permitting a response to such an inference does not justify the cost of litigating the tangential issue of character for truthfulness.

*Renda*, 347 F.3d at 554 (citations omitted). The court also noted that indirect attacks on truthful character may open the door to evidence of good character for truthfulness. *See Renda*, 347 F.3d at 554. *See also United States v. Murray,* 103 F.3d 310, 320-21 (3d Cir. 1997) (holding defendant opened door and prosecution properly introduced evidence of witness' truthful character). If the witness' character for truthfulness is attacked, it is an abuse of discretion to exclude evidence of truthful character.

If character evidence is admitted under Rule 404(a) of the Federal Rules of

Evidence, Instruction 4.39 (Defendant's Character Evidence) should be given instead of this instruction.

## 4.24 Impeachment of Witness – Prior Bad Acts (F.R.E. 608(b))

**You heard evidence that** *(name)***, a witness, committed** *(describe bad act inquired about during cross-examination)***. You may consider this evidence, along with other pertinent evidence, only in deciding whether to believe** *(name)* **and how much weight to give** *(his)(her)* **testimony.**

**Comment**

*See* Ninth Circuit § 4.8.

> Rule 608(b) of the Federal Rules of Evidence provides:
> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

Rule 608(b) governs when the conduct that is the subject of the cross-examination or extrinsic evidence is relevant only to establish the witness' untruthful character. If the evidence is offered to establish something else, such as bias, incompetency, or compromised ability to perceive or recall the events, Rule 608 does not govern. Instead, the court should evaluate the propriety of questions and the admissibility of extrinsic evidence under Rules 402 and 403. *United States v. Abel*, 469 U.S. 45 (1984).

If the court permits cross-examination concerning prior conduct that suggests untruthful character under Rule 608(b), the court should instruct the jury concerning the cross-examination at the time of the cross-examination. *See* Instruction 2.18 (Impeachment of Witness - Prior Bad Acts). In addition, if the witness admits the prior conduct in response to the questions asked on cross-examination, this instruction should be given in the final charge.

Rule 608(b) permits inquiry only concerning prior acts that are probative of untruthful conduct. To fall within the rule, the acts "will normally involve dishonesty or false statement as employed in Rule 609(a)(2)." *See Graham, Handbook of Federal*

*Evidence* § 608.4 at 146-47. The Third Circuit has held that Rule 609(a)(2) applies only to crimes that "bear on the witness' propensity to testify truthfully." *See United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004). In *United States v. Irizarry*, 341 F.3d 273 (3d Cir. 2003), the court noted that the trial court properly allowed the prosecutor to cross-examine the defendant about his possession of identification in someone else's name and about his possession of blank Social Security cards. *Id.* at 312. The Third Circuit stated that the evidence tended to show deceit and therefore fell within Rule 608(b).

The Third Circuit has also held that the decision whether to allow cross-examination under Rule 608(b) falls within the trial court's discretion. *See United States v. McNeill*, 887 F.2d 448, 453 (3d Cir. 1989). In *Johnson v. Elk Lake School District*, 283 F.3d 138 (3d Cir. 2002), the court held that the trial court acted within its discretion when it precluded plaintiff's counsel from cross-examining a key witness concerning a lie on his resume. *Id.* at 145 n.2. The court noted that the trial court's ruling was reviewed under an abuse of discretion standard with "substantial deference" to the trial court. The court stated that "the trial court was within its discretion to conclude that Stevens' lying on his resume, although duplicitous and wrong, was not so indicative of moral turpitude as to be particularly probative of his character for untruthfulness." *Id.* This result is criticized in Graham who states that "the exercise of discretion should very rarely if ever be exercised to exclude an undisputed act of 'lying'" such as that in *Johnson*. *Graham*, supra, § 608.4 n.5.

The inquiry under Rule 608(b) should focus on the actual acts that suggested untruthfulness and not any third party action, such as suspension from a job, that resulted from those acts. *See United States v. Davis*, 183 F.3d 231, 257 n.12 (3d Cir. 1999).

The court may preclude inquiry concerning prior acts if they are remote in time. *See Johnson v. Elk Lake School District*, 283 F.3d 138, 145 n.2 (3d Cir. 2002).

In addition, cross-examination under Rule 608(b) may be limited by the Fifth Amendment. Rule 608(b) provides that no witness, including the accused, waives the Fifth Amendment privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness. The Third Circuit appears not to have addressed this aspect of the rule.

## 4.25 Impeachment of Witness – Prior Conviction (F.R.E. 609)

**You heard evidence that** *(name)***, a witness, was previously convicted of a crime** *(punishable by more than one year in jail)(involving dishonesty or false statement)***. You may consider this evidence, along with other pertinent evidence, in deciding whether or not to believe** *(name)* **and how much weight to give to** *(name)'s* **testimony.**

### Comment

*See* Ninth Circuit (Criminal) § 4.8 and First Circuit § 2.03. For variations, *see* O'Malley et al., supra, § 15.07; Sand et al., supra, 7-12; Fifth Circuit § 1.12; Sixth Circuit § 7.05B; Seventh Circuit § 3.11; Eighth Circuit (Criminal) § 2.18; and Federal Judicial Center § 30.

This instruction should be given as part of the final charge when a witness has been impeached under Rule 609 of the Federal Rules of Evidence with evidence of a prior conviction. This instruction merely directs the jurors to consider the prior conviction in assessing credibility.

Rule 609 governs the admissibility of prior convictions to impeach. As amended effective December 1, 2006, Rule 609(a) provides:

> (a) General rule.--For the purpose of attacking the character for truthfulness of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an

act of dishonesty or false statement by the witness.

*See United States v. Gilmore*, 553 F.3d 266, 272-73 (3d Cir. 2009) (discussing application of Rule 609). Rule 609 (a)(1) permits impeachment of witnesses other than the accused by convictions of crimes punishable by death or imprisonment greater than one year subject only to balancing under Rule 403. *See Government of the Virgin Islands v. Bedford*, 671 F.2d 758 (3d Cir. 1982) (discussing application of Rule 609(a)(1)). Rule 609(a)(2) permits impeachment by conviction of crimes involving false statement or dishonesty; if the crime falls within (a)(2), the trial court must admit the prior conviction. *See United States v. Wong*, 703 F.2d 65, 68 (3d Cir.), *cert. denied,* 464 U.S. 842 (1983). Rule 609(a)(2) is interpreted narrowly and does not include crimes such as theft that do not "bear on the witness' propensity to testify truthfully." *See United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004) (quoting from the Conference Committee notes). As amended, the rule precludes inquiry into the manner in which a crime was committed to establish that it was a crime of dishonesty or false statement. Instead, the nature of the crime must be readily determined.

If more than ten years has passed since the date of conviction or release, the prior conviction is not admissible unless the proponent gives written notice and "the court determines, in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect." F.R.E. 609(b).

There is no clear authority requiring this instruction. However, the court should give the instruction if requested. It is not clear whether failure to give the instruction will be plain error if the defendant does not request it. *Graham, Handbook of Federal Evidence* § 609.6 at pp. 227-28 (5th ed. 2001).

(revised 11/10)

## 4.26 False in One, False in All (*Falsus in Uno, Falsus in Omnibus)*

**If you believe that a witness knowingly testified falsely concerning any important matter, you may distrust the witness' testimony concerning other matters. You may reject all of the testimony or you may accept such parts of the testimony that you believe are true and give it such weight as you think it deserves.**

**Comment**

This instruction is derived from O'Malley et al., supra, § 15.06.

The Third Circuit has recognized the *falsus in uno, falsus in omnibus* instruction. *See Lambert v. Blackwell*, 387 F.3d 210, 256 (3d Cir. 2004); *United States v. Rockwell*, 781 F.2d 985 (3d. Cir. 1986). The other circuits are divided on this instruction. *Compare Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1059 (9th Cir. 2005) (noting that the law "has long recognized that a person who is deemed unbelievable as to one material fact may be disbelieved in all other respects") *with Yongo v. INS*., 355 F.3d 27, 33 (1st Cir. 2004) (referring to *falsus in uno, falsus in omnibus* as "a longstanding but overstated precept"), *and United States v. Jackson*, 69 F. App'x. 630, 632 (4th Cir. 2003) (stating the courts disfavor the instruction). In *Parker v. United States*, 801 F.2d 1382, 1385 (D.C. Cir. 1986), then-Judge Scalia wrote that "[w]hile the falsus in uno instruction has been criticized frequently as superfluous and potentially confusing," the trial court has discretion to give the charge, and giving it is not ground for reversal. The court suggested that there might be a problem if the charge specifically referred to the defendant, appearing to suggest that the court questioned the defendant's testimony. 801 F.2d at 1385-86.

If the court gives the instruction, it "must clearly state that the evidence in question must be material," although it need not necessarily use the word "material." *Dressler v. Busch Entertainment Corp*., 143 F.3d 778, 781 (3d Cir. 1998). Provided that the jury instructions on credibility are thorough, the trial court has discretion to refuse the *falsus in uno, falsus in omnibus* instruction. *See United States v. Leon*, 739 F.2d 885, 893 (3d Cir. 1984).

## 4.27 Defendant's Choice not to Testify or Present Evidence

*(Name of defendant)(A defendant)* **did not testify** *(did not present evidence)* **in this case. A defendant has an absolute constitutional right not to testify** *(or to present any evidence).* **The burden of proof remains with the prosecution throughout the entire trial and never shifts to the defendant. The defendant is never required to prove that he is innocent. You must not attach any significance to the fact that** *(name of defendant)* **did not testify. You must not draw any adverse inference against** *(him)(her)* **because** *(he)(she)* **did not take the witness stand. Do not consider, for any reason at all, the fact that** *(name of defendant)(a defendant)* **did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.**

**Comment**

*See* California Criminal Jury Instructions § 355 and § 5.21. For variations, *see* O'Malley et al., supra, § 15.14; First Circuit § 3.03; Sixth Circuit § 7.02A; Seventh Circuit § 3.01; and Ninth Circuit § 3.3.

Under the Constitution, the defendant in a criminal case has the right to choose whether to testify and the right not to present any evidence. Neither the court nor the prosecutor may comment on the defendant's election to remain silent at trial. *See Griffin v. California*, 380 U.S. 609, 614-15 (1965); *Lesko v. Lehman*, 925 F.2d 1527 (3d Cir. 1991). *But see United States v. Hasting*, 461 U.S. 400, 510-11 (1983) (holding error harmless). If the defendant chooses not to testify, the defendant may also decide to request an instruction directing the jury to draw no negative inference from the defendant's decision not to take the witness stand. The trial court must give such an instruction if requested. *See Carter v. Kentucky*, 450 U.S. 288, 299-303 (1981); *Bruno v. United States*, 308 U.S. 287, 293-94 (1939). Failure to give the requested instruction is error, but the Third Circuit has held that it may be harmless. *See Lewis v. Pinchak*, 348

F.3d 355 (3d Cir. 2003).

Conversely, a defendant who chooses not to testify may prefer not to have the jury's attention drawn to that fact through an instruction. It is not error to give the instruction over the defendant's objection. *See Lakeside v. Oregon*, 435 U.S. 333, 340-41 (1978). Nevertheless, if the defendant prefers not to have the instruction given, the better practice is to comply with the defendant's wishes. *See Lakeside*, 435 U.S. at 340.

The instruction contains alternative language – "a defendant" – to be used in a multi-defendant trial where some defendants testify and some do not. The instruction also contains bracketed language to be used when the defendant presents no evidence.

If the defendant testifies, *see* Instruction 4.28 (Defendant's Testimony).

## 4.28 Defendant's Testimony

**In a criminal case, the defendant has a constitutional right not to testify. However, if** *(he)(she)* **chooses to testify,** *(he)(she)* **is, of course, permitted to take the witness stand on** *(his)(her)* **own behalf. In this case,** *(name of defendant)* **testified. You should examine and evaluate** *(his)(her)* **testimony just as you would the testimony of any witness.**

### Comment

*See* O'Malley et al., supra, § 15.12 and Sand et al., supra, 7-4.

Sand's instruction also includes the following language concerning the defendant's interest in the outcome of the case:

> You should examine and evaluate his testimony just as you would the testimony of any witness with an interest in the outcome of this case. You should not disregard or disbelieve his testimony simply because he is charged as a defendant in this case.

Authority is divided on whether it is proper or desirable to instruct the jury concerning the defendant's interest in the case. In *Reagan v. United States*,157 U.S. 301, 304-05 (1895), the Supreme Court approved the following instruction:

> You should especially look to the interest which the respective witnesses have in the suit, or in its result. Where the witness has a direct personal interest in the result of the suit, the temptation is strong to color, pervert, or withhold the facts. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you, and you must determine how far it is credible. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence, and in determining how far, or to what extent, if at all, it is worthy of credit.

Nevertheless, the circuits do not agree on whether the instruction is proper. *Compare United States v. Wiggins*, 566 F.2d 944, 945 (5th Cir. 1978) (holding instruction proper),

*with United States v. Bear Killer*, 534 F.2d 1253, 1259-60 (8th Cir. 1976) (holding instruction improperly singled out defendant and was therefore error). In a non-precedential decision, *United States v. Jones*, 2010 WL 1220960 (3d Cir. 2010), the Third Circuit rejected a challenge to such an instruction but noted that an instruction singling out the defendant's interest is "not advisable." In *Jones*, the defendant argued unsuccessfully that the trial court had "unfairly singled out [the defendant's] testimony as potentially biased" when the court instructed the jury as follows:

> the defendant, Chesney Jones, has taken the witness stand. You should examine and evaluate her testimony just as you would the testimony of any witness. It is for you to decide to what extent, if at all, Ms. Jones's interest in the result of her prosecution may have affected or colored her testimony.

The trial court had also given a general charge on witness credibility which called attention to the interest of both the parties in the case, The Third Circuit characterized the separate instruction concerning the defendant's testimony as unnecessary and inadvisable, but held it was not reversible error, citing *Reagan*. The court also noted that other Courts of Appeals have expressed concern about similar instructions but have not held them to constitute reversible error.

(revised 11/10)

## 4.29 Defendant's Prior Bad Acts or Crimes (F.R.E. 404(b))

**You have heard testimony that the defendant** *(summarize the other act evidence)***.**

**This evidence of other act***(s)* **was admitted only for** *(a)* **limited purpose***(s)***. You may consider this evidence only for the purpose of deciding whether the defendant** *(describe the precise purpose or purposes for which the other act evidence was admitted: for example (Pick those of the following, or other reasons, that apply)),*

*had the state of mind, knowledge, or intent necessary to commit the crime charged in the indictment;*

*or*

*had a motive or the opportunity to commit the acts charged in the indictment;*

*or*

*was preparing or planning to commit the acts charged in the indictment;*

*or*

*acted with a method of operation as evidenced by a unique pattern (describe);*

*or*

*did not commit the acts for which the defendant is on trial by accident or mistake.;*

*or*

*is the person who committed the crime charged in the indictment. You may consider this evidence to help you decide (describe how the evidence will be used to prove identity – e.g., whether the evidence that the defendant committed the burglary in which the gun that is the subject of this trial was stolen makes it more likely that the defendant was the person who placed the gun in the trunk of the car).*

**Do not consider this evidence for any other purpose.**

**Of course, it is for you to determine whether you believe this evidence and, if you do believe it, whether you accept it for the purpose offered. You may give it such weight as you feel it deserves, but only for the limited purpose that I described to you.**

**The defendant is not on trial for committing these other acts. You may not consider the evidence of these other acts as a substitute for proof that the defendant committed the crime*(s)* charged. You may not consider this evidence as proof that the defendant has a bad character or any propensity to**

**commit crimes. Specifically, you may not use this evidence to conclude that because the defendant may have committed the other act*(s)*, *(he)(she)* must also have committed the act*(s)* charged in the indictment.**

**Remember that the defendant is on trial here only for** *(state the charges briefly)***, not for these other acts. Do not return a guilty verdict unless the government proves the crime*(s)* charged in the indictment beyond a reasonable doubt.**

**Comment**

*See* Sixth Circuit § 7.13. *See United States v. Lee*, --- F.3d ----, 2010 WL 2757340 (3d Cir. 2010) (commenting that trial court's instruction based on Model Instruction 4.29 was not error).

This instruction should be given if evidence of defendant's other crimes or acts has been admitted under Federal Rules of Evidence Rule 404(b). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

*See also United States v. Ferguson*, 2010 WL 3638928 (3d Cir. 2010) (non-precedential) (noting that court must give limiting instruction if it admits other act evidence but holding that trial court did not commit error by delaying instruction to end of trial); *United States v. Givan*, 320 F.3d 452, 460-61 (3d Cir. 2003); *United States v. Gilmore*, 553 F.3d 266, 271 (3d Cir. 2009) (approving use of prior drug convictions to impeach defendant by contradicting his testimony that he had never sold drugs and noting that admission of the evidence is governed by Rules 607 and 403). *But see United States v. Morena*, 547 F.3d 191 (3d Cir. 2008) (reversing conviction where government exceeded limited purpose for which other act evidence was admissible by repeatedly injecting prejudicial references to defendant's drug use and collateral drug transactions in firearms case).).

In *United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988) (citing *Huddleston v. United States*, 485 U.S. 681 (1988)), the court summarized the steps necessary to admit

evidence under Rule 404(b):

> [T]he Supreme Court has listed four guidelines for admissibility under the Rule. First, the other crimes evidence must have a proper purpose. Second, the proffered evidence must be relevant. Third, its probative value must outweigh its potential for unfair prejudice. Fourth, the court must charge the jury to consider the other crimes evidence only for the limited purpose for which it is admitted.

The instruction should not merely include a laundry list of permitted uses of other act evidence. Rather, it should specifically state the limited purpose for which the other act evidence is admitted. *Graham, Handbook of Federal Evidence*, § 404.5 n.56 (5th ed. 2001). *See also United States v. Lee*, --- F.3d ----, 2010 WL 2757340 (3d Cir. 2010) (Rendell, J. dissenting) (criticizing trial court for failing to specify limited purpose).

The instruction is most helpful if it explains to the jury the precise role of the other act evidence. In *Scarfo*, the Court approved the trial court's instructions.

> The trial judge charged the jury: 'Mr. Scarfo is not on trial here for any murders, for any gambling or any other kind of illegal activities.... [T]hose kinds of offenses would be dealt with in other tribunals than this.... I think you can understand that it would be utterly improper for you to take them into account in this case in the sense of saying to yourselves: 'Well, maybe he didn't do this extortion; but he did a lot of other stuff. So it doesn't much matter whether they prove this case. I am going to find him guilty anyway.' That obviously would be totally improper.'
>
> In instructing on the proper use of other crimes evidence, the judge explained that the testimony could be used to assess the nature of the relationship among Caramandi, DelGiorno, and defendant.
>
> > 'It is a position of the Government that Caramandi and DelGiorno were subordinates within this carefully organized and structured organization; that they did Mr. Scarfo's bidding; [that] they never would dream of doing anything this large without his approval; and that the tapes and other evidence in the case corroborate their testimony to the effect that he was involved and did approve.'
>
> The judge also told the jurors that they could use the evidence to decide whether defendant adopted a standardized scheme or mode of operation, to determine whether he had knowledge of or an intent to participate in the conspiracy, as well as to evaluate the witnesses' motives for cooperating with the government. Finally, the judge stated that the government had the

> right to reveal the witnesses' unsavory criminal records 'so as not to be accused of trying to hoodwink the jury by pretending that people like Caramandi and DelGiorno were Boy Scouts.'
>
> These clear, frank, and comprehensive instructions did all that was possible under the circumstances to place the other crimes evidence in proper perspective.

850 F.2d at 1020-21. For other Third Circuit decisions approving instructions on other act evidence, *see United States v. Ferguson*, 2010 WL 3638928 (3d Cir. 2010) (non-precedential); *United States v. Cruz*, 326 F.3d 392 (3d Cir. 2003); *United States v. Givan*, 320 F.3d 452, 460-61 (3d Cir. 2003)*; United States v. Butch*, 256 F.3d 171 (3d Cir. 2001); *United States v. Palma-Ruedas,* 121 F.3d 841, 852 n.11 (3d Cir.1997); *United States v. Major,* 293 Fed.Appx. 160, 2008 WL 4229933 (3d Cir. 2008) (approving admission of other act evidence to prove intent and approving instruction). *But see United States v. Morena*, 547 F.3d 191 (3d Cir. 2008) (concluding that court's instruction was not adequate and reversing conviction).

In *United States v. Carter*, 401 F.2d 748 (3d Cir. 1968), the court held that failure to instruct on the limited purpose of other act evidence was not plain error. *See also Graham, Handbook of Federal Evidence*, § 404.5 at 364 (5th ed. 2001).

This instruction should not be given when the other act evidence was admitted under Rule 413 or 414 of the Federal Rules of Evidence. Those rules allow the prosecution to introduce evidence of similar acts in prosecutions for sexual assault or child molestation. The evidence of prior conduct admitted under those rules "may be considered for its bearing on any matter to which it is relevant." As a result, no limiting instruction should be given.

(revised 11/10)

## 4.30 Consciousness of Guilt (Flight, Concealment, Use of an Alias, etc.)

**You have heard testimony that after the crime was supposed to have been committed,** *(name of defendant) (describe the conduct proven; e.g., shaved his beard and cut his hair, went to Los Angeles)***.**

**If you believe that** *(name of defendant) (describe the conduct proven*)**, then you may consider this conduct, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that** *(he)(she)* **committed the crime charged. This conduct may indicate that** *(he)(she)* **thought** *(he)(she)* **was guilty of the crime charged and was trying to avoid punishment. On the other hand, sometimes an innocent person may** *(describe the conduct proven*) **for some other reason. Whether or not this evidence causes you to find that the defendant was conscious of** *(his)(her)* **guilt of the crime charged, and whether that indicates that** *(he)(she)* **committed the crime charged, is entirely up to you as the sole judges of the facts.**

**Comment**

*See* Sixth Circuit § 7.14. For variations, *see* O'Malley et al., supra, § 14.08; Sand et al., supra, 6-9 and 6-10; First Circuit § 2.09; Eight Circuit § 4.09; and Seventh Circuit § 3.20 and Ninth Circuit § 4 (recommending that no instruction be given).

Certain types of behavior by a defendant may suggest consciousness of guilt and therefore be admissible as evidence that the defendant acted out of awareness of guilt of the charged offense, which in turn may be used by the jury as evidence of guilt. This category includes evidence of the defendant's flight or concealment, use of an alias,

concealment or destruction of evidence, making false exculpatory statements, and threatening or tampering with a witness or juror. This instruction explains to the jury the inference to be drawn from the admitted evidence. The instruction should be tailored to the evidence admitted in the trial.

The court should generally apply Rule 403 of the Federal Rules of Evidence to this evidence, asking whether the evidence generates a risk of unfair prejudice that substantially outweighs the fair probative value. In addition, the admissibility of these types of evidence will sometimes need to be evaluated under Rule 404(b) of the Federal Rules of Evidence, which allows introduction of other act or crime evidence if it is probative for a purpose other than proof of character.

The law views evidence of flight as an admission by conduct reflecting consciousness of guilt. *See United States v. Miles*, 468 F.2d 482 (3d Cir. 1972). In *United States v. Scarfo*, 711 F. Supp. 1315, 1321 (E.D. Pa. 1989), the court noted that the probative value of flight evidence

> depends upon whether there is sufficient evidence to establish the following four inferences: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to the actual guilt of the crime charged. (Citations omitted).

*See also United States v. Green*, 25 F.3d 206 (3d Cir. 1994) (evidence of defendant's flight was properly admitted to show consciousness of guilt when defendant fled upon spotting federal authorities); *United States v. Pungitore*, 910 F.2d 1084, 1151 (3d Cir. 1990) (evidence of defendant's flight admissible to prove his consciousness of guilt in RICO trial); *United States v. Levy*, 865 F.2d 551, 558 (3d Cir. 1989) (evidence of use of false identity admissible in drug case).

In *United States v. Miles*, 468 F.2d 482 (3d Cir. 1972), having admitted evidence of the defendant's flight, the trial court instructed the jury as follows:

> The flight or concealment of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by the jury in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flights or concealment shows a consciousness of guilt, and the significance if any to be attached to such a circumstance, are matters for determination by you, the jury.
>
> In thus instructing you upon the subject of flight or concealment, let it be understood that I do not declare to you, or even remotely suggest, that the Defendant did either so take flight or so conceal himself immediately after the

> commission of the offenses defined in Count I and Count II of the indictment, or either of such counts, or at any other time. Whether he did so take flight or so conceal himself, you will determine from all of the evidence in the case. And, unless you find that he did so take flight or conceal himself, you will entirely disregard my instruction just imparted to you upon those questions. (emphasis added).

The Third Circuit concluded that there was sufficient evidence to justify the trial court's instruction to the jury on the issue of flight and that the instruction was proper and protected the rights of the defendant. *United States v. Miles*, 468 F.2d 482, 489-90 (3d Cir. 1972) (citation omitted).

In *United States v. Katzin*, 94 F. App'x. 134, 138 (3d Cir. 2004), a non-precedential decision, the Third Circuit affirmed the admissibility of flight evidence to prove consciousness of guilt when the trial court properly instructed the jury on how to weigh such evidence and approved the trial court's instruction on the evidence, stating:

> We have consistently held that "evidence of a defendant's flight after a crime has been committed is admissible to prove the defendant's consciousness of guilt." We hold such evidence admissible as circumstantial evidence of guilt to be considered with the other facts of the case. In fact, the District Court charged the jury to consider the evidence only for proper purposes. ("Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance, if any, to be attached to such a circumstance are matters for determination by you, the jury."). Evidence of flight is not considered inadmissible under Fed.R.Evid. 404(b). We find no error here.

An instruction addressing this evidence may not be required. *See United States v. Rothberg*, 896 F. Supp. 450, 456 (E.D. Pa. 1995) (no instruction given addressing evidence of use of alias admissible as consciousness of guilt).

## 4.31 Consciousness of Guilt (False Exculpatory Statements)

**You have heard testimony that** *(name of defendant)* **made certain statements outside the courtroom to law enforcement authorities in which** *(he)(she)* **claimed that** *(his)(her)* **conduct was consistent with innocence and not with guilt. The government claims that these statements are false.**

**If you find that** *(name of defendant)* **made a false statement in order to direct the attention of the law enforcement officers away from** *(himself)(herself)***, you may, but are not required to conclude that** *(name of defendant)* **believed that** *(he)(she)* **was guilty. It is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish** *(his)(her)* **innocence. You may not, however, conclude on the basis of this alone, that** *(name of defendant)* **is, in fact, guilty of the crime for which** *(he)(she)* **is charged.**

**You must decide whether or not the evidence as to** *(name of defendant)* **shows that** *(he)(she)* **believed that** *(he)(she)* **was guilty, and the significance, if any, to be attached to this evidence. In your evaluation, you may consider that there may be reasons – fully consistent with innocence – that could cause a person to give a false statement that** *(he)(she)* **did not commit a crime. Fear of law enforcement, reluctance to become involved, or simple mistake may**

**cause an innocent person to give such a statement or explanation.**

**Comment**

*See* Sand et al., supra, 6-11; O'Malley et al., supra, § 14.06.

In most cases, this issue is best left to the arguments of the parties. Indeed, some circuits recommend that no instruction be given. *See, e.g.,* Seventh Circuit § 3.22; Eighth Circuit § 4.15. The Third Circuit appears to have considered questions concerning false exculpatory statements only rarely. In *Government of the Virgin Islands v. Lovell*, 378 F.2d 799, 806 (3d Cir. 1967), the court cited Wigmore for the settled proposition that false exculpatory statements may be admitted as circumstantial evidence of the defendant's "consciousness that his case is a weak or unfounded one." The court noted with approval that the trial court's instruction came directly from Mathes & Devitt, Federal Jury Practice and Instructions § 8.14 at 99-100 (1965 ed.). *Id.* at 807. The Court further commented that other circuit courts had approved similar instructions. *Id.* at 807 n.9.

In *United States v. Chaney*, 446 F.2d 571, 576 (3d Cir. 1971), the defendant conceded that "exculpatory statements made upon interrogation with intent to divert suspicion or mislead the police, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative value," but argued that the prosecutor had improperly commented on his failure to testify. Concluding that the comments did not constitute plain error, the court noted that the trial court had clarified the prosecutor's meaning by instructing the jury as follows:

> The government also asks me to point out to you the government's contention that, in addition to the other evidence that they argue with respect to Chaney, it is their contention that his statements . . . were false and that is indicative of guilt.

*Id.* at 576.

The instruction states that the false statements were made outside the courtroom. This language is particularly important if the defendant testifies at trial, as the instruction would not be appropriate to cast doubt on the defendant's testimony at trial. *United States v. Clark*, 45 F.3d 1247, 1251 (8th Cir. 1995).

## 4.32 Prior Statement of Defendant – Single Defendant on Trial

**The government introduced evidence that the defendant** *(name of defendant)* **made a statement to** *(name of person who took statement)*. **You must decide whether** *(name of defendant)* **did in fact make the statement. If you find that** *(name of defendant)* **did make the statement, then you must decide what weight, if any, you feel the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning** *(name of defendant) (himself)(herself)* **and the circumstances under which the statement was made.**

*[If, after considering the evidence, you determine that a statement, was made voluntarily, you may give it such weight as you feel it deserves under the circumstances. On the other hand, if you determine that the statement was not made voluntarily, you must disregard it. In determining whether any alleged statement was made voluntarily, you should consider (name of defendant)'s age, training, education, occupation, and physical and mental condition, and (his)(her) treatment while in custody or under interrogation as shown by the evidence in the case. Also consider all other circumstances in evidence surrounding the making of the alleged statement.]*

**Comment**

*See* Seventh Circuit § 3.02 and O'Malley et al., supra, § 14.03.

This instruction should be given when the prosecution introduces a defendant's confession or similar statement and the defendant raises questions about the weight that the jury should accord that evidence. The bracketed language should be included if the defendant raises a colorable question of whether the statement was given voluntarily. In *Crane v. Kentucky*, 476 U.S. 683 (1986), the Supreme Court noted that the pretrial determination that the defendant's confession is voluntary is not conclusive and held that the trial court violated the defendant's constitutional rights when it precluded the defendant from introducing evidence relating to the circumstances of the confession at trial. The evidence "will often be germane to its probative weight, a matter that is exclusively for the jury to assess." *Id.* at 688. Congress has spoken to this issue in 18 U.S.C. § 3501(a), which provides in part:

> [T]he 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.

In *Government of the Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974), the Third Circuit held that the trial court properly instructed the jury to consider the voluntariness of the defendant's confessions and to disregard them if they were not given voluntarily. If a question of voluntariness is raised, the trial court must admit the relevant evidence and instruct the jury on the question.

## 4.33 Prior Statement of Non-testifying Defendant in Multi-Defendant Trial

**The government introduced evidence that the defendant** *(name of defendant)* **made a statement to** *(name of person who took statement)*. **I caution you that you may consider** *(name of defendant)*'**s statement to** *(name of person who took statement)* **only in resolving whether** *(name of defendant)* **is guilty or not guilty. You may not consider or discuss this evidence in any way in resolving whether** *(name of co-defendant, if there is only one) (any of the other defendants on trial) (is)(are)* **guilty or not guilty.** *(Name of defendant)*'**s statement is evidence only against** *(name of defendant)* **and not against** *(name of co-defendant)(any other defendant)*.

**You must decide whether** *(name of defendant)* **did in fact make the statement. If you find that** *(name of defendant)* **did make the statement, then you must decide what weight, if any, you feel the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning** *(name of defendant) (himself)(herself)* **and the circumstances under which the statement was made.**

*[If, after considering the evidence, you determine that a statement was made voluntarily, you may give it such weight as you feel it deserves under the circumstances. On the other hand, if you determine that the statement was not*

*made voluntarily, you must disregard it. In determining whether any alleged statement was made voluntarily, you should consider (name of defendant)'s age, training, education, occupation, and physical and mental condition, and (his)(her) treatment while in custody or under interrogation as shown by the evidence in the case. Also consider all other circumstances in evidence surrounding the making of the alleged statement.]*

**Comment**

*See* Seventh Circuit § 3.02 and Sand et al., supra, 5-20. For variations *see* O'Malley et al., supra, §14.04; Fifth Circuit § 1.27; Eighth Circuit § 2.15; and Eleventh Circuit § 2.2.

This instruction should be given in a multiple defendant trial when one defendant's confession is admitted in a joint trial and the confessing defendant does not testify. A defendant is deprived of his right under the Confrontation Clause when a nontestifying co-defendant's incriminating confession is introduced at their joint trial even if the jury is instructed to consider that confession only against the co-defendant. Limiting instructions are normally inadequate to protect the defendant against the risk that the jury will misuse the codefendant's confession and consider it as evidence against the defendant. *See Bruton v. United States*, 391 U.S. 123 (1968); *see also Cruz v. New York*, 481 U.S. 186, 194 (1987) (protection applies even if the defendant also confessed). However, if the prosecution adequately redacts the codefendant's statement, removing language that the jury could understand as referring to the defendant without further evidentiary linkage, the codefendant's confession may be admitted in a joint trial. *See Richardson v. Marsh*, 481 U.S. 200 (1987) (holding redaction adequate to protect defendant); *Priester v. Vaughn*, 382 F.3d 394 (3d Cir. 2004) (concluding redaction provided adequate protection); *but see Gray v. Maryland*, 523 U.S. 185 (1998) (redaction inadequate); *United States v. Richards*, 241 F.3d 335 (3d Cir. 2001) (redaction inadequate). When such a confession is admitted, this instruction is necessary to protect the defendant's rights under the Confrontation Clause.

The bracketed language should be included if the defendant raises a colorable question of whether the statement was given voluntarily.

## 4.34 Silence in the Face of Accusation

**You heard evidence that** *(name of person who made accusatory statement)* **made a statement accusing** *(name of defendant)* **of the crime charged in the indictment, and that** *(name of defendant)* **did not** *(deny the accusation)(object to the statement)(contradict the statement)*. **If you find that** *(name of defendant)* **was present and actually heard and understood the statement, and that it was made under such circumstances that** *(name of defendant)* **would be expected to** *(deny the accusation)(object to the statement)(contradict the statement)* **if it was not true, then you may consider whether** *(name of defendant)***'s silence was an admission of the truth of the statement.**

**Comment**

This instruction is derived from Eighth Circuit § 4.14. For variations and other approaches, *see* O'Malley et al., supra, § 14.05; Seventh Circuit § 3.03; Ninth Circuit § 4.2; and Sixth Circuit § 7.15 (recommending no instruction be given).

An instruction on this topic should be given only rarely and always with great caution. In criminal cases, courts must carefully assess the admissibility of a statement that would otherwise be hearsay on the basis that the defendant adopted the statement by silence under Federal Rules of Evidence, Rule 801(d)(2)(B). In some instances, the defendant's silence in the face of accusation is admissible. In others, admitting the evidence would violate the defendant's constitutional rights. When the evidence is properly admitted, this instruction may be given to guide the jury's evaluation of the defendant's silence.

In criminal cases, the admissibility of the defendant's silence turns on the precise circumstances in which the defendant remained silent. The cases fall into two broad categories: 1) silence in the face of accusation outside the presence of law enforcement officers, in which the court should apply the general rule, and 2) silence in the presence of law enforcement officers, in which the court must consider whether the Constitution

permits evidentiary use of the defendant's silence.

In *United States v. Ward*, 377 F.3d 671, 675 (7th Cir. 2004), the Seventh Circuit summarized the general law governing adoption by silence:

> Under Federal Rule of Evidence 801(d)(2)(B), a statement is not hearsay if it is offered against a party and is "a statement of which the party has manifested an adoption or belief in its truth." It is not necessary for one to use any specific language to adopt another's statement. Rather, a statement may be adopted as long as the statement was made in the defendant's presence, the defendant understood the statement, and the defendant has the opportunity to deny the statement but did not do so.

A defendant's silence in the face of accusation after arrest raises constitutional questions which are explored at length below. Outside of that context, a defendant's silence in the face of accusation by someone other than a law enforcement officer may be admissible as an adoptive admission if the statement was made in the defendant's presence, the defendant heard and understood the statement, the circumstances called for a denial, the defendant had the opportunity to deny the statement, and the defendant did not deny the statement. *See United States v. Ward*, 377 F.3d 671, 675 (7th Cir. 2004); *United States v. Hoosier*, 542 F.2d 687 (6th Cir. 1976). For example, in *Ward*, the court admitted testimony that the defendant's sister stated "that's the money they got when they robbed the bank" in the defendant's presence and he did not deny it. 377 F.3d at 675. The Third Circuit does not appear to have discussed the admissibility of a defendant's silence under Federal Rule of Evidence 801(d)(2)(B).

If the defendant's silence occurred in the presence of law enforcement officers, the court must consider with care and great caution the constitutionality of using the evidence. Admissibility often turns on whether the silence occurred after the defendant had received *Miranda* warnings. It is clear that the government cannot use evidence that a defendant maintained silence after receiving *Miranda* warnings as substantive evidence of guilt or, under most circumstances, to impeach the defendant. To do so violates the defendant's right to due process. *See Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993); *Doyle v. Ohio*, 426 U.S. 610 (1976); *United States v. Johnson*, 302 F.3d 139, 145 (3d Cir. 2002); *United States v. Balter*, 91 F.3d 427 (3d Cir. 1996). If a prosecutor refers to a defendant's post-*Miranda* silence, the court should consider whether to grant a mistrial. At the very least, the court must give a curative instruction ordering the jury to disregard the prosecutor's questions and not to consider the defendant's post-arrest silence for any reason. In *Johnson*, the prosecutor improperly questioned the defendant concerning his post-*Miranda* silence, but the court avoided a constitutional violation by precluding further questioning and giving the following instruction:

> Members of the Jury, as I instructed you and advised you in the beginning, in a criminal case a Defendant is under no obligation or duty to testify.

> Likewise, a Defendant is under no obligation or duty to respond at any time or to say anything.
> In this particular instance the thrust of [the prosecutor's] question, did Mr. Johnson say it was not his coat, was objected to by [defense counsel] and quite properly so. I'm instructing you that that should be disregarded by you as a piece of information in this case or a piece of evidence. [The prosecutor] is essentially withdrawing that question. So you should strike it from your minds as something that is to be considered in this case.

*See Johnson*, 302 F.3d at 148; *see also Greer v. Miller*, 483 U.S. 756, 764-65 (1987) (holding no *Doyle* violation where court sustained objection to improper question and cautioned jury to disregard evidence); *Hassine v. Zimmerman*, 160 F.3d 941, 948 (3d Cir. 1998) (finding *Doyle* violation where "the trial court gave no curative instructions at all" after the prosecutor asked three questions concerning the defendant's post-arrest, post-*Miranda* warnings silence but holding the violation to be harmless).

However, the Third Circuit has recognized that a defendant's post-*Miranda* silence can be used to impeach the defendant if the defendant "testifies to an exculpatory version of events and claims to have told the police the same version upon arrest." *See Hassine* at 949 (quoting *Doyle*, 426 U.S. at 619 n.11). The Third Circuit emphasized that the exception is limited:

> [T]he prosecution [may] use post-arrest silence to impeach the credibility of the defendant's version of what he did following arrest; the government cannot use the silence to impeach the exculpatory story itself or to draw inferences suggesting the defendant's guilt.

*See Hassine* at 949; *see also Government of Virgin Islands v. Davis*, 561 F.3d 159, 163-65 (3d Cir. 2009) (holding that admission of defendant's post-arrest, post-*Miranda* silence violated defendant's right to due process). If the defendant's silence is admitted only to impeach, this instruction should not be given. Instead, the court should adapt Instruction 4.22 (Impeachment of Witness - Prior Inconsistent Statement for Credibility Only).

By contrast, the defendant's pre-*Miranda* silence is more likely to be admissible. The protection established in *Doyle* applies only to post-arrest, post-*Miranda* warnings silence and not to post-arrest silence before receiving *Miranda* warnings. *See Brecht*, 507 U.S. at 628; *Fletcher v. Weir*, 455 U.S. 603 (1982); *Johnson*, 302 F.3d at 146. A defendant's silence after arrest but before receiving the *Miranda* warnings is admissible to impeach the defendant if the defendant testifies. Likewise, a defendant's pre-arrest silence may be admissible to impeach the defendant's exculpatory testimony at trial. *See Jenkins v. Anderson*, 447 U.S. 231 (1980); *United States v. Balter*, 91 F.3d 427, 431 (3d Cir. 1996) (citing *Jenkins* for the proposition that a defendant's pre-arrest silence is admissible to impeach).

The Supreme Court on occasion has, as a matter of federal evidentiary law, found impeachment on the basis of prior silence inappropriate where the circumstances of the silence were not in fact inconsistent with the defendant's testimony. *See Jenkins*, 447 U.S. at 235 (citing *United States v. Hale*, 422 U.S. 171, 180-81 (1975)); *Stewart v. United States*, 366 U.S. 1, 5 (1961); *Grunewald v. United States*, 353 U.S. 391, 424 (1957).

It is not clear whether the defendant's pre-*Miranda* silence is admissible as substantive evidence of the defendant's guilt. The circuits are split as to whether the prosecution can use pre-*Miranda* silence in its case in chief. *See Combs v. Coyle*, 205 F.3d 269, 283-84 (6th Cir. 2000) (summarizing authority). The Third Circuit has not indicated whether substantive use of pre-*Miranda* silence is constitutional or how to instruct the jury regarding the introduction of a defendant's post-arrest, pre-*Miranda* warnings silence. However, in *United States v. Traitz*, 871 F.2d 368, 400-01 (1989), the Third Circuit appeared to assume that using a defendant's pre-arrest silence could violate the defendant's Fifth Amendment privilege against self-incrimination. *See also United States v. Cummiskey*, 728 F.2d 200, 204 (3d Cir. 1984) (suggesting in dictum that such proof may be prohibited).

The Third Circuit has not discussed how to instruct the jury regarding the use for impeachment of pre-*Miranda* silence.

(revised 12/09)

## 4.35 Impeachment of Defendant - Prior Bad Acts (F.R.E. 608(b))

**You heard evidence that the defendant** *(name)* **on a previous occasion committed** (*describe bad act elicited on cross-examination of defendant*)**. You may consider that evidence only to help you decide whether to believe** *(name)***'s testimony and how much weight to give it. That evidence does not mean that** *(name)* **committed the crime charged here, and you must not use that evidence as any proof of the crime charged in this case.**

*[This evidence may not be used in any way at all in connection with the other defendant(s).]*

**Comment**

*See* Eighth Circuit § 2.16.

This instruction should be given when the prosecution is permitted to cross-examine the defendant under Rule 608(b) of the Federal Rules of Evidence concerning prior bad acts that did not result in conviction. Rule 608(b) of the Federal Rules of Evidence provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

If the court permits the prosecutor to cross-examine the defendant concerning prior bad acts under Rule 608(b) and the defendant admits committing those acts, the court should instruct the jury concerning the cross-examination, whether or not requested, after consultation with the defendant. The instruction simply limits the jury's

consideration of the prior acts to the defendant's believability. The Third Circuit has not considered whether failure to give the instruction if requested is reversible error or whether failure to give the instruction if the defendant does not request it is plain error. The bracketed language should be given in a multi-defendant case.

If the prosecutor asks about the prior acts on cross-examination, a cautionary instruction should be given at the time of the testimony. *See* Instruction 2.24 (Impeachment of Defendant - Prior Bad Acts). Rule 608(b) precludes the introduction of extrinsic evidence to complete the impeachment with bad acts. As a result, if the prosecutor is permitted to ask about the prior bad acts on cross-examination and the defendant denies committing the acts, the prosecution can go no further with the subject. In that event, the court should give Alternative 2 of Instruction 2.24 during the trial. If the defendant admits committing the acts, the court should give Alternative 1 of Instruction 2.24 during the trial and this instruction in the final charge to the jury.

Caution: This instruction should not be given when the defendant has been impeached with a prior conviction under Rule 609 of the Federal Rules of Evidence. *See* Instruction 2.25 (Impeachment of Defendant - Prior Conviction). Nor should this instruction be given when evidence of other crimes has been admitted to prove motive, opportunity, intent, or the like under Rule 404(b) of the Federal Rules of Evidence. Instead, the jury should be specifically instructed on the purpose for which such evidence was admitted. *See* Instruction 2.23 (Defendant's Prior Bad Acts or Crimes). If evidence of the defendant's prior conduct or conviction has been admitted under Rule 404(b) or Rule 609 *and* the defendant is impeached with prior bad acts under Rule 608(b), this instruction should be given in conjunction with Instruction 4.29 (Defendant's Prior Bad Acts or Crimes) respectively. If different evidence has been admitted under all three rules, all three instructions should be given, highlighting the difference in relevance for the jury. If the same evidence is admitted under Rule 608(b) and another of these rules, the instructions should be modified to reflect the multiple bases for admission.

Rule 608(b) permits inquiry only concerning prior acts that are probative of untruthful conduct. To fall within the rule, the acts "will normally involve dishonesty or false statement as employed in Rule 609(a)(2)." *Graham* § 608.4 at 146-47. The Third Circuit has held that Rule 609(a)(2) applies only to crimes that "bear on the witness' propensity to testify truthfully." *See United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004). In *United States v. Irizarry*, 341 F.3d 273 (3d Cir. 2003), the court noted that the trial court properly allowed the prosecutor to cross-examine the defendant about his possession of identification in someone else's name and about his possession of blank Social Security cards. *Id.* at 312. The Third Circuit stated that the evidence tended to show deceit and therefore fell within Rule 608(b).

The Third Circuit has also held that the decision whether to allow cross-examination under Rule 608(b) falls within the trial court's discretion. *See United States v. McNeill*, 887 F.2d 448, 453 (3d Cir. 1989). In *Johnson v. Elk Lake School District*,

283 F.3d 138 (3d Cir. 2002), the court held that the trial court acted within its discretion when it precluded plaintiff's counsel from cross-examining a key witness concerning a lie on his resume. *Id.* at 145 n.2. The court noted that the trial court's ruling was reviewed under an abuse of discretion standard with "substantial deference" to the trial court. The court stated that "the trial court was within its discretion to conclude that Stevens' lying on his resume, although duplicitous and wrong, was not so indicative of moral turpitude as to be particularly probative of his character for untruthfulness." *Id.* This result is criticized in Graham who states that "the exercise of discretion should very rarely if ever be exercised to exclude an undisputed act of 'lying'" such as that in *Johnson*. *Graham* § 608.4 n.5.

The inquiry under Rule 608(b) should focus on the actual acts that suggested untruthfulness and not any third party action, such as suspension from a job, that resulted from those acts. *See United States v. Davis*, 183 F.3d 231, 257 n.12 (3d Cir. 1999). The court may preclude inquiry concerning prior acts if they are remote in time. *See Johnson v. Elk Lake School District*, 283 F.3d 138, 145 n.2 (3d Cir. 2002).

Cross-examination may be limited by the Fifth Amendment; Rule 608(b) provides that no witness, including the accused, waives the Fifth Amendment privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness. *See United States v. Hudson*, 422 F. Supp. 395 (E.D. Pa. 1976), *aff'd* 556 F.2d 566, 569, *cert. denied*, 431 U.S. 922, *cert. denied*, 434 U.S. 839 (1977). The Third Circuit appears not to have addressed this aspect of the rule.

## 4.36 Impeachment of Defendant - Prior Conviction (F.R.E. 609)

**You heard evidence that the defendant** *(name)* **was previously convicted of** *(a)* **crime***(s)*. **You may consider evidence of** *(his)(her)* **previous conviction only to decide whether to believe** *(name)***'s testimony and how much weight to give it. That evidence does not mean that** *(name)* **committed the crime***(s)* **charged here, and you must not use that evidence as any proof of the crime***(s)* **charged in this case.**

*[That evidence may not be used in any way at all in connection with the other defendant(s)].*

**Comment**

*See* Eighth Circuit § 2.16. For variations, *see* O'Malley et al., supra, §§ 11.12 and 15.08; Sand et al., supra, 7-13; Federal Judicial Center § 41; First Circuit § 2.04; Fifth Circuit § 1.11; Sixth Circuit § 7.05A; Seventh Circuit § 3.05; Ninth Circuit § 4.6; and Eleventh Circuit § 6.4.

This instruction should be used when the defendant's prior conviction has been admitted to attack the defendant's credibility under Rule 609 of the Federal Rules of Evidence.

> As amended effective December 1, 2006, Rule 609(a) provides:
> (a) General rule.--For the purpose of attacking the character for truthfulness of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the

> probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

*See United States v. Gilmore*, 553 F.3d 266, 272-73 (3d Cir. 2009) (discussing application of Rule 609).

It is important to distinguish between the two subsections of Rule 609(a). Rule 609(a)(1) permits impeachment by convictions of crimes punishable by death or imprisonment greater than one year if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." *See Government of the Virgin Islands v. Bedford*, 671 F.2d 758 (3d Cir. 1982).

Rule 609(a)(2) applies only to crimes of dishonesty or false statement and makes admission of the evidence mandatory. If the crime falls within (a)(2), the trial court must admit the prior conviction. *See United States v. Wong*, 703 F.2d 65, 68 (3d Cir.), *cert. denied,* 464 U.S. 842 (1983). Rule 609(a)(2) is interpreted narrowly and does not include crimes such as theft that do not "bear on the witness' propensity to testify truthfully." *See United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004) (quoting from the Conference Committee notes). As amended, the rule precludes inquiry into the manner in which a crime was committed to establish that it was a crime of dishonesty or false statement. Instead, the nature of the crime must be readily determined.

Rule 609 also includes a time restriction. If more than ten years has passed since the date of conviction or release, the prior conviction is not admissible unless the proponent gives written notice and "the court determines, in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect." F.R.E. 609(b).

Ordinarily, evidence of the defendant's prior conviction is admissible only for the limited purpose of attacking credibility. As a result, the defendant is entitled, upon request, to an instruction limiting the jury's consideration of the conviction to the purpose for which it was admitted. The Third Circuit has not addressed the question of whether it is plain error not to give this instruction if the defendant fails to request it. Professor Graham opines that failure to give the instruction "will more likely result in plain error where the conviction is similar." *Graham, Handbook of Federal Evidence* § 609.6 at pp.227-28 (5th ed. 2001).

In some cases, a defendant's prior criminal record is introduced for other purposes. In those cases, this instruction should not be given. Instead, the jury should be

specifically instructed on the purpose for which the evidence was admitted. A prior conviction may be required to establish an element of the offense charged, as when the defendant is charged under 18 U.S.C. § 922(g) or (h). *See* Instruction 6.18.922G-3 (Evidence of Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))). Evidence of other crimes may also be admitted to prove motive, opportunity, intent, or the like under Rule 404(b) of the Federal Rules of Evidence. *See* Instruction 4.29 (Defendant's Prior Bad Acts or Crimes). *See also United States v. Gilmore*, 553 F.3d 266, 271-72 (3d Cir. 2009) (approving use of prior convictions to impeach defendant by contradiction).

The bracketed language should be given in a multi-defendant case.

(revised 12/09)

## 4.37 Impeachment of Defendant - Prior Inconsistent Statement Taken in Violation of Miranda

**You will recall that the defendant,** *(name)***, testified during the trial on** *(his)(her)* **own behalf. You will also recall that there was evidence that the defendant made** *(a statement)(certain statements)* **before trial.** *(Name)(admitted)(denied)* **making** *(this)(these)* **earlier statement***(s)***.** *(Name)***'s earlier statement***(s) (was)(were)* **brought to your attention only to help you decide if you believe what** *(name)* **testified to here in court. If you find that** *(name)* **once said something different, then you should decide if what** *(name)* **said here in court was true. You must not, however, consider the earlier statement***(s)* **as evidence of the defendant's guilt. The government must use other evidence to prove, beyond a reasonable doubt, that the defendant committed the crime.**

**Comment**

*See* Federal Judicial Center § 42. For variations, *see* O'Malley et al., supra, §11.13; Eighth Circuit § 2.17.

Normally, prior statements of the defendant are admissible without limitation under Rule 801(d)(2)(A) of the Federal Rules of Evidence. If the defendant's prior statement is admitted without limitation, no instruction is necessary. *But see* Instruction 2.11. However, if a statement is obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and the defendant successfully moves to suppress it, the statement is not admissible substantively, but may nevertheless be admitted to impeach the defendant if the defendant elects to testify. *Harris v. New York*, 401 U.S. 222 (1971). This instruction should then be used during the concluding instructions to restrict the statement to its limited role. In addition, Instruction 2.26 (Impeachment of Defendant - Prior Inconsistent

Statement Taken in Violation of Miranda) should be given during the trial, at the time the prior statement is introduced.

If other prior statements of the defendant are introduced without limitation, the court should give Instruction 2.11 (Limited Admissibility: Evidence Admitted for a Limited Purpose) with this instruction to emphasize the difference in the relevance of the two sets of statements.

## 4.38 Impeachment of Defendant - Prior Inconsistent Statement Not Taken in Violation of *Miranda*

**You will recall that** *(name of defendant)* **testified during the trial on** *(his)(her)* **own behalf. You will also recall that there was evidence that** *(name of defendant)* **made** *(a statement)(certain statements)* **before trial.** *(Describe the statement(s) to differentiate it from those admitted just to impeach.) (This)(These)* **earlier statement***(s)* **by** *(name of defendant) (was)(were)* **brought to your attention in part to help you decide if you believe what the defendant testified to here in court. If you find that** *(name of defendant)* **once said something different, then you should decide if what** *(he)(she)* **said here in court was true. In addition, however, you may consider the earlier statement***(s)* **as evidence of** *(name of defendant)***'s guilt.**

**Comment**

*See* Seventh Circuit § 3.10 and Federal Judicial Center § 42. For variations, *see* O'Malley et al., supra, §11.13; Eighth Circuit 2.17.

Normally, prior statements of the defendant are admissible without limitation under Rule 801(d)(2)(A) of the Federal Rules of Evidence. Generally, no instruction is necessary if the defendant's prior statement is admitted without limitation. However, if any statement of the defendant is also admitted only to impeach, this instruction should be given to differentiate between the statement admissible generally and that admitted for a limited purpose. If a statement is obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and the defendant successfully moves to suppress it, the statement is not admissible substantively, but may be admitted to impeach the defendant if the defendant elects to testify. *See Harris v. New York*, 401 U.S. 222 (1971). This instruction should

then be used during the concluding instructions to distinguish between the statements that play a limited role and those admissible substantively. In addition, Instruction 2.26 (Impeachment of Defendant - Prior Inconsistent Statement Taken in Violation of Miranda) Alternative 1 and/or 2 should be given to define the limited role of the statement taken in violation of *Miranda*.

## 4.39 Defendant's Character Evidence

**You have heard** *(reputation)(opinion)(reputation and opinion)* **evidence about whether the defendant has a character trait for** *(name trait, such as truthfulness, peacefulness, honesty, being a law-abiding citizen, etc.)***.**

**You should consider this character evidence together with and in the same way as all the other evidence in the case in deciding whether the government has proved the charge***(s)* **beyond a reasonable doubt.**

### Comment

*See* Sixth Circuit § 7.09, Seventh Circuit § 3.06, and Ninth Circuit § 4.4. For variations, *see* O'Malley et al., supra, § 15.15; Sand et al., supra, 5-14 and 5-15; Fifth Circuit § 1.09; Eighth Circuit § 4.03; and Eleventh Circuit § 12.

This instruction should be included in the final charge to the jury when the defendant has introduced evidence of good character under Rule 404(a)(1) of the Federal Rules of Evidence. *See United States v. Spangler*, 838 F.2d 85, 87 (3d Cir.), *cert. denied*, 487 U.S. 1224 (1988). Under Rule 404, the government is precluded from introducing evidence of the defendant's bad character unless the defendant first introduces evidence of good character. Rule 404(a)(1) allows a defendant to introduce evidence of a pertinent character trait to establish action in conformity therewith. Rule 405 allows character witnesses to testify either to the defendant's reputation or to their own opinions as to defendant's character. The defendant's character evidence "constitutes substantive evidence which, under certain circumstances, can raise a reasonable doubt as to his guilt, even though it does not relate to the specific criminal act of which he is accused." *United States v. Logan*, 717 F.2d 84, 88 (3d Cir. 1983). Under Rule 405, character witnesses are not permitted to testify to good acts. *See* Instruction 2.17 (Impeachment of Defendant's Character Witness).

There is disagreement concerning whether the jury should be instructed that proof of defendant's good character, standing alone, may be sufficient to create a reasonable doubt. In *Edgington v. United States*, 164 U.S. 361, 364 (1896), the Court held that the trial court committed error by instructing the jury that evidence of good character played a role only when the "commission of the crime was doubtful" and further noted that evidence of good character could raise a reasonable doubt. *Id.* at 366; *see also Michelson*

*v. United States*, 335 U.S. 469, 476 (1948). However, the Court has never held that the jury must be instructed that character evidence may raise a reasonable doubt, although *Michelson* includes dictum to that effect. 355 U.S. at 476. The views of the various circuits range from the position that the defendant is entitled to the instruction to the view that the instruction is improper. *See Spangler v. United States*, 487 U.S. 1224 (1988) (White, J., dissenting from denial of certiorari) (summarizing division of authority). In *United States v. Spangler*, 838 F.2d 85 (3d Cir.), *cert. denied*, 487 U.S. 1224 (1988), the Third Circuit held that the trial court may decline to give the "standing alone" instruction provided the court gives an instruction that "calls the jury's attention to its duty to take character evidence into account with all of the other evidence in deciding whether the government has proved its charge beyond a reasonable doubt." *Id.* at 87.

Most recently, the Third Circuit addressed the character evidence instruction in a non-precedential opinion, *United States v. Long Fei Lin*, 104 F. App'x. 241(3d Cir. 2004). The court stated that *Spangler* is dispositive on the question of the "standing alone" instruction and held that the following instruction, which "largely mirrored" the instruction approved in *Spangler*, was not clearly erroneous:

> You have heard testimony that a defendant has a good reputation in his community for being honest and law-abiding. You may consider such evidence, along with all other evidence in the case, in reaching your verdict. Evaluate such character evidence, along with all of the other evidence in this case, in deciding whether the government has proved the crime charged beyond a reasonable doubt."

*See also United States v. Morrow*, 351 F.App'x. 649, 651 (3d Cir. 2009) (non-precedential) (holding defendant not entitled to instruction that character evidence alone was sufficient to create reasonable doubt).

(revised 11/10)

**4.40 Impeachment of Defendant's Character Witness**

**<u>If character witness testified to reputation:</u> You heard** *(name of witness)* **testify about the defendant's reputation for** *(insert character trait covered by testimony)*. **On cross-examination of** *(name of witness)*, **the prosecutor asked** *(him)(her)* **some questions about whether** *(he)(she)* **had heard that** *(briefly describe the subject of the cross-examination on the character trait, e.g., defendant was convicted of fraud on an earlier occasion)*. **The prosecutor was allowed to ask these questions only to test whether** *(name of witness)* **was familiar with the reputation of the defendant in the community. This is not evidence that the acts described in these questions actually occurred.**

**You may not use the information developed by the prosecutor on this subject for any other purpose. Specifically, you may not use this information to conclude that the defendant committed the act***(s)* **charged in the indictment or as proof that the defendant has a bad character or any propensity to commit crimes.**

**<u>If character witness testified to opinion:</u> You heard** *(name of witness)* **testify about the defendant's character for** *(insert character trait covered by testimony)*. **On cross-examination of** *(name of witness)*, **the prosecutor asked** *(him)(her)* **some questions about whether** *(he)(she)* **knew that** *(briefly describe*

*the subject of the cross-examination on the character trait, e.g., defendant was convicted of fraud on an earlier occasion)*. **The prosecutor was allowed to ask these questions only to test whether** *(name of witness)* **had a good basis for** *(his)(her)* **opinion of the defendant's character. This is not evidence that the acts described in these questions actually occurred.**

**You may not use the information developed by the prosecutor on this subject for any other purpose. Specifically, you may not use this information to conclude that the defendant committed the act***(s)* **charged in the indictment or as proof that the defendant has a bad character or any propensity to commit crimes.**

**Comment**

*See* O'Malley et al., supra, § 11.15, Sand et al., supra, 5-16, and Eighth Circuit § 2.10.

This instruction should be included in the concluding instructions if the prosecutor was permitted to cross-examine the defendant's character witness concerning prior instances of the defendant's conduct. Instruction 2.17 (Impeachment of Defendant's Character Witness) should be given to the jury at the time of the cross-examination.

Under Rule 404(a) of the Federal Rules of Evidence, a defendant is permitted to introduce evidence of good character to support the inference that the defendant did not commit the offense charged. Instruction 4.39 (Defendant's Character Evidence) describes the role of that evidence. Rule 405(a) permits the prosecutor to cross-examine the defendant's character witness concerning specific instances of the defendant's conduct relating to the character trait at issue. The rules thus continue the common law practice discussed in *Michelson v. United States*, 335 U.S. 469 (1948), but with one difference: opinion evidence, which was prohibited at common law, is allowed under the rules. Under the Federal Rules of Evidence, the character witness may testify to either reputation or opinion.

A reputation witness testifies to the defendant's reputation for a specific trait in a specific community, based on conversations with others concerning the defendant. *See Michelson v. United States*, 335 U.S. 469 (1948). Cross-examination of a reputation witness should focus on what the witness has heard and may inquire "about conduct, and even about charges, which may have come to the attention of the relevant community." *See United States v. Curtis*, 644 F.2d 263, 268 (3d Cir. 1981).

An opinion witness testifies to the witness' own opinion of the defendant's character for a specific trait based on that witness' experience with the defendant. Cross-examination of an opinion witness should focus on what the witness knows and will test the accuracy of and basis for the favorable opinion. In *United States v. Curtis*, 644 F.2d 263, 268 (3d Cir. 1981), the Third Circuit noted that, when the character witness testifies to an opinion, "relevant cross examination is only that which bears on the fact or factual basis for formation of the opinion."

The cross-examination permitted by Rule 405(a) often focuses on prior bad conduct by the defendant and therefore injects a risk of unfair prejudice. The Supreme Court noted in *Michelson*:

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.

*Id.* at 479. The trial court has broad discretion concerning the cross-examination of character witnesses. *United States v. Boone*, 279 F.3d 163, 175 (3d Cir. 2002). Correspondingly, the trial judge plays an important role in assuring the fairness of the cross-examination. In *Michelson*, the Court remarked that the discretion to allow relevant cross-examination "is accompanied by heavy responsibility on trial courts to protect the practice from any misuse." *Id.* at 480. The Court outlined the safeguards to be taken by the trial court. *Id.* at 221-22. The trial court must ensure that the question is fair, that it rests on a factual foundation, and that it is relevant to the character trait addressed by the defendant's witness. *Id.* at 221-22. Of course, no evidence may be admitted for the jury establishing that the act occurred.

The Court in *Michelson* also emphasized the importance of limiting instructions directing the jury to consider any prior acts brought out in cross-examination only for purposes of assessing the witness' opinion of the defendant's character trait. *Id.* at 472 n.3. In *Government of Virgin Islands v. Roldan,* 612 F.2d 775, 781 (3d Cir. 1979), the Third Circuit stated, "the defendant is entitled to a limiting instruction to the effect that the prior bad act testimony does not bear on the defendant's propensity to commit such crimes again." *See also United States v. Apfelbaum*, 621 F.2d 62, 64 (3d Cir. 1980) (emphasizing importance of limiting instructions). In *Government of Virgin Islands v. Roldan*, however, the defendant had not requested a limiting instruction, and the Third

Circuit held that the trial court did not commit plain error by failing to give an instruction. 612 F.2d at 781.

If the prosecutor is permitted to cross-examine the defendant's character witness, the court should make a ruling as to what the prosecutor may ask a character witness on cross-examination. The court should consider making a preliminary ruling on the content of the cross examination of defense character witnesses to ensure that questions of such witnesses are based on accurate information and are not substantially more prejudicial than probative. *See United States v. Curtis,* 644 F.2d 263, 268 n.2 (3d Cir. 1981).

## Chapter 5: Mental States

General Introduction to Mental State Instructions

**General Introduction to Mental State Instructions**

Federal crimes commonly include the mental states intentionally, knowingly, or willfully, and less commonly recklessly or negligently. Some federal crimes are also strict or absolute liability offenses, without any mental state requirement. These state of mind elements ("mens rea") have been defined in various ways by Congress and the federal courts. Because of the variety of definitions, other Circuits do not provide model instructions on some or all mental states.

This section includes instructions based on the most frequently used definitions of the mental state elements in federal criminal provisions. It also includes instructions on related mental state principles. The purpose is to provide instructions that can be used when the statute defining the crime charged does not state and has not been interpreted as having a different definition of the mental state requirement. When a different meaning has been established by statute or case law, we have included that definition in the instructions for the specific federal crime. *See* Chapter 6 (Elements of Offenses).

**As to Which Elements Does the Mental State Requirement Apply.** Defining the mental state or culpability requirement does not end the court's inquiry. The court must also determine to which of the elements the mental state requirement applies. The mental state requirement may apply to all or only some of the elements of the offense charged. *See United States v. Bailey*, 444 U.S. 394, 405 (1980) (Supreme Court observed, "Generally, even time-honored common-law crimes consist of several elements, and complex statutorily defined crimes exhibit this characteristic to an even greater degree. Is the same state of mind required of the actor for each element of the crime, or may some elements require one state of mind and some another?"). In deciding this question, of course, the court must ascertain and effectuate the intent of Congress. *Id.* at 632-33.

An example of this further inquiry is *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). There, where defendant said he did not know the girl in the video he sold was under 18, the Supreme Court held that the language "knowingly … distributes, any visual depiction," at the beginning of 18 U.S.C. § 2252 (of the Protection of Children Against Sexual Exploitation Act of 1977), applied to the element "use of a minor" which was stated in a subsequent subsection that began "if … (A) the … visual depiction involve[s] the use of a minor." Under the Court's interpretation, the government was required to prove not only that the defendant knew he was distributing a sexually explicit visual depiction, but also that he knew that it depicted a minor. The Court recognized that this was not the "most grammatically correct reading" of the statute. However, the Court reasoned that "*Morissette*, reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." 513 U.S. at 72, citing *Morissette v. United States*, 342 U.S. 246 (1952), and *Staples v. United States*, 511 U.S. 600 (1994). The Court also relied on two canons of construction – criminal statutes should be strictly interpreted (the so-called "rule of lenity") and statutes should be interpreted to avoid raising a significant constitutional question.

In the criminal statute in *X-Citement Video*, "use of a minor" was the crucial element that allowed criminal prohibition of transporting and distributing pornographic but not obscene depictions without violating the First Amendment. 513 U.S. at 78, citing *New York v. Ferber,* 458 U.S. 747 (1982)*; Smith v. California*, 361 U.S. 147 (1959).

For other examples of Supreme Court cases discussing the application of the mental state requirement to other elements, *see, e.g., Arthur Anderson v. United States*, 544 U.S. 696, 703 (2005) (Supreme Court has "'traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, ..., and out of concern that "a fair warning should be given to the world in language the common world will understand, of what the law intends to do if a certain line is passed" ' " (citations omitted); the Court also stated, when a criminal statute "provides the mens rea – 'knowingly' – and then a list of acts ... the mens rea at least applies to the acts that immediately follow, if not to the *other* elements further down the statutory chain."); *Staples v. United States*, 511 U.S. 600 (1994) (holding that section 5861(d) of the National Firearms Act, making it "unlawful … to receive or possess a firearm that is not registered to him," required proof that the defendant knew the characteristics of the weapon that made it a "firearm" under the statute, even though the act did not expressly provide a mental state requirement); *Morissette v. United States*, 342 U.S. 246 (1952) (holding that "knowingly converts … any thing of value of the United States" requires proof that the defendant was aware not only that he converted property, but also that the property he converted belonged to the United States and had not been abandoned). *But see, e.g., United States v. Freed,* 401 U.S. 601 (1971) (possessing "a firearm that is not registered to him" under § 5861(d) of the National Firearms Act does not require proof that defendant knew the grenades he possessed were unregistered, as long as he knew they were grenades and thus "firearms" under the statute); *United States v. Yermian*, 468 U.S. 63, 68-70 (1984) ("knowingly and willfully" making false statements involving federal agency matters, under 18 U.S.C. § 1001, requires proof that defendant knew his statements were false but not that he knew of federal agency jurisdiction); *United States v. Feola*, 420 U.S. 671, 684 (1975) (assaulting a federal officer under 18 U.S.C. § 111 does not require proof that the defendant knew the person he assaulted was a federal officer).

Congress has not adopted the Model Penal Code, but the Supreme Court has alluded to the benefits of the Code's treatment of mental state requirements, *see, e.g., United States v. Bailey*, 444 U.S. 394 (1980), and has often applied principles similar to the Code in interpreting federal statutes. *See, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 440 (1978) ("The ALI Model Penal Code is one source of guidance upon which the Court has relied to illuminate questions of this type."). The Model Penal Code explicitly defines four mental states (called "culpability") to be used in criminal codes (purposely, knowingly, recklessly, and negligently). Model Penal Code § 2.02. The Code's purpose is to "attempt[] the extremely difficult task of articulating the kinds of culpability that may be required .... The purpose of articulating these distinctions in detail is to advance the clarity of draftsmanship, ..., and to dispel the obscurity with which the culpability requirement is often treated when such concepts as 'general criminal intent,' 'mens rea,' 'presumed intent,' 'malice,' 'wilfulness,' 'scienter' and the like have been employed." Comment to Model Penal Code § 2.02. The Model Penal Code also

includes interpretative provisions to help resolve the question whether the expressed mental state requirement applies to all or only some of the elements. *See* Model Penal Code § § 2.02(1), 2.02(3), 2.02(4).

**5.01 Proof Of Required State of Mind – Intentionally, Knowingly, Willfully**

**Often the state of mind** *[intent, knowledge, willfulness, or recklessness]* **with which a person acts at any given time cannot be proved directly, because one cannot read another person's mind and tell what he or she is thinking. However,** *(name's)* **state of mind can be proved indirectly from the surrounding circumstances. Thus, to determine** *(name's)* **state of mind** *(what (name) intended or knew)* **at a particular time, you may consider evidence about what** *(name)* **said, what** *(name)* **did and failed to do, how** *(name)* **acted, and all the other facts and circumstances shown by the evidence that may prove what was in** *(name's)* **mind at that time. It is entirely up to you to decide what the evidence presented during this trial proves, or fails to prove, about** *(name's)* **state of mind.**

**You may also consider the natural and probable results or consequences of any acts** *(name)* **knowingly did, and whether it is reasonable to conclude that** *(name)* **intended those results or consequences. You may find, but you are not required to find, that** *(name)* **knew and intended the natural and probable consequences or results of acts** *(he) (she)* **knowingly did. This means that if you find that an ordinary person in** *(name's)* **situation would have naturally realized that certain consequences would result from** *(his) (her)* **actions, then you may find, but you are not required to find, that** *(name)* **did know and did intend that those consequences would result from** *(his) (her)* **actions. This is entirely up to you to decide as the finders of the facts in this case.**

**Comment**

*See* Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A *Federal Jury Practice and Instructions* (5th ed. 2006) [hereinafter O'Malley et al] O'Malley § 17.07, 17.08. For variations in other Circuits, *see* Sixth Circuit § 2.08.

The bracketed language *[intent, knowledge, willfulness, recklessness]* suggests that the trial judge should use the actual mental state element provided in the statute proscribing the offense charged.

**Permissive Inferences Not Presumptions.** When instructing on proof of state of mind elements, the court must be careful not to suggest to the jury that there is a presumption, either mandatory or rebuttable, that the evidence presented, whatever it might be, proves the required state of mind; *i.e.*, that the jury must find that the defendant had the required state of mind or must find that state of mind unless the defendant presents evidence to the contrary. The jury may be told that it may find or is permitted to find (or to draw an inference) that the defendant had the required state of mind from certain evidence presented at trial, but it must be clear that this is permissive and that the jury is not required to make that finding or draw that inference. See, e.g., *Sandstrom v. Montana*, 42 U.S. 510 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978).

**5.02 Knowingly**

**The offense***(s)* **of** *(state offense or offenses that include knowingly or with knowledge)* **charged in the indictment requires that the government prove that** *(name of defendant)* **acted "knowingly"** *["with knowledge"]* **with respect to an** *(the) (certain)* **element***(s)* **of the offense***(s)***. This means that the government must prove beyond a reasonable doubt that** *(name)* **was conscious and aware of the nature of** *(his) (her)* **actions and of the surrounding facts and circumstances, as specified in the definition of the offense***(s)* **charged.**

**In deciding whether** *(name)* **acted "knowingly"** *["with knowledge"]***, you may consider evidence about what** *(name)* **said, what** *(name)* **did and failed to do, how** *(name)* **acted, and all the other facts and circumstances shown by the evidence that may prove what was in** *(name)***'s mind at that time.**

*[The government is not required to prove that (name) knew (his) (her) acts were against the law.]*

**Comment**

*See* 1A O'Malley et al, supra, § 17.04. For variations in other Circuits, *see* Seventh Circuit § 4.06; Ninth Circuit § 5.6; Eleventh Circuit § 9.1.

In some cases the judge may want to be specific about the conduct, facts, or circumstances knowledge of which is required for the offense charged. In such a case, the judge should include the following after the first paragraph: *"Specifically, this means that in this case the government must prove beyond a reasonable doubt that (name) was conscious and aware of (state the nature of conduct or facts and circumstances knowledge of which is required for the offense charged)."*

The optional language at the end of the instruction explains that this most commonly used

definition of knowingly does not require that the defendant know his or her conduct is against the law. In most cases this is not an issue and therefore this optional instruction is not required, but it may be given when this is an issue. In this regard, the most commonly used definition of knowingly differs from the most commonly used definition of "willfully." *See, e.g., United States v. Dixon*, 548 U.S. 1, 126 S.Ct. 2437, 2441 (2006) ("As we have explained, 'unless the text of the statute dictates a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.' *Bryan v. United States,* 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) (footnote omitted). And the term 'willfully' in §924(a)(1)(D) requires a defendant to have 'acted with knowledge that his conduct was unlawful.' *Ibid*."); *United States v. Starnes*, 583 F.3d 196, 210 (3d Cir. 2009) (same). *See* Instruction 5.05.

Model instructions in some other Circuits include the statement that knowingly means that the defendant "did not act because of ignorance, mistake, or accident." Although this language may be inappropriate in some cases, and is not therefore included in the instruction above, it may be important to include this language in appropriate cases.

**Most Frequently Used Definition of Knowingly.** This instruction provides the most frequently given definition of "knowingly," when it is used alone in a federal criminal statute. *See, e.g., United States v. Dixon*, 548 U.S. 1, 5 (2006) ("As we have explained, 'unless the text of the statute dictates a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.' *Bryan v. United States,* 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998)."); *Arthur Anderson v. United States*, 544 U.S. 696, 705 (2005) (Knowingly is "normally associated with awareness, understanding, or consciousness," citing dictionaries); *United States v. Weiler*, 458 F.2d 474 (3d Cir. 1972). In *United States v. Cheeseman*, 600 F.3d 270, 281 (3d Cir. 2010), the Third Circuit rejected defendant's argument that he did not knowingly violate 18 U.S.C. § 922(g)(3), as required for the forfeiture of firearms under 18 U.S.C. § 924(d)(1). The court stated:

> This argument is unpersuasive because it discounts firmly established case law construing the term "knowing" to require "only that the act be voluntary and intentional and not [to require] that a person knows he is breaking the law." *United States v. Sokolow,* 91 F.3d 396, 408 (3d Cir.1996) (internal quotation marks & citation omitted). . . . In essence, [defendant] invites the Court to read into § 924(d)(1) a willfulness requirement, which, if applied, would require him to have had actual knowledge that his prohibited conduct was illegal in order for the firearms to be forfeitable. . . . Here, Congress used the term "knowing" and not "willful" clearly indicating its preference for the lower scienter.

This instruction should be used with offenses that do not have a different definition of "knowingly." The bracketed alternative language *["with knowledge"]* should be used when the statute proscribing the offense charged employs that language.

**Different Meaning of Knowingly for Some Offenses.** As to some federal offenses, "knowingly" has a meaning different from the meaning given in this instruction, because the statute proscribing the offense explicitly provides a different definition or because federal courts

have interpreted knowingly in the statute as having a different meaning. For those offenses, the proper instructions as to the meaning of knowingly are included in the instructions for the specific offenses. See Chapter 6 of these instructions.

The statutes proscribing some federal offenses provides a specific definition of knowingly that is different from the general definition given in this instruction. *See, e.g.*, the False Claims Act, 31 U.S.C. § 3729 (defines "knowingly" as actual knowledge of the information, or deliberate ignorance of the truth or falsity of the information, or reckless disregard of the information).

For other offenses, the Supreme Court and the Third Circuit have interpreted "knowingly" as having a different meaning than that given in this instruction. For example, in *Liporata v. United States*, 471 U.S. 419 (1985), the Supreme Court interpreted "knowingly uses, transfers, acquires, alters, or possesses [food stamps] in any manner not authorized by [the statute] or the regulation," in the federal statute prohibiting food stamp fraud, to mean not only that the defendant must be aware that he/she did the prohibited actions, but also that the defendant was aware of the existence and meaning of the regulation that those actions violated. (This is similar to the most frequently used definition of "willfully." See Instruction 5.05.) The Court was concerned that unless knowingly required proof of awareness of the regulation, the statute would criminalize "a broad range of apparently innocent conduct." In contrast, in *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971), the Court held that 18 U.S.C. § 834(f), which makes it a crime to "knowingly violat[e]" a regulation of the ICC regarding transportation of corrosive liquids (promulgated under 18 U.S.C. § 834(a)), only requires proof that the defendant knew it had committed the acts that violated the regulation. The government did not have to prove that defendant knew the existence and meaning of the regulation. The Court reasoned, in part, that a company that is engaged in a business involving significant risks to the public likely would and certainly should know of the federal regulations that apply to that business. Also *see United States v. Barbosa*, 271 F.3d 438, 457-58 (3d Cir. 2001) ("To act 'knowingly' is to act with 'knowledge of the facts that constitute the offense' but not necessarily with knowledge that the facts amount to illegal conduct, unless the statute indicates otherwise. *Bryan v. United States*, 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998).").

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given. If the defendant asserts "good faith" as a defense, see Instruction 5.07 (Good Faith).

(Revised 11/10)

## 5.03 Intentionally

**The offense***(s)* **of** *(state offense or offenses that include intentionally or with intent)* **charged in the indictment requires that the government prove that** *(name of defendant)* **acted "intentionally"** *["with intent"]* **with respect to an** *(certain)* **element***(s)* **of the offense***(s)***. This means that the government must prove beyond a reasonable doubt either that (1) it was** *(name's)* **conscious desire or purpose to act in a certain way or to cause a certain result, or that (2)** *(name)* **knew that** *(he) (she)* **was acting in that way or would be practically certain to cause that result.**

**In deciding whether** *(name)* **acted "intentionally"** *["with intent"]***, you may consider evidence about what** *(name)* **said, what** *(name)* **did and failed to do, how** *(name)* **acted, and all the other facts and circumstances shown by the evidence that may prove what was in** *(name)***'s mind at that time.**

**Comment**

O'Malley et al, supra, and the other Circuits do not provide instructions on intent or intentionally. *See* 1A O'Malley et al, supra, § 17.04; Sixth Circuit § 2.07; Seventh Circuit § 4.08; Eighth Circuit § 7.01; Ninth Circuit § 5.4.

**Most Frequently Used Definition of Intentionally.** This instruction provides the most frequently used definition of "intentionally" in federal criminal statutes. It should be used for all offenses that do not have a different definition of "intentionally." The bracketed alternative language *[with intent]* should be used when that is the language of the statute proscribing the offense charged. Where, as to particular federal offenses, intentionally or with intent have a meaning different from the meaning explained in this instruction, the proper instructions as to the meaning of these terms are included in the instructions for the specific offenses. *See* Chapter 6 (Elements of Offenses).

**Different Meaning for Some Offenses; General and Specific Intent.** In *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978), the Supreme Court recognized that the

"[t]he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose [meaning, conscious object or desire] or the more general one of knowledge or awareness." The Court also noted that the Model Penal Code breaks this traditional concept of intent into two separate mental states of "purposely," meaning conscious object, and "knowingly," meaning awareness. 438 U.S. at 444, citing Model Penal Code § 2.02(2). The Court observed, however, that "[g]enerally this limited distinction between knowledge and purpose has not been considered important since 'there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.'" 438 U.S. at 445, quoting W. LaFave & A. Scott, Criminal Law 197 (1972). Whether "intent" in a federal criminal statute is given this traditional meaning or a more precise meaning akin to the Model Penal Code's purposely depends, of course, on the language of the statute and the intent of Congress. In the *United States Gypsum* case, involving the mental state requirement for criminal violations of the Sherman Act, the Court concluded that nothing in the Act, its history, or otherwise suggested that the traditional understanding of intent should not be used. 438 U.S. at 445-46.

The common law distinguished between "specific" and "general" intent, and classified crimes as specific or general intent crimes. *See, e.g., United States v. Bailey*, 444 U.S. 394, 403 (1980). In *Bailey*, the Court discussed these concepts and their prevalence in modern federal crimes. 444 U.S. at 402-09 (holding that the crime of escape under 18 U.S.C. § 751(a) only requires general not specific intent; therefore, the government only had to prove the defendant knew his or her actions would result in leaving physical confinement without permission). Also *see, e.g., United States v. Starnes*, 583 F.3d 196, 209 (3d Cir. 2009) ("'Specific intent' is usually distinguished from 'general intent.' *United States v. Bailey*. . . . As most commonly understood, a general-intent crime is one that requires 'proof of knowledge with respect to the *actus reus* of the crime,' *Carter v. United States,* 530 U.S. 255, 269 . . . (2000), while a specific-intent crime, in contrast, is 'one whose definition requires a special *mens rea* above and beyond that which is required for the *actus reus* of the crime,'. . . . Both concepts are somewhat elusive, with 'specific intent' being particularly susceptible to a wide variety of meanings.")

Observing that "[f]ew areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime," 444 U.S. at 403, the Court in *United States v. Bailey* recognized that the Model Penal Code's more precise articulation of state of mind (culpability) elements exemplified the modern movement away from this traditional, common law approach. 444 U.S. at 403-04. Citing *United States v. United States Gypsum Co.*, the *Bailey* Court observed that in federal statutes "intent" generally encompasses both "specific intent" (which corresponds loosely to "purposely" under the Model Penal Code) and "general intent" (loosely comparable to "knowingly" under the Code), but did acknowledge that for a narrow class of crimes (e.g., murder, conspiracy, attempt) the heightened culpability purposely (conscious object) and not knowingly was required. *Id.* at 405.

Continued use of the terms specific intent and general intent in modern federal criminal law is more likely to confuse than enlighten. *See, e.g., United States v. Starnes*, 583 F.3d at 209 ("While the 'traditional dichotomy of general versus specific intent' is a venerable one, in many situations it can be more perplexing than helpful. *Dixon v. United States,* 548 U.S. 1, 7 . . .

(2006) (citing *Bailey,* 444 U.S. at 403-04) . . .; *United States v. Hernandez-Hernandez,* 519 F.3d 1236, 1239 (10th Cir.2008) (decrying 'opaque common law labels [like "general" and "specific" intent] that sometimes blur the line between distinct mental elements').")

With respect to those offenses for which intentionally has a meaning different from that expressed in this instruction (*i.e.,* a meaning limited to what the common law called specific intent and the Model Penal Code calls purposely), see the instructions for those specific offenses.

**Conditional Intent.** The Supreme Court has also recognized that the intent or specific intent required to commit a crime may be conditional. *See, e.g., Holloway v. United States*, 526 U.S. 1, (1999) (Carjacking "with intent to cause death or serious bodily injury" requires "specific intent or purpose to kill or harm, but does not require an unconditional intent to kill or harm, and can be established by proof that the defendant used a deliberate threat of violence that he would use if the victim did not comply by relinquishing her vehicle), citing inter alia, Model Penal Code § 2.02(6) ("When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.").

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given. If the defendant asserts "good faith" as a defense, see Instruction 5.07 (Good Faith).

(revised 12/09)

## 5.04 Motive Explained

**Motive is not an element of the offense with which *(name)* is charged. Proof of bad motive is not required to convict. Further, proof of bad motive alone does not establish that *(name)* is guilty and proof of good motive alone does not establish that *(name)* is not guilty. Evidence of *(name's)* motive may, however, help you find *(name's)* intent.**

**Intent and motive are different concepts. Motive is what prompts a person to act. Intent refers only to the state of mind with which the particular act is done.**

**Personal advancement and financial gain, for example, are motives for much of human conduct. However, these motives may prompt one person to intentionally do something perfectly acceptable while prompting another person to intentionally do an act that is a crime.**

### Comment

*See* 1A O'Malley et al, supra, § 17.06.

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given.

## 5.05 Willfully

**The offense***(s)* **of** *(state offense or offenses that include willfully)* **charged in the indictment require***(s)* **the government to prove that** *(name)* **acted "willfully" with respect to an** *(certain)* **element***(s)* **of the offense***(s)***. This means the government must prove beyond a reasonable doubt that** *(name)* **knew** *(his) (her)* **conduct was unlawful and intended to do something that the law forbids. That is, to find that** *(name)* **acted "willfully," you must find that the evidence proved beyond a reasonable doubt that** *(name)* **acted with a purpose to disobey or disregard the law. "Willfully" does not, however, require proof that** *(name)* **had any evil motive or bad purpose other than the purpose to disobey or disregard the law.**

*["Willfully" (does) (does not) require proof that the actor knew of the existence and meaning of the statute making his conduct criminal.]*

### Comment

*See* 1A O'Malley et al, supra, § 17.05. For variations in other Circuits, *see* Fifth Circuit § 1.38; Eleventh Circuit § 9.1. Some Circuits do not recommend a general instruction defining the term "willfully." *See* Sixth Circuit § 2.05; Seventh Circuit § 4.09; Eighth Circuit § 7.02; Ninth Circuit § 5.5.

An instruction defining "willfully" should be given only when, by statute or court decision, willfully is made a mental state element of the offense charged. An instruction on willfully should not be given just because willfully is alleged in the indictment, unless it is a legal element of the offense charged. *See* Seventh Circuit § 4.09.

**Most Frequently Used Definition of Willfully.** Although "willfully" has been defined in various ways and is a word of notoriously elusive meaning, the definition given here is the one now used most frequently by the Supreme Court and the Third Circuit. The important difference between willfully as defined in this instruction and the most frequently used definition of knowingly, as stated in Instruction 5.02, is that willfully requires proof beyond a reasonable

doubt that the defendant knew his or her conduct was unlawful and intended to do something that the law forbids; that the defendant acted with a purpose to disobey or disregard the law. *See, e.g., United States v. Dixon*, 548 U.S. 1, 126 S.Ct. 2437, 2441 (2006) ("As we have explained, 'unless the text of the statute dictates a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.' *Bryan v. United States,* 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) (footnote omitted). And the term 'willfully' in § 924(a)(1)(D) requires a defendant to have 'acted with knowledge that his conduct was unlawful.' *Ibid*."); *United States v. Cheeseman*, 600 F.3d 270, 281 (3d Cir. 2010) (knowing requires "only that the act be voluntary and intentional and not that a person knows he is breaking the law," while "a willfulness requirement . . . would require him to have had actual knowledge that his prohibited conduct was illegal.") Sometimes "willfully," as defined here, is referred to by courts as "specific intent." *See, e.g., United States v. Stadtmauer*, – F.3d – , 2010 WL 3504321 (3d Cir. 2010) ("'Willfulness' thus requires more than a general intent to accomplish an act; it requires proof that the act was done with the specific intent to do something that the law forbids." (citations omitted)).

In *Bryan v. United States*, 524 U.S. 184 (1998), the Supreme Court held that in the Firearms Owners' Protection Act, "willfully" dealing in firearms without a federal license required proof that the defendant acted with the knowledge that his conduct was unlawful. The Court reasoned that there was no danger of convicting the innocent where there was enough evidence that the defendant knew dealing in firearms was unlawful to show that defendant acted "with an evil-meaning mind." That was all willfully required in this statute. Similarly, in *Ratzlaf v. United States*, 510 U.S. 135 (1994), the Court held that "willfully," in 31 U.S.C. § 5324 (part of the Money Laundering Control Act of 1986), required proof not only that the defendant knew of the bank's reporting requirements for certain financial transactions, but also that he knew the structuring of transactions he undertook to evade those requirements constituted a criminal offense, because otherwise there was a risk of punishing innocent conduct.

This definition of willfully has often been given for criminal violations of federal tax laws, because of their complexity, but the Supreme Court no longer seems to limit this definition to that context. In *Cheek v. United States*, 498 U.S. 192 (1991), the Court reaffirmed its traditional interpretation that "willfully" in federal tax statutes means "voluntary, intentional violation of a known legal duty," and therefore required proof that defendant had actual knowledge that the law imposed a legal duty on him and that he voluntarily and intentionally violated that duty. Accordingly, the Court said that the defendant could not be found guilty if the jury found that he honestly believed the tax laws did not make his conduct criminal, even if that belief was unreasonable. The Court reasoned that, because of the complexity of federal tax laws, citizens may honestly not realize their conduct is criminal and thus may innocently believe they are not violating the law. This specific definition of willfully is included in the specific instructions for tax evasion, in Chapter 6 of these Model Instructions. *See* Instruction No. 6.26.7201-4 (Tax Evasion – Willfully Defined).

The Third Circuit case law tracks that of the Supreme Court. In *United States v. Starnes*, 583 F.3d 196, 210-11 (3d Cir. 2009), the Third Circuit explained:

> "Willfully". . . is a "notoriously slippery term," a "chameleon word" that "takes color from the text in which it appears." *United States v. Ladish Malting Co.,* 135 F.3d 484, 487-88 (7th Cir.1998); *see Bryan,* 524 U.S. at 191 & n. 12; . . . . The cases delineate at least three levels of interpretation of the term. *See, e.g., Bryan,* 524 U.S. at 191-95; *United States v. Kay,* 513 F.3d 432, 447-48 (5th Cir.2007). In some contexts, "willfully" may denote " 'an act which is intentional, or knowing, or voluntary, as distinguished from accidental.' " *Bryan,* 524 U.S. at 191 n. 12 (quoting *United States v. Murdock,* 290 U.S. 389, 394, 54 S.Ct. 223, 78 L.Ed. 381 (1933)). But when "willfully" is used in a criminal statute, and particularly where the term is used in conjunction with "knowingly,". . . it usually requires the government to prove that the defendant acted "not merely 'voluntarily,' but with a 'bad purpose,' " that is, with knowledge that his conduct was, in some general sense, "unlawful." *Id.* at 192-93 & n. 13 (quoting *Ratzlaf v. United States,* 510 U.S. 135, 137 . . . (1994) and *Felton v. United States,* 96 U.S. 699, 702 . . . (1877)); . . .; *see also* Third Circuit Model Criminal Jury Instructions § 5 .05 (providing that "willfully" requires the government to prove beyond a reasonable doubt that a defendant "knew that [his or her] conduct was unlawful and intended to do something that the law forbids"); . . . .. And in some rare instances involving highly technical statutes that present the danger of ensnaring individuals engaged in apparently innocent conduct, such as the federal criminal tax and antistructuring provisions, "willfully" has been read to require proof that the defendant actually knew of the specific law prohibiting the conduct. *See Bryan,* 524 U.S. at 194-95 (discussing, among other cases, *Ratzlaf,* 510 U.S. at 138, 149 (antistructuring statutes) and *Cheek v. United States,* 498 U.S. 192, 199-201, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (criminal tax statutes)); *Kay*, 513 F.3d at 448, 450 (explaining that under the "strictest level of interpretation of criminal willfulness"-that reserved for "complex" statutes-"a defendant must know the specific law he is violating in order to act willfully").

Also *see, e.g., United States v. Stadtmauer*, --- F.3d ----, 2010 WL 3504321 (3d Cir. 2010) (filing materially false or fraudulent federal tax returns); *United States v. DePaoli*, 41 Fed. Appx. (3d Cir. 2002) (federal income tax evasion); *United States v. Curran*, 20 F.3d 560, 567-69 (3d. Cir. 1994) (concluding that Supreme Court's definition of willfully in *Ratzlaf* should be applied generally, and specifically to "willfully causing" under 18 U.S.C. § 2(b)); *United States v. Gross*, 961 F.2d 1097 (3d Cir. 1992) (securities law violations); *United States v. Greenlee*, 517 F.2d 899 (3d Cir. 1975) (failure to file federal income tax return). With respect to the last sentence of the first paragraph of the instruction, *see, e.g., United States v. Pompanio*, 429 U.S. 10 (1976) (federal tax evasion).

**Ignorance or Mistake of Law.** As the Supreme Court noted in *Cheek*, this definition of "willfully," by requiring awareness of and a purpose to violate the law, allows for a "defense" of ignorance or mistake of law. Although traditionally ignorance of the law was not a defense, where the state of mind element requires awareness that the conduct is against the law, ignorance or mistake about whether the conduct violates the law would negate the state of mind element. If the jury finds that the defendant made a mistake about or was ignorant whether his or her conduct violated the law, then the jury must find that the government failed to meet its burden of proving willfully beyond a reasonable doubt. The mistake or ignorance need not be reasonable, as long

as it is honest or genuine. Of course, the jury can disbelieve the defendant's claim of mistake, find that it was not honestly or genuinely held, and therefore find that the defendant did act willfully. See *Cheek v. United States*, 498 U.S. 192 (1991); Model Penal Code § 2.02(9).

If there a significant issue in the case about whether the defendant made an honest mistake or had an honest misunderstanding about whether he or she was doing something illegal, the trial judge may want to instruct as follows (*see* Sand § 3A-3):

> In this case there is a question whether the defendant *(name)* honestly believed that *(his) (her)* conduct was lawful *[not unlawful]*. It is for you to decide whether *(name)* honestly thought or believed that *(his) (her)* conduct was lawful, meaning something that the law allows. *[did not know or misunderstood whether (his) (her) conduct was unlawful, something that the law forbids]*. To find the defendant guilty, you must find that *(he) (she)* acted willfully, and therefore you must find that the government proved beyond a reasonable doubt that *(name)* knew *(his) (her)* conduct was unlawful and had a purpose to disobey or disregard the law.

In this instruction, the positive statements ("honestly believed that *(his) (her)* conduct was lawful," etc.) should be given whenever possible, but the alternative double negative language may have to be used depending on the nature of the mistake or misunderstanding raised in the case.

**Good Faith Defense.** The defense of ignorance or mistake of law, discussed in the preceding paragraph, is encompassed within the "good faith" defense explained in Instruction 5.07 (Good Faith). Good faith, in the sense of the defendant's honest belief that his or her conduct was lawful, is a defense to any offense in which the mental state element requires proof that the defendant was aware that his or her conduct was unlawful (*e.g.,* willfully as defined in this instruction). However, the "good faith defense" seems to be used in the federal courts most often in the context of tax offenses and fraud type offenses, such as mail fraud, securities fraud, bankruptcy fraud, bank fraud and the like, as well as false statement offenses. *See* Daniel S. Jonas, *The Circuit Split Over Instructing the Jury Specifically on the Good Faith Defense: A Consequence of Superlegislation by Courts or the Standards of the Appellate Review*, 46 SYR. L.R. 61 (1995). For tax offenses, *see* Instruction 6.26.7201-4 (Tax Evasion – Willfully Defined).

**Knowledge of Specific Statute Making Conduct Criminal.** The bracketed, second paragraph of the instruction recognizes that in some situations the Supreme Court has interpreted federal criminal statutes either as requiring or as not requiring proof that the actor knew not only that what he or she did was generally against the law, but also that he or she knew of the existence and meaning of the statute making the unlawful conduct criminal. *See, e.g., United States v. Starnes*, 583 F.3d 196, 211 (3d Cir. 2009) ("[I]n some rare instances involving highly technical statutes that present the danger of ensnaring individuals engaged in apparently innocent conduct, such as the federal criminal tax and antistructuring provisions, "willfully" has been read to require proof that the defendant actually knew of the specific law prohibiting the conduct. *See Bryan,* 524 U.S. at 194-95 (discussing, among other cases, *Ratzlaf,* 510 U.S. at 138, 149

(antistructuring statutes) and *Cheek v. United States,* 498 U.S. 192, 199-201, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (criminal tax statutes)). *Compare Bryan v. United States*, 524 U.S. 184 (1998) ("willfully" in firearms act does not require proof that defendant knew the existence of the federal statute that made it criminal) *with Ratzlaf v. United States*, 510 U.S. 135 (1994) ("willfully" in Money Laundering Control Act of 1986 requires proof that defendant knew of the existence and meaning of the criminal statute he was charged with violating; Congress later amended the statute to disavow the Court's interpretation; see Money Laundering Suppression Act of 1994). The jury may well have difficulty with this distinction, therefore it is included in the model instruction as alternative language. If the jury does not need to consider this issue, the bracketed second paragraph need not be given. However, the trial court should instruct on this point if the issue is fairly raised at trial and is supported by the evidence.

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given.

(Revised 11/10)

**5.06 Willful Blindness** *[Deliberate Ignorance]*

**To find** *(name)* **guilty of** *(state the offense)***, you must find that the government proved beyond a reasonable doubt that** *(name)* **knew** *(state the fact or circumstance, knowledge of which is required for the offense charged)***. In this case, there is a question whether** *(name)* **knew** *(state the fact or circumstance, knowledge of which is required for the offense)***. When, as in this case, knowledge of a particular fact or circumstance is an essential part of the offense charged, the government may prove that** *(name)* **knew of that fact or circumstance if the evidence proves beyond a reasonable doubt that** *(name)* **deliberately closed** *(his) (her)* **eyes to what would otherwise have been obvious to** *(him) (her)***.**

**No one can avoid responsibility for a crime by deliberately ignoring what is obvious. Thus, you may find that** *(name)* **knew** *(state the fact or circumstance, knowledge of which is required for the offense charged)* **based on evidence which proves that: (1)** *(name)* **was aware of a high probability of this** *(fact) (circumstance)***, and (2)** *(name)* **consciously and deliberately tried to avoid learning about this** *(fact) (circumstance)***.**

**You may not find that** *(name)* **knew** *(state the fact or circumstance, knowledge of which is required for the offense charged)* **if you find that the defendant actually believed that this** *(fact) (circumstance)* **did not exist. Also, you may not find that** *(name)* **knew** *(state the fact or circumstance, knowledge of which is required for the offense charged)* **if you find only that** *(name)* **should have known of the** *(fact) (circumstance)* **or that a reasonable person would have known of a high probability of the** *(fact) (circumstance)***. It is not enough that** *(name)* **may have been stupid or foolish, or may have acted out of inadvertence or accident. You must find that** *(name)* **was actually aware of a high probability of** *(state the fact or*

*circumstance, knowledge of which is required for the offense charged)***, deliberately avoided learning about it, and did not actually believe that it did not exist.**

**Comment**

*See* 1A O'Malley et al, supra, § 17.09. For variations in other Circuits, *see* First Circuit § 2.14; Sixth Circuit § 2.09; Eighth Circuit § 7.04; Ninth Circuit § 5.7. The willful blindness instruction is sometimes referred to as the "ostrich instruction."

**When to Give Willful Blindness Instruction.** The mental state requirements knowingly, intentionally, and willfully each includes some aspect of awareness or knowledge of pertinent facts or circumstances. See Instructions 5.02, 5.03, and 5.05. "Willful blindness" may be used to prove the knowledge or awareness aspect of any of these mental states. "Willful blindness" could also be used to prove the awareness of substantial and unjustifiable risk aspect of recklessly. See Instruction 5.08. Thus, when supported by the evidence, this willful blindness instruction should be given together with the instruction on the appropriate mental state element, either the general mental state instruction included in this chapter or the more specific mental state instruction for the particular crime charged, included in Chapter 6. The Third Circuit has also held that, if supported by the evidence, it is not inconsistent for a court to give instructions on both actual knowledge and willful blindness, because if the jury does not find actual knowledge, it might still find willful blindness. *See, e.g., United States v. Wert-Ruiz*, 228 F.3d 250, 255 (3d Cir. 2000). Other circuits seem to disagree on this point. *See, e.g., United States v. Alston-Graves*, 435 F.3d 331, 342 n. 15 (D.C. Cir 2006).

As discussed in Instruction 5.05 and its Comment, "willfully" generally requires the government to prove that the defendant knew his or her conduct was unlawful and intended to do something that the law forbids. In *United States v. Stadtmauer,* --- F.3d ----, 2010 WL 3504321 (3d Cir. 2010) (affirming defendant's conviction of filing materially false or fraudulent federal tax returns), the Third Circuit held that with respect to willfully, a willful blindness instruction can apply both to the defendant's knowledge of facts and also to his knowledge of the law. The court also stated, however, that the willful blindness instruction cannot apply to the additional requirement of willfully that the defendant have specific intent or purpose to violate, disobey or disregard the law. As noted above, willful blindness may be used with respect to the knowledge or awareness aspects of willfully and intentionally, but not the purposive or specific intent aspects of those mental states.

There are cases that might be read as suggesting that willful blindness may be used with respect to specific intent. For example, in *United States v. Berscht*, 370 Fed. Appx. 325, 328 (3d Cir. 2010) (non-precedential), the court stated that "willful blindness as to a deposit of a counterfeit check is sufficient *fraudulent intent* under § 1344 [bank fraud]," which the court had already characterized as "the *specific intent* requirement of § 1344." (Emphasis added). However, a careful reading of these cases shows that the Third Circuit approved willful blindness instructions only as to the knowledge aspects of specific intent. Thus, the court in *Berscht* cited *United States v. Khorozian,* 333 F.3d 498, 504 (3d Cir 2003), for this point, but in *Khorozian*, the

Third Circuit was clear that willful blindness only applied to the defendant's awareness of the counterfeit nature of certain checks, not to the more purposive or intentional aspects of specific intent to defraud. *Id.* at 504-05. Similarly, in *United States v. Stewart*, 185 F.3d 112, 125-26 (3d Cir. 1999), where the Third Circuit upheld the trial court's willful blindness instructions with respect to intent to defraud for mail and wire fraud, the approved instructions applied this doctrine to the guilty knowledge aspect of the fraudulent intent requirement; *i.e.*, that the defendant knew the statements he made were lies.

Among the Third Circuit cases that show the situations in which a willful blindness instruction was properly given is *United States v. Brodie*, 403 F.3d 123 (3d Cir. 2005). Charged with conspiracy to violate the Trading with Enemy Act and Cuban Assets Control Regulations, which required proof that the defendant (company president) knew the facts constituting the offense, knew the illicit purpose of the conspiracy, knew the law forbidding his actions, and acted with the specific intent to circumvent that law, the defendant denied having that knowledge and intent. Instead, he asserted that he thought the transactions in question were being handled lawfully through Canadian and United Kingdom companies, not unlawfully through a United States company. However, various pieces of evidence showed that the defendant recognized the likelihood that the United States entity was involved in illegal transactions with Cuba "yet deliberately avoided learning the true facts." This included evidence suggesting that the defendant tried to ensure that he never saw a direct reference to Cuba, that the corporate culture was to refer to Cuba by "code words," that the defendant failed to ask the "natural follow-up question[s]" to references to the "Caribbean," and never instigated any follow-up to his own instruction to ensure that his company was not transacting business with Cuba. The Third Circuit held that the trial judge properly instructed the jury on willful blindness.

For other cases in which the Third Circuit has upheld the giving of willful blindness instructions, *see, e.g., United States v. Stadtmauer,* --- F.3d ----, 2010 WL 3504321 (3d Cir. 2010) (trial court did not abuse its discretion in concluding that a willful blindness instruction was warranted on charges of willfully filing materially false or fraudulent federal tax returns, where "there was abundant evidence that [defendant] was intimately involved with the operations of the partnerships and was aware of how the partnerships characterized capital expenditures, charitable contributions, gift and entertainment expenses, and "non-property" expenses in the general ledgers and financial statements. There was also evidence that, despite this knowledge . . . [he] spent very little time reviewing the partnerships' tax returns, and never asked questions. . . ." All this evidence supported an "inference . . . that [defendant] deliberately avoided 'ask[ing] the natural follow-up question[s]' . . . despite his awareness of a high probability of that fact."); *United States v. Wasserson,* 418 F.3d 225, 237-39 (3d Cir. 2005) (with respect to defendant charged with causing, and aiding and abetting, the disposal of hazardous waste without a permit in violation of the Resource Conservation and Recovery Act, it was reasonable for the jury to conclude that defendant knew or was willfully blind about whether hazardous wastes would be disposed of at an unpermitted facility where, knowing of the presence of hazardous waste in his company's warehouse and of the requirements for proper disposal of that waste, defendant told an unknowing employee to find someone to clean out the warehouse); *United States v. Titchell*, 261 F.3d 348 (3d Cir. 2001) (in a prosecution for mail fraud and conspiracy to commit mail fraud based on fraudulent advertising invoices, defendant denied knowledge of the falsity of statements

he had made); *United States v. Wert-Ruiz*, 228 F.3d 250 (3d Cir. 2000) (conspiracy to commit money laundering by generating false receipts in connection with remitting drug trafficking proceeds funds from US to overseas; jury could have concluded that defendant deliberately avoided learning that she was dealing with the proceeds of illegal activity and that the transactions were designed to conceal the illicit source of those funds; jury could rationally conclude that using code words for transactions, minimizing dollar amounts, and receiving large amounts of cash in gym bags must have alerted defendant to the possibility that her money transfer activities were actually in service of a money laundering operation, and that her failure to inquire further evinced willful blindness.); *United States v. Stewart*, 185 F.3d 112 (3d Cir. 1999) (in prosecution for mail fraud, wire fraud, money laundering, and racketeering based on a complicated series of fraudulent transactions involving insolvent insurance companies, defendant argued that he lacked the intent to defraud because he relied on the findings of solvency reported in state examinations and audit reports, but evidence permitted the jury to conclude that he recognized the likelihood of insolvency yet deliberately avoided learning the true facts); *United States v. Caminos*, 770 F.2d 361 (3d Cir. 1985) (at trial for knowingly importing cocaine and possessing cocaine with intent to distribute, evidence was sufficient to allow the jury to find that defendant deliberately ignored the probability that something other than a $60 wood carving was involved, where evidence showed defendant was approached by two men who were willing to pay over $1,000 to ensure that the wood carving, in which cocaine was concealed, was delivered to Pittsburgh).

**Categories of Evidence of Willful Blindness.** In these cases, the Third Circuit has upheld the use of a willful blindness instructions based on two categories of evidence, without explicitly identifying the categories as such. *See, e.g., United States v. Wasserson*, 418 F.3d 225, 237-39 (3d Cir. 2005); *United States v. Brodie*, 403 F. 3d 123 (3d Cir. 2005). The Seventh Circuit has articulated these categories, stating that, "[e]vidence of deliberate ignorance can be placed into two categories: evidence of 'overt physical acts,' and evidence of 'purely psychological avoidance, a cutting off of one's normal curiosity by effort of the will." *United States v. Carrillo*, 435 F. 3d 767, 780 (7th Cir. 2006). The Seventh Circuit explained that the first category was generally easy, but "[t]he second category, psychological avoidance, is more troublesome. ... The difficulty in a psychological avoidance case – one without any outward physical manifestation of an attempt to avoid the facts – lies in distinguishing between a defendant's mental effort of cutting off curiosity, which would support an ostrich instruction, and a defendant's simple lack of mental effort, or lack of curiosity, which would not support an ostrich instruction." *Id.*

**The Content of the Willful Blindness Instruction.** Although the Third Circuit cases are clear about when a willful blindness instruction should be given, they have approved varying forms of the content of the instruction. In *United States v. Titchell*, 261 F.3d 348, 351 (3d Cir. 2001), the court upheld a willful blindness instruction where it concluded that the instructions as a whole made it sufficiently clear that willful blindness is not merely negligence or lack of an objectively reasonable belief, even though the trial judge did not explicitly instruct the jury that it must find that the defendant was (subjectively) "aware of a high probability that the fact or circumstance existed." The court stated, "[O]ur cases make clear that no such requirement exists. As we explained in *United States v. Stewart*, 185 F.3d 112 (3d Cir.1999), 'we do not

require a court's [willful blindness] charge to contain specific language that a defendant must have "a subjective awareness of a high probability that something is amiss."' *Id*. at 126 (quoting *United States v. Stuart*, 22 F.3d 76, 81 (3d Cir.1994))." Nevertheless, the Third Circuit has also stated that subjective awareness of a high probability is required for willful blindness and, therefore, the better practice is to instruct the jury on this point explicitly. For example, in *United States v. Wert-Ruiz*, 228 F.3d 250 (3d Cir. 2000), the Third Circuit upheld instructions that allowed the jury to find that the defendant acted knowingly, based on alternative theories of actual knowledge or willful blindness. The court stated (228 F.3d at 255):

> A willful blindness instruction is often described as sounding in "deliberate ignorance." *See United States v. One 1973 Rolls Royce,* 43 F.3d 794, 807-08 (3d Cir.1994). Such instructions must be tailored, as the District Court's was here, to avoid the implication that a defendant may be convicted simply because he or she should have known of facts of which he or she was unaware. Willful blindness is not to be equated with negligence or a lack of due care, *see id.* at 809 n. 13, for "willful blindness is a subjective state of mind that is deemed to satisfy a scienter requirement of knowledge," *id.* at 808. The instruction "must make clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability." *United States v. Caminos,* 770 F.2d 361, 365 (3d Cir.1985). If such a charge is supported by sufficient evidence, it is not inconsistent for a court to give a charge on both willful blindness and actual knowledge, for if the jury does not find the existence of actual knowledge, it might still find willful blindness. *See United States v. Stewart*, 185 F.3d 112, 126 (3d Cir.1999).

Also *see, e.g., United States v. Stadtmauer,* --- F.3d ----, 2010 WL 3504321 (3d Cir. 2010) (The willful blindness instruction in this case "adhered to our precedent requiring that such an instruction ' "make clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability" ' *Wert-Ruiz,* 228 F.3d at 255 (quoting *Caminos,* 770 F.2d at 365). The [District] Court instructed the jury that it must find beyond a reasonable doubt that [defendant] (1) 'was aware of a high probability that the tax returns at issue were false or fraudulent as to a material matter,' and (2) 'consciously and deliberately tried to avoid learning about this fact.' (App.3974.) The Court told the jury that it could not find the element of knowledge satisfied if it found only that [defendant] '*should have known* that the tax returns at issue were false as to a material matter[,] or that a *reasonable person would have known* of a high probability of that fact.' (*Id.* (emphases added).) . . . A showing of negligence or of a good-faith mistake of law is not . . . sufficient to support a finding of . . . knowledge.' (*Id.*).") *United States v. Brodie*, 403 F.3d 123, 148 (3d Cir. 2005) ("To find knowledge premised on the latter 'willful blindness' theory, the jury must be able to conclude that 'the defendant himself was [subjectively] aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability,'" quoting *United States v. Caminos,* 770 F.2d 361, 365 (3d Cir.1985)). Even though other circuits have approved different wording for willful blindness instructions, they all seem to agree that, "[t]he most important principle for the district court to keep in mind is that the ostrich 'instruction is not meant to allow a jury to convict a person for negligence.' ... [E]ven under that old formulation of the ostrich instruction we repeatedly held, in

the face of objections to the contrary, that the instruction 'calls for a subjective inquiry, rather than an objective one.' " *United States v. Carrillo*, 435 F.3d 767, 781-82 (7th Cir. 2006) (citations omitted).

The Third Circuit has also not explicitly held that the jury must be instructed that it cannot find knowledge based on willful blindness unless it finds that the defendant did not actually believe that the fact or circumstance did not exist. However, in more than one case the court has referred to this requirement favorably. For example, in *United States v. Titchell*, 261 F.3d 348, 351 (3d Cir. 2001), the court stated:

> The court gave the jury a fairly standard willful blindness instruction, which stated that the government could meet its burden of proving Titchell's knowledge of the falsity of his statements if the government establishes "beyond a reasonable doubt that [Titchell] acted with deliberate disregard" of the truth or with the "conscious purpose of avoiding learning the truth." The court also properly limited this instruction by telling the jury that the element of knowledge would not be satisfied if Titchell "actually believed the statement[s] to be true," and that guilty knowledge "cannot be established by demonstrating that [Titchell] was merely negligent or foolish or acting out of inadvertence or accident."

In *United States v. Wert-Ruiz*, 228 F.3d 250 (3d Cir. 2000), the defendant did not challenge the legal adequacy of the instruction as it was worded, only the sufficiency of the evidence to justify it. The court noted that, "[a]t trial, the District Court instructed the jury on the issue of willful blindness as follows: When knowledge of the existence of a particular fact is an essential part of an offense, such knowledge may be established if a defendant is aware of a high probability of its existence, *unless she actually believes that it does not exist*. ...I must emphasize, however, that the requisite proof of knowledge on the part of a defendant cannot be established by demonstrating she was negligent, careless or foolish." 228 F.3d at 255 (emphasis added). Although it has not been specifically adopted by Congress, the Supreme Court, or the Third Circuit, *see also* Model Penal Code § 2.02(7) ("*Requirement of Knowledge Satisfied by Knowledge of High Probability*. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."). Other circuits have recognized that the willful blindness instruction is problematic, because it seems inconsistent to say that awareness can be proved by evidence that the defendant avoided awareness: "It makes obvious sense to say that a person cannot act 'knowingly' if he does not know what is going on. To add that such a person acts 'knowingly' if she intentionally does not know what is going on is something else again." *United States v. Alston-Graves*, 435 F.3d 331, 337 (D.C. Cir 2006). "[I]t is hard to see how ignorance, from whatever cause, can be knowledge." *Id.* at 337 n. 1 (internal quotation marks and citations omitted).

**Willful Blindness Instructions in Other Federal Circuits.** Finally, "[a]ll of the other circuits ... have approved [willful blindness] instructions for a wide range of offenses, although the courts' rationales vary, as do the wording of the instructions, and the limits on the doctrine's proper use." *United States v. Alston-Graves*, 435 F.3d at 338 (footnotes omitted). For example,

the Ninth Circuit, which decided *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976), one of the earliest federal appeals court willful blindness cases, recently held it was error to give the instruction in *United States v. Heredia*, 429 F.3d 820 (9th Cir. 2005). In *Heredia*, the Ninth Circuit stated:

> In the years since we decided *Jewell,* we have restricted the circumstances under which we will permit the instruction to be issued. We have warned that the instruction is "rarely appropriate," and should be given only when the government presents "specific evidence" that the defendant "(1) actually suspected that he or she might be involved in criminal activity, (2) deliberately avoided taking steps to confirm or deny those suspicions, and (3) did so in order to provide himself or herself with a defense in the event of prosecution." . . . It is not enough that the defendant "was mistaken, recklessly disregarded the truth or negligently failed to inquire." . . . The instruction should therefore "be rarely given because of the risk that the jury will convict on a standard of negligence: that the defendant *should* have known the conduct was illegal." The purpose of the *Jewell* instruction is ... for those cases of "willful blindness," where the defendant "suspects a fact, realizes its probability, but refrains from obtaining final confirmation in order to be able to deny knowledge if apprehended."

429 F.3d at 824-25 (citations omitted). "Many of the [other] courts of appeals [also] admonish that 'caution is necessary in giving a willful blindness instruction.' " *Unites States v. Alston-Graves*, 435 F.3d at 340-41 (citations omitted).

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given.

(Revised 11/10)

**5.07 Good Faith Defense**

**The offense***(s)* **of** *(state offenses)* **charged in the indictment require***(s)* **proof that** *(name)* **acted** *(describe the required mental state, e.g., "willfully," "intent to defraud," "knowingly defraud," "intentionally or knowingly making false statements")***. If you find that** *(name)* **acted in "good faith," that would be a complete defense to this charge, because good faith on the part of** *(name)* **would be inconsistent with** *(his) (her)* **acting** *(describe the required mental state)***.**

**A person acts in "good faith" when he or she has an honestly held belief, opinion, or understanding that** *(describe the belief or opinion that is inconsistent with the required mental state, e.g., honest belief about the existence of a fact, honest belief in the truth of statements, honest opinion that acts were not unlawful)***, even though the belief, opinion, or understanding turns out to be inaccurate or incorrect. Thus, in this case if** *(name)* **made an honest mistake or had an honest misunderstanding about** *(state the belief, opinion or understanding that would be inconsistent with the required mental state)* **then** *(he) (she)* **did not act** *(describe the required mental state)***.**

*[(Name) did not act in "good faith," however, if, even though (he) (she) honestly held a certain opinion or belief or understanding, (he) (she) also knowingly made false statements, representations, or promises to others.]*

*(Name)* **does not have the burden of proving "good faith." Good faith is a defense because it is inconsistent with the requirement of the offense***(s)* **charged, that** *(name)* **acted** *(describe the required mental state)***. As I have told you, it is the**

**government's burden to prove beyond a reasonable doubt each element of the offense, including the mental state element. In deciding whether the government proved that** *(name)* **acted** *(describe the required mental state)* **or, instead, whether** *(name)* **acted in good faith, you should consider all of the evidence presented in the case that may bear on** *(name's)* **state of mind. If you find from the evidence that** *(name)* **acted in good faith, as I have defined it, or if you find for any other reason that the government has not proved beyond a reasonable doubt that** *(name)* **acted** *(describe the required mental state)***, you must find** *(name)* **not guilty of the offense of** *(state the offense)***.**

**Comment**

*See* 1A O'Malley et al, supra, § 19.06. For variations in other Circuits, *see* First Circuit § 5.02; Seventh Circuit §§ 6.10 & 6.11; Eighth Circuit § 9.08; Eleventh Circuit §§ 17 & 18.

**When is Good Faith a Defense.** "Good faith" is a defense whenever the defendant's good faith is inconsistent with a finding that the defendant acted with the mental state required by the definition of the offense charged. Good faith exculpates when, if the jury finds the defendant acted in good faith, it would necessarily have to find that defendant did not act with the required mental state. Of course, whether good faith would disprove the mental state element depends on how that element is defined with respect to the offense charged and the trial evidence about the nature of the defendant's honest beliefs. Because good faith relates to an element of the offense, the defendant does not have the burden of persuasion, although the defendant may have the burden of production. When a good faith defense is raised and supported by some evidence, the government has the burden of disproving good faith as part of its burden of proving the mental state element.

"Good faith" is a defense to any crime for which the defendant's genuine lack of awareness or misunderstanding negates the mental state requirement. Perhaps because of *Cheek v. United States*, 498 U.S. 192 (1991), where the Supreme Court held that the defendant could not be convicted if the jury found that he honestly believed the tax laws did not make his conduct criminal, even if that belief was unreasonable, this defense is often thought of in connection with tax offenses. *See* Comment to Instruction 5.05. In tax cases the trial judge should give Instruction 6.26.7201-4 (Tax Evasion – Willfully Defined), supplemented if need be under the

circumstances of the case, by this instruction.

The defense has also been used commonly in the context of fraud type offenses, such as mail fraud, securities fraud, bankruptcy fraud, bank fraud and the like, as well as false statement crimes. For instructions on the intent requirement for mail, wire, and bank fraud, *see* Instructions 6.18.1341-4 (Mail or Wire Fraud – "Intent to Defraud" Defined) and 6.18.1344-1 (Bank Fraud – "Intent to Defraud" Defined). Also *See* Daniel S. Jonas, *The Circuit Split Over Instructing the Jury Specifically on the Good Faith Defense: A Consequence of Superlegislation by Courts or the Standards of the Appellate Review*, 46 SYR. L.R. 61 (1995). Thus, in *United States v. Jimenez*, 513 F.3d 62, 75 (3d Cir. 2008), where the defendants were convicted of bank fraud, the Third Circuit held that:

> Read as a whole, the jury instructions did not deny the defendants their requested defense of good faith, but accurately reflected the law and appropriately informed the jury of the relevance of the evidence. The district court explicitly told the jury that good faith was a complete defense to bank fraud because good faith negated the element of intent to defraud required for a bank fraud conviction . . ., and that the Government bore the burden of proving beyond a reasonable doubt that the defendants acted with the requisite intent to defraud, negating a good faith defense.

In *United States v. Gross*, 961 F.2d 1097 (3d Cir.), cert. denied, 506 U.S. 965 (1992), where the charges were making false statements to the Securities and Exchange Commission and conspiring to violate the securities laws, offenses that required proof that the defendant had conspired to knowingly make false statements and willfully defraud, the defendant asserted that he acted without knowledge of the falsity of the statements or the wrongfulness of his actions. The Third Circuit recommended that trial judges use the "good faith" instruction in appropriate cases as a supplement to the instructions on "knowingly and willfully," but held that the trial court did not abuse its discretion in declining to give an explicit "good faith" instruction in that case.

If the defendant asserts that he or she acted in good faith based on the advice of counsel, the court may want to mention that in its instruction on the good faith defense.

**Good Faith Instruction Recommended, But Not Required Where Trial Judge Fully Instructs on the Mental State Requirement.** Considering the jury instructions as a whole, the Third Circuit in *United States v. Gross* concluded that the trial judge's "detailed instruction on the elements of the crime with which Gross was charged ... ensured that a jury finding of good faith would lead to an acquittal." 961 F.2d at 1103. The Third Circuit cautioned, however, that, "While it was not reversible error for the district court to refuse to give the good faith instruction in this case, we commend to the district judges in the exercise of their discretion its use as a supplement to the 'knowing and willful' charge in future cases." *Id.* The Court also explained the treatment of good faith instructions in other circuits, stating that it was persuaded by the majority view:

> The majority of circuits have held that an instruction setting forth all of the

> elements of a "knowledge" crime is sufficient and, hence, that a district court does not abuse its discretion in refusing to instruct on the good faith defense. See *United States v. McElroy,* 910 F.2d 1016, 1025-26 (2d Cir.1990); *United States v. Rochester,* 898 F.2d 971, 978-79 (5th Cir.1990); *United States v. Nivica,* 887 F.2d 1110, 1125 (1st Cir.1989); *United States v. Green,* 745 F.2d 1205, 1209 (9th Cir.1984); *United States v. McGuire,* 744 F.2d 1197, 1201-02 (6th Cir.1984); *United States v. Gambler,* 662 F.2d 834, 837 (D.C.Cir.1981). Two circuits, however, have held that a district court abuses its discretion by refusing to give a good faith defense charge even if the court has already given an instruction on the elements of the crime. See *United States v. Casperson,* 773 F.2d 216, 223-24 (8th Cir.1985); *United States v. Hopkins,* 744 F.2d 716, 718 (10th Cir.1984) (en banc).
>
> The majority position derives from the theory that the good faith defense instruction is merely surplusage. Rather than treating good faith as an affirmative defense, these circuits have viewed the good faith instruction as simply a reiteration that the government must carry its burden in demonstrating that the accused acted knowingly and willfully, because a jury finding that the defendant has acted knowingly and willfully is inconsistent with a finding that the defendant acted in good faith. Thus, according to the majority position, if an instruction already contains a specific statement of the government's burden to prove these elements of the crime, the good faith instruction is simply a redundant version of the instruction on those elements. In contrast, those circuits that have held to the contrary have emphasized that a specific instruction on good faith "directs the jury's attention to the defense of good faith with sufficient specificity to avoid error." *Casperson,* 773 F.2d at 223. Under this view, conveying to the jury the essence and context of the good faith defense is of crucial importance.

961 F.2d at 1102-03. *See* Daniel S. Jonas, *The Circuit Split Over Instructing the Jury Specifically on the Good Faith Defense: A Consequence of Superlegislation by Courts or the Standards of the Appellate Review*, 46 SYR. L.R. 61 (1995). In *United States v. Leahy*, 445 F. 3d 634, 651-52 (3d Cir. 2006), as in *Gross*, the Third Circuit held that where the district court instructed completely and properly regarding the knowledge element of fraud crimes, it did not abuse its discretion in refusing to give a specific good faith instruction, as any "good faith instruction would have been unnecessary and duplicative." *See also United States v. Cocchiola*, 358 Fed. Appx. 376, 380-81 (3d Cir. 2009) (non-precedential) (holding trial court properly denied good faith instruction where other instructions adequately covered requisite intent); *United States v. Evans*, 356 Fed. Appx. 580, 585 (3d Cir. 2009) (non-precedential) (trial judge did not err in refusing to give defendant's proposed good faith, willfulness, and theory-of-the-defense instructions, where "the [District] Court's explanation of willfulness in the jury charge substantially covered the relevant points and allowed Evans to argue his theory of the case.")

(Revised 11/10)

## 5.08 Recklessly

**The offense***(s)* **of** *(state offense or offenses that include recklessly)* **charged in the indictment require***(s)* **that the government prove that** *(name of defendant)* **acted "recklessly." This means that the government must prove beyond a reasonable doubt (1) that** *(name)* **was aware of a substantial and unjustifiable risk of a fact or circumstance required for the offense or that the result required for the offense would be caused by** *(his) (her)* **actions; and (2) that** *(name)* **consciously disregarded that risk**

**Specifically, in this case the government must prove beyond a reasonable doubt:**

**First: That** *(name)* **was aware of a substantial and unjustifiable risk of** *(state the fact or circumstance the risk of which defendant must be aware)* **or that** *(his) (her)* **actions would cause** *(state the result the risk of which the defendant must be aware)***; and**

**Second: That** *(name)* **consciously disregarded that risk.**

**Comment**

Instructions defining "recklessly" are not included in O'Malley et al, supra, or in the pattern jury instructions of other circuits. This instruction is based on the definition of "recklessly" in Model Penal Code § 2.02(2)(c). Although Congress has not adopted the Model Penal Code, the Supreme Court, the Third Circuit, and other federal court decisions have been guided by the Model Penal Code definition of recklessly. In addition to defining recklessly as consciously disregarding a substantial and unjustifiable risk that the material element exists or will result from defendant's conduct, the Code also states that "the risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Although the Third Circuit does not seem to have included this further definition in its few cases discussing recklessly, the trial court could include it in an instruction on recklessly if thinks a further explanation is necessary.

"Recklessly" is not frequently used to define the state of mind requirement in federal criminal statutes. As a result, few Third Circuit or other federal appellate court cases discuss the meaning of "recklessly." Nevertheless, the federal courts that have discussed recklessly in federal criminal cases have looked to the Model Penal Code for guidance. Thus, for example, in

*United States v. Johnstone*, 107 F.3d 200 (3d Cir. 1997) (upholding jury instructions on mental state element of 18 U.S.C. § 242, where state police officers were convicted of using excessive force in violation of that section), the Third Circuit recognized, based on Supreme Court precedent, that "willfully" in § 242 required the government to prove that "the defendant had the particular purpose of violating a protected right made definite by rule of law *or recklessly disregarded the risk that he would violate such a right*." *Id.* at 210 (emphasis added). The Third Circuit noted that although the Supreme Court had not defined "reckless disregard" under § 242, the Court had stated in dicta in *Farmer v. Brennan*, 511 U.S. 825, (1994), that in criminal cases reckless disregard required subjective awareness and disregard of risk, *id.* at 836-37, and that this definition was appropriate in criminal prosecutions under 18 U.S.C. § 242. *Id.* at 839 n.7. Also *see, e.g., United States v. Dise*, 763 F.2d 586, 592 (3d Cir. 1985) (defendant can be criminally liable under § 242 "if he acted in reckless disregard of the law as he understood it").

*Farmer v. Brennan*, 511 U.S. 825 (1994), was a civil action asserting the liability of prison officials under the Eighth Amendment Cruel and Unusual Punishment clause for denying humane conditions of confinement, in which the state of mind requirement was "deliberate indifference" to inmate health and safety. After reviewing circuit opinions regarding "deliberate indifference," the Court stated, "[i]t is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." 511 U.S. at 836. The Court rejected an objective test for deliberate indifference (reckless disregard) and held "that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. Distinguishing the meaning of recklessly in civil cases, the Court stated that in criminal cases reckless disregard generally requires a subjective analysis; a criminal defendant exhibits reckless disregard if he is indifferent to a risk "of which he is aware." *Id.* at 836-37. Citing the Model Penal Code, among other sources, the Court reasoned, "subjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishment Clause as interpreted in our cases, and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment." *Id.* at 839-40.

Other circuits have reasoned like the Third Circuit in *Johnstone*. For example, in *United States v. Albers*, 226 F.3d 989 (9th Cir. 2000), the Ninth Circuit interpreted "recklessly" in a Department of Interior regulation prohibiting disorderly conduct in national parks and concluded "that the relevant inquiry in finding recklessness here is whether the defendants deliberately disregarded a substantial and unjustifiable risk of creating a hazardous or physically offensive condition of which they were aware." 226 F.3d at 995. The Ninth Circuit reasoned that in other cases where the regulation or statute did not define terms, it had looked to the Model Penal Code for guidance and quoted section 2.02(2)(c) which defines recklessly. The Ninth Circuit also noted that "the Supreme Court has ... explained that the criminal law generally permits a finding of recklessness only when persons disregard a risk of harm of which they are aware. *See Farmer v. Brennan,* 511 U.S. 825, 836-37 (1994)." Also *see, e.g., United States v. McCord*, 143 F.3d 1095, 1098 (8th Cir. 1998) (regarding sentencing enhancement for fraud offenses that involve

"conscious or reckless risk of serious bodily injury," Eighth Circuit explained "[t]he normal meaning of reckless in the criminal law (unlike the civil law) is that the defendant disregarded 'a risk of harm of which he is aware,'" citing *Farmer v. Brennan*); *United States v. Ladish Malting Co.*, 135 F.3d 484, 487 (7th Cir. 1998) (on appeal from conviction for criminal violation of Occupational Health and Safety Act, which imposed a mental state requirement of "willfully" further defined by the Act to include knowingly and recklessly, the Seventh Circuit looked to Model Penal Code definitions, reasoning in part that "[t]he Supreme Court found the Model Penal Code's classification of mental states useful when it had to determine what mental state is required in antitrust prosecutions, see *United States v. United States Gypsum Co.,* 438 U.S. 422, 444-46(1978).").

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given.

## 5.09 Negligently

**The offense***(s)* **of** *(state offense or offenses that include negligently)* **charged in the indictment require***(s)* **that the government prove that** *(name of defendant)* **acted "negligently." This means that the government must prove beyond a reasonable doubt that the defendant** *(name)* **should have been aware, or that a reasonable person would have been aware, of a substantial and unjustifiable risk that a fact or circumstance required for the offense existed or that a result required for the offense would be caused by** *(his) (her)* **actions.**

*[Specifically, this means that the government must prove beyond a reasonable doubt that (name) should have been aware, or that a reasonable person would have been aware, of a substantial and unjustifiable risk that (state the fact or circumstance defendant should have been aware of) or that (state the result defendant should have been aware of).]*

*[The risk must be such that its disregard involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.]*

**Comment**

This instruction should be used when the federal crime charged includes negligently as an element of the offense. This happens most often in regulatory type offenses, such as violations of environmental laws. *See, e.g.,* Federal Water Pollution Control Act, 33 U.S.C. § 1319(c).

Instructions defining "negligently" are not included in O'Malley et al, supra, or in the model instructions of other circuits. This instruction is based on the definition of "negligently" in Model Penal Code § 2.02(2)(d), because the federal courts often look to the Model Penal Code for guidance with respect to mental state concepts. In addition to defining negligently as "should be aware of a substantial and unjustifiable risk," the Code further states that "the risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." If the trial court believes that this further definition would assist the jury, the court can give the bracketed second paragraph of the instruction. Negligence as thus defined is sometimes referred to as "criminal negligence," as

opposed to "civil negligence" or the mere failure to exercise ordinary, reasonable care.

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given.

## 5.10 Failure to Act *(Omissions)*

**Ordinarily, to commit an offense a defendant must commit a conscious and voluntary act, with the required state of mind. Thus, ordinarily a criminal offense is not committed by a person's failure to act or omission. In most instances, the law does not require people to act even to help or to save another person who is in danger. However, a failure to act or an omission can be the basis for criminal responsibility if the government proves beyond a reasonable doubt that the defendant had a legal duty to act, but failed or omitted to perform that legal duty with the required mental state.**

*[In this case the government asserts that (name) had a duty to (describe) that was imposed on (him) (her), because (describe the asserted legal basis for the duty), and consciously, voluntarily failed or omitted to perform that duty. In order to find (name) guilty because of (his) (her) omission or failure to act, you must find that the government proved beyond a reasonable doubt that (name) had this legal duty and consciously, voluntarily failed or omitted to perform it.]*

**Comment**

Neither O'Malley t al, supra, nor any other Circuits provide a general instruction on failures to act or omissions. As suggested by the bracketed second paragraph above, this instruction should be tailored to the particular case before the court.

There do not appear to be any Third Circuit cases discussing omissions as a basis for criminal responsibility, except in limited situations related to specific offenses. *See, e.g., United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994) (to convict for concealing a material fact in a matter within the jurisdiction of a federal agency or department, in violation of 18 U.S.C. § 1001, "the government must show that a defendant had a legal duty to disclose the facts at the time he was alleged to have concealed them.").

Ordinarily, criminal liability is based on an omission when the statute defining the crime explicitly makes an omission or failure to act criminal. However, a legal duty to act may also be imposed by contract or tort law, and also because of a relationship between the defendant and

another person that makes the defendant responsible for the safety and well-being of another person, or where a defendant voluntarily undertakes to provide assistance to another person, or when a defendant's actions put another person in danger. *See, e.g., United States v. Jones*, 308 F.2d 307 (D.C. Cir. 1962); Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 Cal. L. Rev. 547 (1988) (and authorities cited therein); Model Penal Code § 2.01(3) ("Liability for commission of an offense may not be based on an omission unaccompanied by action unless: (a) the omission is expressly made sufficient by the law defining the offense; or (b) a duty to perform the omitted act is otherwise imposed by law.").

**6.18.152(1) Bankruptcy - Fraudulent Concealment of Assets - Elements of the Offense (18 U.S.C. § 152(1))**

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with bankruptcy fraud, which is a violation of federal law.**

**In order to find** *(name)* **guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:**

**First: That a bankruptcy case was pending on or about** *(specify time alleged in the indictment)* **in which** *(name of debtor)* **was the Debtor;**

**Second: That** *(describe the property alleged in the indictment)* **was a part of the bankruptcy estate of the Debtor;**

**Third: That** *(name)* **concealed** *(describe the property alleged in the indictment)* **from the** *[(custodian)(trustee)(Marshal)(person)]* **charged with the custody and control of that property; and**

**Fourth: That** *(name)* **acted knowingly and with the intent to defraud.**

**The term "debtor" means the** *(person) (business)* **for whom a bankruptcy case has been commenced. When a debtor files a petition seeking protection from creditors under the bankruptcy laws, a "bankruptcy estate" is created. The bankruptcy estate is comprised of all property belonging to the debtor as of the time the bankruptcy case is filed, regardless of where that property is located or who holds the property.** *[The "bankruptcy estate" also includes proceeds, products, rents, or*

*profits of or from the property of the estate, but it does not include earnings from services performed by an individual after the case is filed.]*

**Property may be concealed in a number of different ways. "Concealment" can mean hiding property or assets. It also includes preventing the discovery of assets, transferring property, or withholding information that is required to be made known. Concealment of property of the bankruptcy estate may include transferring property to a third party or entity, destroying the property, withholding knowledge concerning the existence or whereabouts of the property, or knowingly doing anything else by which the defendant acts to hinder, unreasonably delay or defraud any creditors. The government need not prove that the concealment was successful.**

**An act is done knowingly if it is done voluntarily and intentionally, and not because of mistake, accident or other innocent reason.**

**An act is done with intent to defraud if it is done with the intent to deceive any creditor, trustee or bankruptcy judge.**

**Comment**

*See* Eighth Circuit § 6.18.152A, Fifth Circuit § 2.10; Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 15-7 (Matthew Bender 2003).

18 U.S.C. § 152(1) provides:

> A person who (1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of

> property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor; * * * shall be fined under this title, imprisoned not more than 5 years, or both.

This instruction should be given only if the defendant is charged under this section. It does not apply to other violations of Section 152.

In *United States v. Zerbach*, 47 F.3d 1252, 1261 (3d Cir. 1995), the Third Circuit noted that "[t]he statutory requirement that the underlying acts be performed 'knowingly' requires only that the act be voluntary and intentional and not that a person knows that he is breaking the law." Good faith belief in the lawfulness of the conduct is not a defense to bankruptcy fraud. *See Zerbach*, 47 F.3d at 1261.

In *United States v. Thayer*, 201 F.3d 214, 224-25 (3d Cir. 1999), the Third Circuit held that the following charge adequately informed the jurors of the elements of the offense, including the intent to conceal:

> Counts 28 through 37 charge[ ] willful concealment of assets from the Bankruptcy Court. The law provides whoever knowingly and fraudulently conceals from the custodians, trustee, marshal or other officer of the bankruptcy [court] charged with the control or custody of property, or from creditors in any case in bankruptcy shall be guilty of a felony.
>
> The elements are: One, on or about the date alleged in the indictment, the proceeding in bankruptcy was in existence. That's not in dispute. Two, the defendant fraudulently concealed the property described in the indictment from creditors in the bankruptcy proceedings. And, three, that such property belonged to the estate of the debtor.
>
> A person fraudulently conceals property of the estate of a debtor when that person knowingly withholds information or property or knowingly acts for the purpose of preventing the discovery of such property, intending to deceive or cheat a creditor, a trustee, or a custodian or a bankruptcy judge.
>
> Fraudulently concealing property of the estate of the debtor may include transferring property to a third party, destroying the property, withholding knowledge concerning the existence or whereabouts of property, or knowingly doing anything else by which the person acts to hinder, delay or defraud any of the creditors.
>
> The act of concealment does not depend on the amount or value of the property involved. It is sufficient if a substantial amount of property was knowingly and fraudulently concealed or transferred by the accused as charged in the indictment . . . .

# Bribery of Public Officials and Witnesses (18 U.S.C. § 201)

**6.18.201B1 Bribery of a Public Official (18 U.S.C. § 201(b)(1))**

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with bribery of a public official, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **gave, offered, or promised something of value, that is** *(specify thing of value)* **to** *(name of official)***;**

**Second: That** *(name of official)* **was, at that time, a public official; and**

**Third: That** *(name)* **did so corruptly with the intent to influence an official act, that is,** *(name)* **intended to give** *(specify thing of value)* **in exchange for an official act.**

**Comment**

Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions [hereinafter O'Malley et al., supra]§ 27.03.

> 18 U.S.C. § 201(b)(1) provides that anyone who
> directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent--
>
> > (A) to influence any official act; or
> > (B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
> > (C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person.

commits a federal offense. In some cases, the court may want to modify the instruction to inform the jury that the bribe may be direct or indirect, that the defendant may be convicted of the offense based on an offer or promise to bribe, or that the conviction may be based on the intent defined in § 201(b)(1)(B) or (C). In addition to the elements instruction, the court should give Instruction 6.18.201B1-1 (Bribery of a Public Official – "Public Official" Defined), Instruction 6.18.201B1-3 (Bribery of a Public Official – "Corruptly" Defined), and, if appropriate, Instruction 6.18.201B1-2 (Bribery of a Public Official – "Official Act" Defined). Giving an illegal gratuity to a public official in violation of 18 U.S.C. § 201(c)(1)(A) may be a lesser included offense. *See* Instruction 6.18.201C1A (Illegal Gratuity to a Public Official (18 U.S.C. § 201(c)(1)(A))).

The statute requires proof that the defendant intended to influence an official act. "In other words, for bribery there must be a quid pro quo-a specific intent to give or receive something of value in exchange for an official act." *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999). *See also United States v. Kemp*, 500 F.3d 257, 284 (3d Cir. 2007).

A quid pro quo may be implicit as well as explicit. *Evans v. United States*, 504 U.S. 255, 268 (1992). The improper benefit may consist of money, property, services, or any other act which advances the official's personal or business interests, including a loan. *See United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007).

In addition, a conviction under this section may be based on a stream of benefits to the public official or to a third party whom the official favors, and the government does not need to establish that any specific benefit was given in exchange for a specific official act. Payments in violation of the statute may be made with the intent to retain the official's services on an "as needed" basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf. *See Kemp*, 500 F.3d at 282.

To violate the statute, the defendant's act of bribery need not be calculated to induce unlawful conduct by the public official. In *United States v. Labovitz*, 251 F.2d 393 (3d Cir. 1958), the Third Circuit stated:

> [E]ither an intention to influence official behavior or an intention to induce unlawful action will supply the culpability which the statute requires. * * * "The statute is violated when a bribe is given or an offer to bribe is made regardless of the occasion therefor, provided it is done with the requisite intent and provided the acceptor or the offeree of the bribe is a person of the sort described in the statute."

251 F.2d at 394 (citations omitted).

(revised 12/09)

## 6.18.201B1-1 Bribery of a Public Official – "Public Official" Defined

**The term "public official" means** *(a Member of Congress, or)* **an officer or employee or person acting** *(for) (on behalf of)* **the United States, or any department, agency or branch of the United States Government, in any official function, under or by authority of any such department, agency, or branch of government.**

**The term "public official" includes any employee of the United States government as well as any person who is performing work for or acting on behalf of the United States government.**

**Comment**

O'Malley et al., supra, § 27.07.

18 U.S.C. § 201 (a)(1)provides:

> the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.

In some cases, the court may want to define "public official " for the jury.

In *Dixson v. United States*, 465 U.S. 482 (1984), the Supreme Court concluded that "[t]he term public official is not limited to persons in a formal employment or agency relationship with the Government." 465 U.S. at 494. The Court identified the appropriate inquiry as "whether the person occupies a position of public trust with official federal responsibilities." 465 U.S. at 496. To clarify, the Court explained, "[t]o be a public official under section 201(a), an individual must possess some degree of official responsibility for carrying out a federal program or policy." 465 U.S. at 499.

**6.18.201B1-2 Bribery of a Public Official – "Official Act" Defined**

**The term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust. The government must prove that** *(name)* **intended to influence a specific act or acts.**

**The term "official act" includes the decisions or actions generally expected of the public official. These decisions or actions do not need to be specifically described in any law, rule, or job description to be considered to be an "official act."**

**Comment**

O'Malley et al., supra, § 27.08; *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 405-06 (1999).

18 U.S.C. § 201 (a)(3) provides:

> the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

In some cases, the court may want to define "official act" for the jury. *See United States v. Ozcelik*, 527 F.3d 88 (3d Cir. 2008) (discussing definition).

(revised 12/09)

## 6.18.201B1-3 Bribery of a Public Official – "Corruptly" Defined

**A person offers a thing of value to a public official "corruptly" if the person acts knowingly and intentionally with the purpose either of accomplishing an unlawful end or unlawful result or of accomplishing some otherwise lawful end or lawful result influenced by the offer of the thing of value to the public official.**

**Corrupt acts are ordinarily motivated by a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit to another.**

*[It is not necessary for the government to prove that the public official was actually influenced, or actually performed an official act, or was even aware of the bribe. What the government must prove beyond a reasonable doubt is that the defendant acted with corrupt intent to bribe a public official, regardless whether the act was successful.]*

### Comment

O'Malley et al., supra, § 27.09.

In *United States v. Traitz*, 871 F.2d 368 (3d Cir. 1989), the Third Circuit explained:

> This statute has been said to require that the alleged briber offer the bribe with a "corrupt intent" to influence official conduct. This requires the government to show that the "money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would be influenced." Provided that the money is offered with corrupt intent, "the official does not necessarily even need to be aware of the bribe . . . so long as a bribe is offered or promised with the required intent to influence any official act the crime is committed."

871 F.2d at 396 (citations omitted).

## 6.18.201B2 Receiving Bribe by Public Official (18 U.S.C. §201(b)(2))

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with demanding, seeking, or receiving a bribe while a public official, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **demanded, sought, or received something of value, that is,** *(specify item described in the indictment)***;**

**Second: That** *(name)* **was, at that time, a public official of the United States** *(or was acting on behalf of the United States)***; and**

**Third: That** *(name)* **did so corruptly in return for being influenced in the performance of an official act, that is,** *(name)* **intended to perform an official act in exchange for** *(specify thing of value)***.**

### Comment

O'Malley et al., supra, § 27.06.

18 U.S.C. § 201(b)(2) provides that whoever

> being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

> (A) being influenced in the performance of any official act;
> (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
> (C) being induced to do or omit to do any act in violation of the official duty of such official or person

commits a federal offense. In some cases, the court may want to modify the instruction to inform the jury that the bribe may be direct or indirect, that the defendant may be convicted of the offense based on an agreement to accept a bribe, or that the conviction may be based on the intent defined in § 201(b)(1)(B) or (C). In addition to the elements instruction, the court should also give Instruction 6.18.201B1-1 (Bribery of a Public Official – "Public Official" Defined), Instruction 6.18.201B1-3 (Bribery of a Public Official – "Corruptly" Defined), and, if appropriate, Instruction 6.18.201B1-2 (Bribery of a Public Official – "Official Act" Defined).

In *United States v. Ozcelik*, 527 F.3d 88 (3d Cir. 2008), the Third Circuit stated that violation of this section has three elements:

> (1) defendant must be a public official, (2) who directly or indirectly demanded, sought, received, accepted, or agreed to receive or accept anything of value personally or for any other person or entity, and (3) did so specifically for one of the three corrupt purposes set forth in subsections (A) through (C).

*Ozcelik*, 527 F.3d at 93. In *Ozcelik*, the evidence showed that the defendant, who worked for the Department of Homeland Security, asked others within DHS to take official action on behalf of the person from whom the defendant solicited a bribe. The Third Circuit noted that the government's "theories blend together into one theory of aiding and abetting other unidentified Immigration officials to take official action to alter [the briber's] records." *Ozcelik*, 527 F.3d at 94. The government's case did not fail merely because the government could not identify those who were to take the official action.

(revised 12/09)

## 6.18.201B2-1 Receiving Bribe by Public Official – "Corruptly" Defined

**A public official demands, seeks, or receives a thing of value corruptly if the official accepts the item knowingly and intentionally with the purpose either of accomplishing an unlawful end or unlawful result or of accomplishing some otherwise lawful end or lawful result influenced by the receipt of the thing of value.**

**Corrupt acts are ordinarily motivated by a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit to another.**

### Comment

O'Malley et al., supra, § 27.09.

In *United States v. Traitz*, 871 F.2d 368 (3d Cir. 1989), the Third Circuit explained:

> This statute has been said to require that the alleged briber offer the bribe with a "corrupt intent" to influence official conduct. This requires the government to show that the "money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would be influenced." Provided that the money is offered with corrupt intent, "the official does not necessarily even need to be aware of the bribe . . . so long as a bribe is offered or promised with the required intent to influence any official act the crime is committed."

871 F.2d at 396 (citations omitted).

## 6.18.201B3 Bribery of a Witness (18 U.S.C. §201(b)(3))

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with** *(briefly describe charged offense; e.g., with offering a bribe to a witness)***, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name of witness)* **was to be a witness under oath or affirmation at** *(describe proceeding, e.g., a trial before the United States District Court for the Eastern District of Pennsylvania)***;**

**Second: That** *(name) [(gave) (offered) (promised)]* **something of value to** *(name of witness)***; and**

**Third: That** *(name)* **did this act corruptly, that is, with the intent to influence** *[(name of witness's) testimony] [(name of witness) to be absent from the proceeding described]***.**

**Comment**

Eighth Circuit § 6.18.201C.

18 U.S.C. §201(b)(3) provides that whoever

directly or indirectly, corruptly gives, offers, or promises anything of value to any

> person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom

commits a federal offense. The court should also modify and give Instruction 6.18.201B1-3 (Bribery of a Public Official – "Corruptly" Defined). In some cases, the court may want to modify this instruction to inform the jury that the bribe may be direct or indirect or that the defendant may be convicted of the offense based on an offer or promise to bribe.

Section 201(d) provides:

> Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

18 U.S.C.A. § 201(d).

## 6.18.201B4 Soliciting Bribe by Witness (18 U.S.C. §201(b)(4))

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with** *(briefly describe charged offense; soliciting a bribe while a witness)***, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **was to be a witness under oath or affirmation at** *(specify proceeding, e.g., a trial before the United States District Court for the Eastern District of Pennsylvania*)**;**

**Second: That** *(name) [(asked for) (demanded) (accepted) (agreed to receive)]* **something of value** *(personally) (for (specify person or entity))***; and**

**Third: That** *(name)* **did so corruptly, that is, in return for** *[(being influenced in (his)(her) testimony at) (absenting (himself) (herself) from)] (specify proceeding)***.**

### Comment

Eighth Circuit § 6.18.201D.

18 U.S.C. §201(b)(4) provides that whoever

> directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting

himself therefrom

commits a federal offense. The court should also modify and give Instruction 6.18.201B2-1 (Receiving Bribe by Public Official – "Corruptly" Defined).

Section 201(d) provides:

> Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

18 U.S.C.A. § 201(d).

## 6.18.201C1A Illegal Gratuity to a Public Official (18 U.S.C. § 201(c)(1)(A))

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with giving an illegal gratuity to a public official, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name of official)* **was a public official or a former public official;**

**Second: That** *(name)* **knowingly directly or indirectly** *(gave) (offered) (promised)* **something of value to** *(name of official)***,and that this was not provided by law for the proper discharge of** *(name of official)***'s official duty; and**

**Third: That** *(name)* **did so** *(for) (because of)* **an official act** *(performed) (that was going to be performed)* **by** *(name of official)***. To establish this element, the government must prove that there was a link between the offer or giving of the thing of value and a specific official act for or because of which it was offered or given. It is not sufficient that the gratuity was offered or given because** *(name of public official)* **had authority over matters in which** *(name)* **had an interest, or that the gratuity was offered or given solely for social reasons or friendship.**

**The government, however, does not need to show that the gratuity influenced or was intended to influence the official act; it is sufficient if the gratuity was a reward for some future act that the public official would later take** *(and may already have determined to take)***, or for a past act that** *(he)(she)* **had already taken.**

**Comment**

Fifth Circuit § 2.14.

18 U.S.C. § 201(c)(1) provides that whoever, otherwise than as provided by law for the proper discharge of official duty,

> (A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official

commits a federal offense. The court should also give Instruction 6.18.201B1-1 (Bribery of a Public Official – "Public Official" Defined), Instruction 6.18.201B1-2 (Bribery of a Public Official – "Official Act" Defined), and Instruction 5.02 (Knowingly). Giving an illegal gratuity to a public official in violation of 18 U.S.C. § 201(c)(1)(A) may be a lesser included offense of the crime of bribing a public official in violation of 18 U.S.C. § 201(b)(1). *See* Instruction 6.18.201B1 (Bribery of a Public Official (18 U.S.C. § 201(b)(1)))).

In *United States v. Niederberger*, 580 F.2d 63 (3d Cir. 1978), the Third Circuit described the requirements of the statute:

> What is proscribed, simply put, is a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official, and he was in a position to use his authority in a manner which could affect the gift-giver.

580 F.2d at 69.

This provision of § 201 "requires a showing that something of value was given, offered, or promised to a public official . . . 'for or because of any official act performed or to be performed by such public official.'" *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404 (1999). In *Sun-Diamond*, the Court explained the difference between bribery and giving an illegal gratuity:

> The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a quid pro quo-a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.

526 U.S. at 404-05.

Merely giving a gratuity to an official to foster good will does not violate the statute. The government must prove that the defendant gave the gratuity to the official "for or because of" the official's position, and "not solely for reasons of friendship or social purposes." *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979). Furthermore, the gratuity must be linked to a specific official act or acts. *See Sun-Diamond*, 526 U.S. at 407-08. "[I]n order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *Sun-Diamond*, 526 U.S. at 414.

In *United States v. Holck*, 398 F. Supp.2d 338 (E.D. Pa. 2005), *aff'd sub nom. United States v. Kemp,* 500 F.3d 257 (3d Cir. 2007), the district court discussed whether *Sun-Growers* requires a specific temporal relationship between the gratuity and the official act. The district court focused on the decision of the D.C. Circuit in *United States v. Schaffer*, 183 F.3d 833 (D.C. Cir. 1999), which the defendants cited as requiring proof of such a relationship:

> On the surface, it might appear that *Schaffer* provides some persuasive authority for [the defendants'] temporal attenuation argument. However, there are two main reasons why this Court does not take it as such.
>
> First, as the D.C. Circuit recognized, the U.S. Supreme Court has clearly left the magnitude of the necessary link "in doubt." *Schaffer* is a D.C. Circuit opinion, which is obviously not binding in the courts of the Third Circuit. Moreover, research indicates that no other courts (including the Third Circuit) have cited to *Schaffer* for a specific principle related to "temporal attenuation;" nor have any courts generally opined on an appropriate temporal benchmark. As such, *Schaffer* is not only inapposite on the facts, it stands on its own in the legal landscape, and is far from "established" law that would control here.

> Second, and perhaps more important, a more nuanced reading of *Schaffer* than that offered by counsel for [defendants] suggests that *Schaffer* is better understood as a case about the knowledge--rather than the mere time frame--required to establish the required link. Schaffer was acquitted of the gratuity charges not simply because there was a long period of time between the gifts and the USDA's policy revisions, but, rather, because of a finding that there was no evidence that Schaffer knew or anticipated anything about those policy revisions (or any other decisions affecting Tyson within Espy's purview) at the time of the gift giving. *See Schaffer*, 183 F.3d at 833. If evidence had demonstrated that Schaffer had actually known about the potential USDA policy revisions, nothing in *Schaffer* says that the D.C. Circuit would have refused to affirm the jury's verdict merely because of significant temporal attenuation between the gifts and the actual policy revisions. Knowledge may or may not be a product of temporal attenuation (i.e., one could easily conceive of a situation where a lack of knowledge was due to something other than an issue of timing). The factual scenario in *Schaffer* happened to involve a question of knowledge that hinged on the timing of an outside event, but a case could just as easily turn on something else.

398 F. Supp. 2d at 353-54.

The court continued:

> [T]he appropriate question under conspiracy and bribery jurisprudence is not whether the favorable loans and [the public official's] official actions were greatly attenuated in time, but, rather, whether [the defendants] knew or anticipated anything when they made the favorable loans with regard to future acts of [the public official] (e.g., the NTI line of credit), or did [the public official's] actions regarding the NTI line of credit evidence a payback as consideration for their having made the loans. The actions of [the defendants] were not so temporally attenuated that the jury could not find their conduct with regard to both the loans and the NTI line of credit evidenced the scheme to corrupt [the public official].

398 F. Supp. 2d at 354.

## 6.18.201C1B Receiving Illegal Gratuity by a Public Official (18 U.S.C. § 201(c)(1)(B))

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with receiving a gratuity while a public official, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **was a public official** *(or a former public official)***;**

**Second: That** *(name)* **knowingly directly or indirectly** *(demanded) (sought) (received) (accepted) (agreed to receive or accept)* **something of value, and that this was not provided by law for the proper discharge of** *(name)***'s official duty; and**

**Third: That** *(name)* **did so** *(for) (because of)* **an official act** *(name) (had performed) (was going to perform)***. To establish this element, the government must prove that there was a link between the thing of value sought or received and a specific official act for or because of which it was sought or received. It is not sufficient that the gratuity was sought or received because** *(name)* **had authority over matters in which** *(name of donor)* **had an interest, or that the gratuity was offered or given solely for social reasons or friendship. The government,**

**however, does not need to show that the gratuity influenced or was intended to influence the official act; it is sufficient if the gratuity was a reward for some future act that** *(name)* **would later take** *(and may already have determined to take)***, or for a past act that** *(he)(she)* **had already taken.**

**Comment**

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 16-14 (Matthew Bender 2003).

18 U.S.C. § 201(c)(1)(B) provides that whoever, otherwise than as provided by law for the proper discharge of official duty,

> being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person

commits a federal offense. The court should also instruct the jury on the meaning of knowingly. *See* Instruction 5.02 (Knowingly)**.** In some cases, the court may also wish to give Instruction 6.18.201B1-1 (Bribery of a Public Official – "Public Official" Defined) and Instruction 6.18.201B1-2 (Bribery of a Public Official – "Official Act" Defined). Receiving an illegal gratuity while a public official in violation of 18 U.S.C. § 201(c)(1)(B) may be a lesser included offense of the crime of receiving a bribe by a public official in violation of 18 U.S.C. § 201(b)(2). *See* Instruction 6.18.201B2 (Receiving Bribe by Public Official (18 U.S.C. §201(b)(2))).

In *United States v. Niederberger*, 580 F.2d 63 (3d Cir. 1978), the Third Circuit described the requirements of the statute:

> What is proscribed, simply put, is a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official, and he was in a position to use his authority in a manner which could affect the gift-giver.

580 F.2d at 69.

In *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404 (1999), the Court explained the difference between bribery and giving an illegal gratuity:

> The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a quid pro quo-a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.

526 U.S. at 404-05. *See also Kemp*, 500 F.3d at 284. The gratuity must be linked to a specific official act or acts. *See Sun-Diamond*, 526 U.S. at 407-08. "[I]n order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *Sun-Diamond*, 526 U.S. at 414.

(revised 12/09)

## Chapter 6. Final Instructions: Elements Of Offenses

## Conspiracy (18 U.S.C. § 371)

**6.18.371A Conspiracy To Commit An Offense Against The United States Basic Elements (18 U.S.C. § 371)**

**Count** *(no.)* **of the indictment charges that on or about the___ day of _____, 2__, in the _____ District of _____,** *(name)* **agreed or conspired with one or more other persons to commit an offense***(s)* **against the United States, namely** *(describe the substantive offense(s))* **and that, to further the objective of the conspiracy, at least one member of the conspiracy committed at least one overt act,** *(*as *alleged in the indictment) (*as *I will describe to you)***.**

**It is a federal crime for two or more persons to agree or conspire to commit any offense against the United States, even if they never actually achieve their objective. A conspiracy is a kind of criminal partnership.**

**In order for you to find** *(name)* **guilty of conspiracy to commit an offense***(s)* **against the United States, you must find that the government proved beyond a reasonable doubt each of the following four (4) elements:**

**First: That two or more persons agreed to commit an offense***(s)* **against the United States, as charged in the indictment.** *(I have explained the elements of the offense(s) already.) (I will explain the elements of the offense(s) to you shortly.)***;**

**Second: That** *(name)* **was a party to or member of that agreement;**

**Third: That** *(name)* **joined the agreement or conspiracy knowing of its objective***(s)* **to commit an offense***(s)* **against the United States and intending to**

**join together with at least one other alleged conspirator to achieve** *(that) (those)* **objective***(s)***;that is, that** *(name)* **and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal***(s)* **or objective***(s)***, to commit an offense***(s)* **against the United States; and**

**Fourth: That at some time during the existence of the agreement or conspiracy, at least one of its members performed an overt act in order to further the objectives of the agreement.**

**I will explain each of these elements in more detail.**

**Comment**

*See* Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 2 *Federal Jury Practice and Instructions* (5th ed. 2000) [hereinafter O'Malley et al] §§ 31.01 - 31.03. For variations in other Circuits, *see* First Circuit § 4.03; Fifth Circuit § 2.20; Sixth Circuit §§ 3.01A & 3.01B; Seventh Circuit § 5.08; Eighth Circuit § 5.06A; Ninth Circuit § 8.16.

The general federal conspiracy statute, 18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The Third Circuit in *United States v. Rigas*, 605 F.3d 194, 203-12 (3d Cir. 2010), held that, under the double jeopardy clause prohibition of multiple prosecution for the "same offense," this statute creates only one offense – conspiracy. Thus, the statute does not establish conspiracy to commit any offense and conspiracy to defraud the United States as two separate offenses; agreeing to commit an offense or to defraud the United States are simply two alternative ways to commit the single § 371 offense.

This instruction is for conspiracies to commit an offense against the United States.

Instruction 6.18.371B should be used when the indictment charges a conspiracy to defraud the United States.

The Third Circuit has used a variety of words to describe the elements of a section 371 conspiracy, but these different articulations state essentially the same elements. *Compare United States v. Rankin*, 870 F.2d 109, 113 (3d Cir. 1989); *United States v. Shoup*, 608 F.2d 950, 956 (3d Cir. 1979) *with United States v. Uzzolino*, 651 F.2d 207, 214 (3d Cir. 1981); *United States v. Small*, 472 F.2d 818, 819 (3d Cir. 1971).

The elements and consequences of a conspiracy charge are defined in fair detail by the case law, because of the significant number of conspiracy prosecutions in the federal courts generally and within the Third Circuit more specifically. As a result, many aspects of conspiracy law need their own instruction, and we have addressed that need in the instructions that follow. In those instructions, alternative language is included to use depending on whether the conspiracy is to commit a federal offense or to defraud the United States.

**Instructions on the Object Offense(s).** In addition to instructing on the elements of conspiracy to commit an offense against the United States, the trial judge must also instruct on the elements of the substantive offense(s) that is (are) the object of the conspiracy. *See, e.g., United States v. Yasbin*, 159 F.2d 705 (3d Cir. 1947) ("An examination of the record in this case discloses that while the trial judge charged the jury as to the elements of the crime of conspiracy he did not instruct them as to the elements of the substantive offense involved in the conspiracy. Consequently the judgment of the conviction is reversed . . . ."). If the defendant is also charged with the substantive offense(s), the trial judge will already be explaining those elements in the instructions; if the substantive offense(s) is (are) not charged, the court must define the elements of the object offense(s) here.

**Specific Federal Conspiracy Statutes.** There are also specific federal statutes covering conspiracies to commit specific offenses. Some of these specific statutes do not require proof of an overt act. Indeed, the Third Circuit has noted that when "the language of the statute did not require an overt act. . . . The court should not infer such a requirement. *See Whitfield v. United States,* 543 U.S. 209, 213, 125 S.Ct. 687, 160 L.Ed.2d 611 (2005) ('[W]here Congress had omitted from the relevant conspiracy provision any language expressly requiring an overt act, the Court would not read such a requirement in the statute.')." *United States v. Fullmer*, 584 F.3d 132, 160 n.13 (3d Cir. 2009) (conspiracy to violate the Animal Enterprise Protection Act). Also *see, e.g.,* 21 U.S.C. § 846 (conspiracy to commit federal drug offenses; no overt act required); 18 U.S.C. § 1962(d) (RICO conspiracy; no overt act required). Instructions on these specific conspiracy statutes are in Chapter 6 of these Model Instructions. *See* Instructions 6.18.1962D (RICO – Conspiracy; Elements of the Offense); 6.21.846B (Controlled Substances – Conspiracy to (*Distribute*) (*Possess with Intent to Manufacture/Distribute*) (*Manufacture*) (*Possess*)).

**Criminal Responsibility for and Admissibility of Acts and Statements of Co-Conspirators.** Conspiracy also has consequences with respect to criminal responsibility for

substantive offenses, as well as the admissibility of acts and statements of co-conspirators. *See* Instructions 7.03 (Responsibility for Substantive Offenses Committed by Co-Conspirators (*Pinkerton* Liability), 7.04 (Withdrawal as a Defense to Substantive Offenses Committed by Co-Conspirators), and 6.18.371K (Acts and Statements of Co-Conspirators).

(Revised 11/10)

**6.18.371B Conspiracy "To Defraud the United States" – Basic Elements (18 U.S.C. § 371)**

**Count** *(no.)* **of the indictment charges that on or about the___ day of _____, 2__, in the _____ District of _____,** *(name)* **agreed or conspired with one or more other persons to defraud the United States and that, to further the objective of the conspiracy, one member of the conspiracy committed at least one overt act,** *(*as *alleged in the indictment) (*as *I will describe to you)***.**

**It is a federal crime for two or more persons to conspire or agree to defraud the United States or any of its agencies, even if they never actually achieve their objective. A conspiracy is a kind of criminal partnership.**

**In order for you to find** *(name)* **guilty of conspiracy to defraud the United States, you must find that the government proved beyond a reasonable doubt each of the following four (4) elements:**

**First: That two or more persons agreed "to defraud the United States," as charged in the indictment. "Defraud the United States" means to cheat the United States government or any of its agencies out of money or property. It also means to obstruct or interfere with one of the United States government's lawful functions, by deceit, craft, trickery, or dishonest means;**

**Second: That** *(name)* **was a party to or member of that agreement;**

**Third: That** *(name)* **joined the agreement or conspiracy knowing of its objective to defraud the United States and intending to join together with at**

**least one other conspirator to achieve that objective; that is, that *(name)* and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal*(s)* or objective*(s)*, to defraud the United States; and**

**Fourth: That at some time during the existence of the agreement or conspiracy, at least one of its members performed an overt act in order to further the objective of the agreement.**

**I will explain these elements in more detail.**

## Comment

This should be the first instruction on conspiracy when the charge is conspiracy to defraud the United States under 18 U.S.C. § 371. *See* the Comment to Instruction 6.18.371A.

For cases discussing the broad interpretation of "defraud the United States" stated in this instruction, *see, e.g., Hass v. Henkel*, 216 U.S. 462, 479 (1910); *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924); *Glasser v. United States*, 315 U.S. 60, 66 (1942); *Bridges v. United States*, 346 U.S. 209, 221, n. 19 (1953). The Supreme Court held in *United States v. Tanner*, 483 U.S. 107, 129-30 (1987), however, that a conspiracy to defraud a third party that merely received financial assistance and some supervision from the United States was not itself a conspiracy "to defraud the United States." Except under unusual circumstances, *see Bridges v. United States*, 346 U.S. at 215-224, fraud is an essential element of the offense. *United States v. Vazquez*, 319 F.2d 381, 384 (3d Cir. 1963).

(revised 12/09)

**6.18.371C Conspiracy – Existence of an Agreement**

**The first element of the crime of conspiracy is the existence of an agreement. The government must prove beyond a reasonable doubt that two or more persons knowingly and intentionally arrived at a mutual understanding or agreement, either spoken or unspoken, to work together to achieve the overall objective of the conspiracy,** *[to commit the offense(s) of (state offenses)] [to defraud the United States]***.**

**The government does not have to prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding. The government also does not have to prove that all the members of the conspiracy directly met, or discussed between themselves their unlawful objective***(s)***, or agreed to all the details, or agreed to what the means were by which the objective***(s)* **would be accomplished. The government is not even required to prove that all the people named in the indictment were, in fact, parties to the agreement, or that all members of the alleged conspiracy were named, or that all members of the conspiracy are even known. What the government must prove beyond a reasonable doubt is that two or more persons in some way or manner arrived at some type of agreement, mutual understanding, or meeting of the minds to try to accomplish a common and unlawful objective.**

**You may consider both direct evidence and circumstantial evidence in deciding whether the government has proved beyond a reasonable doubt that an**

**agreement or mutual understanding existed. You may find the existence of a conspiracy based on reasonable inferences drawn from the actions and statements of the alleged members of the conspiracy, from the circumstances surrounding the scheme, and from evidence of related facts and circumstances which prove that the activities of the participants in a criminal venture could not have been carried out except as the result of a preconceived agreement, scheme, or understanding.**

*[The indictment charges a conspiracy to commit several federal crimes. The government does not have to prove that the alleged conspirators agreed to commit all of these crimes. The government, however, must prove that they agreed to commit at least one of the object crimes, and you must unanimously agree on which crime. You cannot find (name) guilty of conspiracy unless you unanimously agree that the same federal crime(s) was (were) the objective(s) of the conspiracy. It is not enough if some of you agree that one of the charged crimes was the objective of the conspiracy and others agree that a different crime was the objective of the conspiracy.]*

**Comment**

*See* 2 O'Malley et al, supra, § 31.04. For variations in other Circuits, *see* Sixth Circuit § 3.02; Eighth Circuit § 5.06B.

Agreement is the essential element of conspiracy and the evil at which the crime of conspiracy is directed. *See, e.g., Iannelli v. United States*, 420 U.S. 770, 777 n. 10 (1975); *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir. 1989). The government need not present direct evidence to prove the agreement, and can prove it with circumstantial evidence. *United States v. Fullmer*, 584 F.3d 132, 160 (3d Cir. 2009); *United States v. McKee,* 506 F.3d 225, 238 (3d Cir.2007). Numerous Third Circuit cases have discussed what the government is and is not required to prove in order to establish the existence of an agreement. *See, e.g., United States v.*

*Basroon*, 38 Fed. Appx. 772 (3d Cir. 2002); *United States v. Appelwhaite*, 195 F.3d 679 (3d Cir. 1999); *United States v. Messerlian*, 832 F.2d 778 (3d Cir. 1987); *United States v. Addonizio*, 449 F.2d 100 (3d Cir. 1971); *United States v. Frank*, 290 F.2d 195 (3d Cir. 1961); *United States v. Lester*, 282 F.2d 750 (3d Cir. 1960).

If the indictment charges an agreement to commit several offenses, the bracketed final paragraph should be given.

(revised 12/09)

**6.18.371D Conspiracy – Membership in the Agreement**

**If you find that a criminal agreement or conspiracy existed, then in order to find** *(name)* **guilty of conspiracy you must also find that the government proved beyond a reasonable doubt that** *(name)* **knowingly and intentionally joined that agreement or conspiracy during its existence. The government must prove that** *(name)* **knew the goal***(s)* **or objective***(s)* **of the agreement or conspiracy and voluntarily joined it during its existence, intending to achieve the common goal***(s)* **or objective***(s)* **and to work together with the other alleged conspirators toward** *(that) (those)* **goal***(s)* **or objective***(s)***.**

**The government need not prove that** *(name)* **knew everything about the conspiracy or that** *(he) (she)* **knew everyone involved in it, or that** *(he) (she)* **was a member from the beginning. The government also does not have to prove that** *(name)* **played a major or substantial role in the conspiracy.**

**You may consider both direct evidence and circumstantial evidence in deciding whether** *(name)* **joined the conspiracy, knew of its criminal objective***(s)***, and intended to further the objective***(s)***. Evidence which shows that** *(name)* **only knew about the conspiracy, or only kept "bad company" by associating with members of the conspiracy, or was only present when it was discussed or when a crime was committed, is not sufficient to prove that** *(name)* **was a member of the conspiracy even if** *(name)* **approved of what was happening or did not object to it. Likewise,**

**evidence showing that *(name)* may have done something that happened to help a conspiracy does not necessarily prove that *(he) (she)* joined the conspiracy. You may, however, consider this evidence, with all the other evidence, in deciding whether the government proved beyond a reasonable doubt that *(name)* joined the conspiracy.**

**Comment**

*See* 2 O'Malley et al, supra, § 31.05. For variations in other Circuits, *see* Sixth Circuit § 3.03; Eighth Circuit § 5.06b.

Some cases have suggested that once the existence of a conspiracy is established, only "slight evidence" is needed to allow the jury to find that the defendant was a member. *See, e.g., United States v. Kates*, 508 F.2d 308, 310 n. 4 (3d Cir. 1975); *United States v. Weber*, 437 F.2d 327, 336 (3d Cir. 1970). This idea is not included in the instruction because of concern that it would dilute the government's burden of proving beyond a reasonable doubt that the defendant was a member of the conspiracy. Also *see United States v. Cooper*, 567 F.2d 252, 255 (3d Cir. 1977) ("One may not be convicted of conspiracy solely for keeping bad company.").

**6.18.371E Conspiracy – Mental States**

**In order to find** *(name)* **guilty of conspiracy you must find that the government proved beyond a reasonable doubt that** *(name)* **joined the conspiracy knowing of its objective***(s)* **and intending to help further or achieve** *(that) (those)* **objective***(s)***. That is, the government must prove: (1) that** *(name)* **knew of the objective***(s)* **or goal***(s)* **of the conspiracy, (2) that** *(name)* **joined the conspiracy intending to help further or achieve that** *(those)* **goal***(s)* **or objective***(s)***, and (3) that** *(name)* **and at least one other alleged conspirator shared a unity of purpose toward** *(that) (those)* **objective***(s)* **or goal***(s)***.**

**You may consider both direct evidence and circumstantial evidence, including** *(name)***'s words or conduct and other facts and circumstances, in deciding whether** *(name)* **had the required knowledge and intent.** *[For example, evidence that (name) derived some benefit from the conspiracy or had some stake in the achievement of the conspiracy's objective(s) might tend to show that (name) had the required intent or purpose that the conspiracy's objective(s) be achieved.]*

**Comment**

Neither O'Malley et al, supra, nor the other Circuits include a separate instruction on the required state of mind element for conspiracy. The trial judge may feel that it is not necessary to give this instruction, in addition to instructions on the Basic Elements (Instructions 6.18.371A and 6.18.371B), Existence of an Agreement (Instruction 6.18.371C), and Membership in the Agreement (Instruction 6.18.371D), all of which reference the mental state requirements.

**Mental State Requirement for Conspiracy Defined.** In *United States v. Korey*, 472

F.3d 89 (3d Cir. 2007) (conspiracy to distribute a controlled substance under 18 U.S.C. § 846), the Third Circuit stated that, "'[o]ne of the requisite elements the government must show in a conspiracy case is that the alleged conspirators shared a "unity of purpose", the intent to achieve a common goal, and an agreement to work together toward the goal.' " 472 F.3d at 93 (quoting *United States v. Cartwright*, 359 F.3d 281, 286 (3d Cir. 2004), in turn quoting *United States v. Wexler*, 838 F.2d 88, 90-91 (3d Cir.1988)). In *Korey*, the court held that the trial judge erred by instructing the jury that it could convict if it found merely that the defendant agreed to accept cocaine in payment for killing the victim, without clearly instructing that the jury must find that the government proved a unity of purpose between defendant and his alleged conspirator.

The Supreme Court noted in *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n. 20 (1978), that, "[i]n a conspiracy, two different types of intent are generally required – the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy. *See* W. LaFave & A. Scott, Criminal Law 464- 465 (1972)." Also *see, e.g., United States v. Shoup*, 608 F.2d 950, 956 n. 9 (3d Cir. 1979) (quoting *United States Gypsum*). Knowingly facilitating a conspiracy or the commission of the objective of a conspiracy is not enough alone to make one guilty of conspiracy. *United States v. Carlucci*, 288 F.2d 691 (3d Cir 1961); *United States v. Giuliano*, 263 F.2d 582, 583 (3d Cir. 1959) (a legitimate vendor's sale of supplies to conspirators was insufficient to convict the vendor of conspiracy). In *United States v. Carbo*, the Third Circuit noted that "conspiracy and aiding and abetting both require that the defendant specifically intend to further the substantive offense. . . ." 572 F.3d 112, 116 n. 2 (3d Cir. 2009) (citing *Salinas v. United States*, 522 U.S. 52, 65 (1997), and *United States v. Dixon,* 658 F.2d 181, 189 n.17 (3d Cir.1981)). However, specific intent or purpose may be inferred from knowledge if the inference is reasonable under the circumstances. *Ingram v. United States*, 360 U.S. 672, 680 (1959) ("What was said in Direct Sales Co. v. United States on behalf of a unanimous Court is of particular relevance here: 'Without the knowledge, the intent cannot exist. . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes," quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943).); *United States v. Falcone*, 311 U.S. 205 (1940); *People v. Lauria*, 251 Cal App.. 471, 59 Cal. Rptr. 628 (1967). Courts have also observed that receiving a benefit from or having a stake in the object of a conspiracy is evidence of intent, but is not necessary to prove intent. *See, e.g., Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943); *United States v. Pedroni*, 45 Fed. Appx. 103, 108 (3d Cir. 2002) (not precedential); *United States v. Shoup*, 608 F.2d at 957.

In *United States v. Brodie*, 403 F. 3d 123, 147 (3d Cir. 2005), the Third Circuit also stated that, "the government, in proving a conspiracy under 18 U.S.C. § 371, was required to prove at least the degree of criminal intent necessary for the underlying substantive offense of violating the American Cuban embargo. *See United States v. Feola,* 420 U.S. 671, 686. . . ." The mental state required for the underlying offense in *Brodie* was specific intent, which "[i]n the context of [that] offense ... demands that the government prove that a defendant had general knowledge of

the law which forbade his actions and acted with the specific intent to circumvent that law." *Brodie*, 403 F.3d at 147.

(revised 12/09)

**6.18.371F Conspiracy – Overt Acts**

**With regard to the fourth element of conspiracy – overt acts – the government must prove beyond a reasonable doubt that during the existence of the conspiracy at least one member of the conspiracy performed at least one of the overt acts described in the indictment, for the purpose of furthering or helping to achieve the objective*(s)* of the conspiracy.**

**The indictment alleges certain overt acts. The government does not have to prove that all of these acts were committed or that any of these acts were themselves illegal. Also, the government does not have to prove that *(name)* personally committed any of the overt acts. The government must prove beyond a reasonable doubt that at least one member of the conspiracy committed at least one of the overt acts alleged in the indictment and committed it during the time that the conspiracy existed, for the purpose of furthering or helping to achieve the objective*(s)* of the conspiracy. You must unanimously agree on the overt act that was committed.**

**Comment**

*See* 2 O'Malley et al, supra, § 31.07. For variations in other Circuits, *see* Sixth Circuit § 3.04; Eighth Circuit § 5.06D.

The overt acts must have been committed during the existence of the conspiracy. When the defense argues that this temporal connection has not been proved, the court should be careful to instruct that the overt act must have been committed during the conspiracy, not before its formation or after its termination.

A single overt act by any member of the conspiracy is sufficient to satisfy this element, *United States v. Nelson*, 852 F.2d 706, 713 (3d Cir. 1988 ); *United States v. Kapp*, 781 F.2d

1008, 1012 (3d Cir. 1986), as long as the act was committed to further the conspiracy and tended towards that end. *See, e.g., United States v. Small*, 472 F.2d 818, 819 (3d Cir. 1972). The *Pinkerton* rule of co-conspirator responsibility applies to overt acts, as it does to substantive offenses. *See* Instruction 6.18.371K (Conspiracy - Acts and Statements of Co-Conspirators). Acts as innocent as writing a letter or talking on the telephone may constitute sufficient overt acts. *United States v. Nelson*, 852 F.2d at 706, 713. Also *see, e.g., United States v. Braverman*, 317 U.S. 49, 53 (1942); *United States v. Adamo*, 534 F.2d 31, 39 (3d Cir. 1976).

The government may satisfy the overt act element by proving "overt acts not listed in the indictment, so long as there is no prejudice to the defendants thereby." *United States v. Schurr*, 794 F.2d 903, 908 n. 4 (3d Cir. 1986); *United States v. Adamo*, 534 F.2d at 39 (slight differences in the dates of overt acts as proven compared to those alleged).

**Failure to Act as Overt Act.** A failure to act or an omission can be an overt act, where the co-conspirator who failed to act had a legal duty to perform the act and he or she omitted performance in order to further the achievement of the objectives of the conspiracy. *See, e.g., United States v. Curran*, 20 F.3d 560 (3d Cir. 1994) (conspiracy conviction vacated where jury misled into believing defendant acted unlawfully by omitting performance of an act that he was under no legal duty to perform). When the indictment alleges failure to act or omission as an overt act, Instruction 5.10 should be given.

**Specific Federal Conspiracy Statutes That Do Not Require An Overt Act.** Commission of an overt act is an element of an 18 U.S.C. § 371 conspiracy, but there are other, specific conspiracy statutes that do not require an overt act. *See United States v. Fullmer*, 584 F.3d 132, 160 n.13 (3d Cir. 2009) (quoting *Whitfield v. United States*, 543 U.S. 209, 213 (2005) ("[W]here Congress had omitted from the relevant conspiracy provision any language expressly requiring an overt act, the Court would not read such a requirement in the statute.")). *See, e.g.,* 18 U.S.C. § 1962(d) (RICO conspiracy); 21 U.S.C. § 846 (conspiracy to commit controlled substance offenses).

(revised 12/09)

## 6.18.371G Conspiracy – Success Immaterial

**The government is not required to prove that any of the members of the conspiracy were successful in achieving any or all of the objective*(s)* of the conspiracy. You may find *(name)* guilty of conspiracy if you find that the government proved beyond a reasonable doubt the elements I have explained, even if you find that the government did not prove that any of the conspirators actually** *[committed any other offense against the United States] [defrauded the United States]***. Conspiracy is an criminal offense separate from the offense*(s)* that *(was) (were)* the objective*(s)* of the conspiracy; conspiracy is complete without the commission of** *(that) (those)* **offense*(s)*.**

**Comment**

*See* 2 O'Malley et al, supra, § 31.08. For variations in other Circuits, *see* Sixth Circuit § 3.13; Eighth Circuit § 5.06E.

"The crime of conspiracy is separate and distinct from the related substantive offense." *United States v. Watkins*, 339 F.3d 167, 178 (3d Cir. 2003). *See United States v. Uzzolino*, 651 F.2d 207 (3d Cir. 1981) (defendant acquitted of embezzlement but convicted of conspiracy to embezzle pension funds). Commission of the substantive offense that was the objective of the conspiracy is not a prerequisite to conviction of conspiracy. *United States v. Shoup*, 608 F.2d 950, 956 (3d Cir. 1979). Although there are no Third Circuit cases on this precise point, the same would be true for defrauding the United States; that is, a defendant can be convicted of conspiracy to defraud the United States even though the United States was not defrauded.

The Model Jury Instructions in the Sixth Circuit include the following instruction, but there are no Third Circuit cases on this point:

> § 3.13 Impossibility Of Success
>
> One last point about conspiracy. It is no defense to a conspiracy charge that success was impossible because of circumstances that the defendants did not know about.

This means that you may find the defendants guilty of conspiracy even if it was impossible for them to successfully complete the crime that they agreed to commit.

**6.18.371H Conspiracy – Single or Multiple Conspiracies**

**The indictment charges that** *(name)* **and the other alleged co-conspirators were all members of one single conspiracy** *[to commit (state offense(s)] [to defraud the United States]*. *(Name)* **has argued that there were really two** *[or more]* **separate conspiracies** *[one between _____ to commit (state offense(s)), and another between _____ to commit (state offense(s))]*. **Whether a single conspiracy or multiple conspiracies exist is a question of fact that you must decide.**

**In order to find** *(name)* **guilty of the conspiracy charged in the indictment, you must find that the government proved beyond a reasonable doubt that** *(name)* **was a member of that conspiracy. If the government failed to prove that** *(name)* **was a member of the conspiracy charged in the indictment, then you must find** *(name)* **not guilty of conspiracy, even if you find that there were multiple conspiracies and that** *(name)* **was a member of a separate conspiracy other than the one charged. However, proof that** *(name)* **was a member of some other conspiracy would not prevent you from also finding** *(him) (her)* **guilty of the conspiracy charged in the indictment, if you find that the government proved beyond a reasonable doubt that** *(name)* **was a member of the conspiracy charged.**

**In deciding whether there was one single conspiracy or more than one conspiracy, you should concentrate on the nature of the agreement proved by the evidence. To prove a single conspiracy, the government must prove beyond a**

**reasonable doubt that each of the alleged members or conspirators agreed to participate in what *(he) (she)* knew or should have known was a single group activity directed toward *(a)* common objective*(s)*. The government must prove that there was a single agreement on *(an)* overall objective*(s)*.**

**Multiple conspiracies are separate agreements operating independently of each other. However, a finding of a master conspiracy that includes other, sub-schemes does not constitute a finding of multiple, unrelated conspiracies. A single conspiracy may exist when there is a continuing core agreement that attracts different members at different times and which involves different sub-groups committing acts in furtherance of an overall objective.**

**In determining whether a series of events constitutes a single conspiracy or separate and unrelated conspiracies, you should consider whether there was a common goal among the alleged conspirators; whether there existed common or similar methods; whether and to what extent alleged participants overlapped in their various dealings; whether and to what extent the activities of the alleged conspirators were related and interdependent; how helpful each alleged coconspirator's contributions were to the goals of the others; and whether the scheme contemplated a continuing objective that would not be achieved without the ongoing cooperation of the conspirators.**

**A single conspiracy may exist even if all the members did not know each other, or never sat down together, or did not know what roles all the other members**

**would play. A single conspiracy may exist even if different members joined at different times, or the membership of the conspiracy changed over time. Similarly, there may be a single conspiracy even though there were different sub-groups operating in different places, or many acts or transactions committed over a long period of time. You may consider these things in deciding whether there was one single conspiracy or more than one conspiracy, but they are not necessarily controlling. What is controlling is whether the government has proved beyond a reasonable doubt that there was one overall agreement on *(a)* common objective*(s)*.**

**Comment**

*See* 2 O'Malley et al, supra, § 31.09. For variations in other Circuits, *see* Fifth Circuit § 2.21; Sixth Circuit §§ 3.08 & 3.09; Eighth Circuit § 5.06G; Ninth Circuit § 8.17.

**Variances.** Defendants charged in an indictment alleging a single conspiracy often argue that the evidence actually proved multiple conspiracies and that they were a member of some conspiracy other than the one charged. Where a single conspiracy is alleged in the indictment, there may be a fatal variance if the evidence at trial proves only the existence of multiple, separate and independent conspiracies. *See, e.g., United States v. Kotteakos*, 328 U.S. 750, 757-58 (1946); *United States v. Kemp*, 500 F. 3d 257, 287 (3d Cir. 2007); *United States v. Perez*, 280 F.3d 318, 345-46 (3d Cir. 2002); *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir.1989) (citing *United States v. Smith*, 789 F.2d 196, 200 (3d Cir. 1986)). In *United States v. Kemp*, 500 F. 3d 257, 287 (3d Cir. 2007) (holding that although there was a variance, the defendants failed to demonstrate prejudice), the Third Circuit acknowledged that, " 'A conviction must be vacated when (1) there is a variance between the indictment and the proof presented at trial and (2) the variance prejudices a substantial right of the defendant.' *United States v. Kelly,* 892 F.2d [at] 258. . . . ." Also *see, e.g., United States v. Kotteakos*, 328 U.S. at 757-58; *United States v. Daraio*, 445 F.3d 253, 259-64 (3d Cir. 2006) (discussing the similarities and differences between a constructive amendment of an indictment and a variance). The Third Circuit in *Kemp* also noted that, "Our jurisprudence distinguishes between challenges to the sufficiency of the evidence, in which the appellant claims that the government failed to prove an essential element of conspiracy, and variance claims, in which the appellant argues that the government proved multiple conspiracies instead of the one charged in the indictment." 500 F.3d at 287 n.18.

**Determining Whether Single Conspiracy or Multiple Conspiracies.** In *United States*

*v. Kelly*, 892 F.2d 255, 258 (3d Cir.1989), the Third Circuit discussed the analysis to use in determining a single rather than multiple, separate conspiracies:

> We will employ a three-step inquiry to determine whether a series of events constitutes a single conspiracy or separate and unrelated conspiracies. *United States v. DeVarona,* 872 F.2d 114 (5th Cir.1989). First, we examine whether there was a common goal among the conspirators. *DeVarona,* 872 F.2d at 118. Second, we look at the nature of the scheme to determine whether "the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators. *DeVarona,* 872, F.2d at 119 (*quoting United States v. Perez,* 489 F.2d 51, 62 (5th Cir.1973), *cert. denied,* 417 U.S. 945 (1974)). Third, we examine the extent to which the participants overlap in the various dealings. *DeVarona,* 872 F.2d at 118.

Also *see, e.g., United States v. Kemp,* 500 F. 3d 257, 287 (3d Cir. 2007) (quoting *Kelly*).

The Third Circuit recognized in *United States v. Hoffecker*, 530 F.3d 137, 174 (3d Cir. 2008), that, "'[i]f a defendant asks for a charge on multiple conspiracies and there is sufficient evidence to support such an instruction, the failure to grant the request can be reversible error,' *United States v. Curran,* 20 F.3d 560, 572 (3d Cir.1994), but that principle is inapplicable here because the evidence did not support the instruction." The court held that, "[d]espite the complexity of the scheme in this case, the evidence could not support a conclusion that there had been a conspiracy other than the one charged. All of the business entities and divisions in labor existed to advance the single conspiracy. . . . Moreover, the District Court gave a clear instruction that the jury only could convict Hoffecker if it found that he knowingly and willingly joined the single charged conspiracy." *Id.*

In *United States v. Kemp*, the Third Circuit held that the evidence failed to prove the single conspiracy charged in the indictment, agreeing with the defendants' argument "that the government charged a hub-and-spokes conspiracy but failed to prove the existence of a rim connecting the spokes." 500 F.3d at 287-88. The Court noted that this analysis was based on the seminal Supreme Court case *United States v. Kotteakos*, 328 U.S. 750, 754-55 (1946). In *Kotteakos*, the indictment charged one single conspiracy among the defendants, but the Supreme Court held that there was a fatal variance between the evidence and the indictment, because the evidence proved multiple, separate conspiracies (which the government had conceded), and the defendant was prejudiced by the variance (which the government did not concede). The evidence against the alleged co-conspirators was similar, showing that they had all transacted illegal business with the same person, but it also showed that the defendants had no relationship with or connection to each other except for their similar, but independent illegal business dealings with the same person. The Supreme Court concluded that the evidence showed "at least eight, and perhaps more, separate and independent groups, none of which had any connection with any other, though all dealt independently with Brown as their agent." The *Kotteakos* Court used the "rim-less wheel" metaphor, explaining that the pattern shown was "that of separate spokes meeting at a common center [or hub]," but without the rim of the wheel to enclose the spokes and prove one overall conspiracy. 328 U.S. at 755.

The Supreme Court later observed in *Blumenthal v. United States*, 332 U.S. 539, 558 (1948), "Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan." Also *see United States v. Kemp*, 500 F.3d at 288, (quoting *Blumenthal*). The Supreme Court in *Blumenthal* then distinguished *Kotteakos* and held that the evidence in the case before it did prove that all five defendants joined a single conspiracy. The Court in *Blumenthal* reasoned:

> We think that in the special circumstances of this case the two agreements were merely steps in the formation of the larger and ultimate [sic] more general conspiracy. . . . The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal.
>
> The case therefore is very different from the facts admitted to exist in the Kotteakos case, [where] no two of those agreements were tied together as stages in the formation of a large all-inclusive combination, all directed to achieving a single unlawful end or result.

332 U.S. at 557-59.

In *Kemp*, the Third Circuit observed with respect to *Blumenthal*, "the Court noted that all the conspirators 'knew of and joined in the overriding scheme' and 'sought a common end' . . ., so that 'the several agreements were essential and integral steps.' " 500 F.3d at 288, quoting *Blumenthal*, 332 U.S. at 559. *Kemp* continued, "The contrast between *Kotteakos* and *Blumenthal* helps us to determine whether an impermissible variance has occurred. As this Court has noted, the Government may not charge 'multiple unrelated conspiracies,' but it can charge a 'master conspiracy [with] more than one subsidiary scheme.' *United States v. Kenny,* 462 F.2d 1205, 1216 (3d Cir.1972); *see also United States v. Chandler,* 388 F.3d 796, 811 (11th Cir.2004) (stating that 'although each of these alleged spoke conspiracies had the same goal, there was no evidence that this was a *common* goal')." 500 F.3d at 288.

In holding that the evidence in *Kemp* failed to prove the single conspiracy charged in the indictment, the Third Circuit reasoned, "First, . . . the government failed to present evidence that they either knew or should have known about [other alleged co-conspirators'] activities. . . . Nor is this the type of conspiracy that *must* have had other members; it would have been perfectly reasonable for [the defendants] to have believed that they were doing business with only Kemp

and White. . . . This may be contrasted with *Blumenthal,* where . . . [t]he Court held that while 'each salesman aided in selling only his part,'. . . they could nevertheless form part of a single conspiracy, because they 'knew or must have known that others unknown to them were sharing in so large a project.' " *Id.* at 288-89, quoting 332 U.S. at 541, 558-59. The court in *Kemp* concluded on this point that, "given the absence of any evidence to the contrary, . . . the government failed to prove that [defendants] were aware of the existence of the other spokes." *Id.* at 289.

The *Kemp* court also reasoned, "Second, . . . [the defendants'] activities and those of the other spokes were neither interdependent nor mutually supportive. In evaluating interdependence, we consider how helpful one individual's contribution is to another's goals. . . . We reiterate that interdependence serves as 'evidence of an agreement,' that is, it helps establish whether the alleged coconspirators are 'all committed to the same set of objectives in a single conspiracy.'" *Id.* (citations omitted). The court then observed that "Chain-shaped conspiracies present the classic examples of interdependence," *id.* at 289, and discussed several cases within and outside the Third Circuit as examples of this point. *Id.* at 289-90 (discussing *United States v. Perez*, 280 F.3d 318, 347 (3d Cir. 2002) ("two drug sellers and a drug smuggler were interdependent . . . because '[the dealers] depended on a scheme involving [the smuggler and the middleman].' "); *United States v. Kenny*, 462 F.2d 1205, 1217 (3d Cir 1972) ("[w]hile the scheme involved a diverse group of individuals, the evidence showed 'a determined group repeatedly cooperated to achieve a common purpose of self-enrichment by extracting kickbacks.'"); *United States v. Greenridge*, 495 F.3d 85 (3d Cir. 2007) ("finding a single conspiracy where depositors of stolen and alterd checks 'did not represent independent customers, but were an integral part of this [pyramidal] "corporate" scheme' "); *United States v. Portela,* 167 F.3d 687, 697 (1st Cir.1999) (explaining that "a single conspiracy [exists] if the continued health of the trafficking and distribution network necessarily depends on the continued efforts of multiple suppliers"); *United States v. Evans,* 970 F.2d 663, 670 (10th Cir.1992) ("Interdependence is present when each alleged coconspirator ... depend[s] on the operation of each link in the chain to achieve the common goal.")).

The Third Circuit in *Kemp* also discussed *United States v. Smith*, 82 F.3d 1261 (3d Cir. 1996), where the court "concluded that there was no interdependence between two kickback schemes because '[t]he co-conspirators in each state derived no benefit, financial or otherwise, from Smith's activities in the other state, nor was the success of the conspiracy in one state contingent on the success of the conspiracy in the other.' " 530 F.3d at 290, quoting 82 F.3d at 1271. In *Smith*, the Third Circuit had held that, for Double Jeopardy purposes, the evidence showed not one single conspiracy but multiple, separate conspiracies. *Compare United States v. Rigas*, 605 F.3d 194, 212-19 (3d Cir. 2010) (using the same analysis as it used in *Kemp* and *Smith*, but considering additional factors such as location, temporal overlap, overlap of personnel, overt acts, and the role played by the defendant, the Third Circuit held that a conspiracy to commit multiple fraud offenses, charged and tried in the Southern District of New York, was for double jeopardy, multiple prosecution purposes, the same offense as a conspiracy to defraud the United States which was charged in an indictment in the Middle District of Pennsylvania). The *Smith* court stated, "Following the law established in *Kotteakos* and

*Blumenthal,* in numerous variance cases we have drawn a distinction between multiple and single conspiracies based upon the existence of a commitment to a single set of objectives." 789 F.2d at 1270 (citations omitted).

> The ultimate [question] is ... whether two groups of conspirators alleged by the government to have entered separate agreements are actually all committed to the same set of objectives in a single conspiracy. [Proof] of a single conspiracy will be made when the record reveals a degree of participant overlap, which together with other factors, permits an inference that members of each alleged conspiracy were aware of the activities and objectives of the other conspiracy and had some interest in the accomplishment of those objectives. When, as here, [the government] claims that there was a single hub and spoke conspiracy despite the presence of spoke conspirators who lacked knowledge of each other's activities, a factfinder will be unable to infer the existence of but one conspiracy in the absence of evidence that the activities of the spoke participants were, to some degree, interdependent or mutually supportive.

789 F.2d at 1271 (citations omitted). The Third Circuit also noted Justice Stevens' observation in *United States v. Broce,* that "the fact that there may be an ongoing, core conspiracy is not inconsistent with the prosecution of a member of that conspiracy for separate illegal agreements with others entered into in furtherance of the overall objective of the core conspiracy." *Id.* at 1272-73, citing 488 U.S. 563, 580-81 (Stevens, J., concurring). Also *see, e.g., United States v. Castro*, 776 F.2d 1118, 1124 n. 4 (3d Cir. 1985) (noting that, "[t]he 'wheel' conspiracy describes an arrangement of co-conspirators around a central figure, or 'hub,' who deals separately with peripheral figures, or 'spokes.' Each of the spokes is a member of the conspiracy even though they may not have any direct relations with one another. These peripherial [sic] members must have been aware of one another and have done something in furtherance of a single, illegal enterprise, however, or it is said that the conspiracy alleged lacks 'the rim of the wheel to enclose the spokes.'" Citing *Kotteakos* and *Blumenthal*).

In *United States v. Boyd*, 595 F.2d 120 (3d Cir. 1978), the Third Circuit explained:

> The gist of a criminal conspiracy, the agreement between co-conspirators, may continue over an extended period of time and involve numerous transactions. Parties may join the conspiracy after its inception, and may withdraw and terminate their relationship with the conspiracy prior to its completion. The fact that conspirators individually or in groups perform different tasks in pursuing the common goal does not, by itself, necessitate a finding of several distinct conspiracies. And even if a small group of co-conspirators are at the heart of an unlawful agreement, others who knowingly participate with the core members and others to achieve a common goal may be members of a single conspiracy.
>
> It follows from these basic principles that the government, without committing a variance between a single conspiracy charged in an indictment and its proof at trial, may establish the existence of a continuing core conspiracy which attracts different members

at different times and which involves different sub-groups committing acts in furtherance of the overall plan.

595 F.2d at 123 (citations omitted). *See also United States v. Lee*, 359 F.3d 194, 207 (3d Cir. 2004), quoting *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir. 1989), and *United States v. Smith*, 789 F.2d 196, 200 (3d Cir. 1986) ("[A] finding of a master conspiracy with subschemes does not constitute a finding of multiple, unrelated conspiracies."); *United States v. Salerno*, 485 F.2d 260, 262 (3d Cir. 1973) (defendants who provided counterfeit securities on only a few occasions to a core conspiracy which engaged in persistent securities fraud could be convicted of aiding and abetting the conspiracy).

Also *compare United States v. Hoffecker,* 530 F.3d at 174 (evidence did not show multiple conspiracies despite the complexity of the scheme, where all of the business entities and divisions in labor existed to advance the single conspiracy to dupe victims into investing in a particular company); *United States v. DiPasquale*, 740 F.2d 1282 (3d Cir. 1984) (single conspiracy to collect debts through extortion, although multiple extortionate acts committed by varying extortionists over extended period of time, where defendants pooled resources, shared a common space, and used stories of each others' actions to persuade later victims); *United States v. Lester*, 282 F.2d 750, 753 (3d Cir. 1960) (single conspiracy to transport stolen property in interstate commerce, where defendant agreed to buy stolen geophysical map with a kick back for successful wells after original conspirator stole it and then original conspirator stole additional maps; conspiracy "committed whether or not the parties comprehend its entire scope, whether they act separately or together, by the same or different means, known or unknown to some of them.") *with United States v. Camiel*, 689 F.2d 31 (3d Cir. 1982) (no single unitary patronage scheme involving successive chairs of a political party though both used same techniques to secure no-show jobs for party loyalists; reasonable to infer separate conspiracies defined by each chair's period in the position).

(Revised 11/10)

### 6.18.371I Conspiracy – Duration

**A conspiracy ends when the objectives of the conspiracy have been achieved or when all members of the conspiracy have withdrawn from it. However, a conspiracy may be a continuing conspiracy and if it is, it lasts until there is some affirmative showing that it has ended or that all its members have withdrawn. A conspiracy may be a continuing one if the agreement includes an understanding that the conspiracy will continue over time. Also, a conspiracy may have a continuing purpose or objective and, therefore, may be a continuing conspiracy.**

**Comment**

For variations in other Circuits, *see* Sixth Circuit § 3.12.

This instruction ordinarily is not necessary in a conspiracy case. It should be given only where the facts present the possibility that a conspiracy terminated before events at issue in the case.

In *United States v. DiPasquale*, 740 F.2d 1282 (3d Cir. 1984), extortionate collections of claimed debts arising out of the conspirators' drug transactions demonstrated "a continuity of purpose and a continued performance of acts," and the lapse of a year's time between incidents was not sufficient to prove that the conspiracy had ended. 740 F.2d at 1290, citing *United States v. Steele*, 685 F. 2d 793, 801 (3d Cir.), *cert. denied,* 459 U.S. 908 (1982) (where the purpose of a conspiracy to bribe and defraud could not continue after the scheme was disclosed, the conspiracy terminated conclusively on the date when it was disclosed to officials with authority to order a prosecution) and *United States v. Mayes*, 512 F.2d 637, 642-43 (6th Cir.) (Sixth Circuit stated, "Nor does the fact that the conspiracy continued over a long period of time and contemplated the commission of many illegal acts transform the single conspiracy into several conspiracies.... A conspiracy is completed when the intended purpose of the conspiracy is accomplished. But where a conspiracy contemplates a continuity of purpose and continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated; and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn." citations omitted.).

**6.18.371J Conspiracy – Withdrawal Before the Commission of an Overt Act as a Defense to Conspiracy** *[Withdrawal as a Defense to Conspiracy Based on the Statute of Limitations]*

*(Name)* **has argued that** *(he) (she)* **is not guilty of the conspiracy charged in the indictment because** *(he) (she)* **withdrew from the conspiracy. If you find, based on the evidence, that** *(name)* **withdrew from the conspiracy before any conspirator committed any overt act** *[before (date), X years before the government obtained the indictment charging the conspiracy]***, then you must find** *(name)* **not guilty of conspiracy.**

**In order to withdraw from the conspiracy,** *(name)* **must have taken some clear, definite and affirmative action to terminate** *(his) (her)* **participation, to abandon the illegal objective, and to disassociate** *(himself) (herself)* **from the agreement. Withdrawal requires proof that** *(name)* **changed** *(his) (her)* **intent about participating in the agreement. If the evidence only shows that** *(name)* **stopped activities in furtherance of the conspiracy, or stopped cooperating with the conspiracy, or merely was inactive for a period of time, that is not enough to find that** *(name)* **withdrew from the conspiracy.**

**It is the government's burden to prove beyond a reasonable doubt that** *(name)* **was a member of the conspiracy at the time when an overt act was committed** *[after (date)]***. If, after considering all the evidence in this case, you have a reasonable doubt about whether** *(name)* **was a member of the conspiracy at the time when an**

**overt act was committed** *[after (date)]*, **you must find** *(name)* **not guilty of the conspiracy. However, even if you find that** *(name)* **withdrew from the conspiracy at some point in time, you should still find** *(name)* **guilty of conspiracy if you find that the government proved beyond a reasonable doubt that all the elements of the conspiracy charged in the indictment, including the requirement of the commission of an overt act, occurred before** *(name)* **withdrew** *[after (date)]*.

**Comment**

*See* 2 O'Malley et al, supra, § 31.11. For variations in other Circuits, *see* Sixth Circuit §§ 3.11A, C; Seventh Circuit §§ 5.12, 5.13; Eighth Circuit § 5.06H; Ninth Circuit § 8.19.

**Withdrawal Can Be a Defense in Different Ways**:

> (1) A defense to conspiracy if, although the jury finds that defendant joined the agreement with the required mental state, the evidence shows that the defendant withdrew before the commission of an overt act; or
>
> (2) A defense to conspiracy and to substantive offenses committed by other co-conspirators where, although the evidence proves that a conspiracy existed, the defendant joined the conspiracy with the required mental state, and an overt act was committed while defendant was a member, the evidence also proves that defendant withdrew and thereafter the statutes of limitation ran before the government obtained an indictment; or
>
> (3) As a defense to substantive offenses committed by other co-conspirators, if the evidence proves that the defendant withdrew before the substantive offenses were committed *(see* Instruction 7.04 (Withdrawal as a Defense to Substantive Offense Committed by Co-Conspirators)).

*See, e.g., United States v. Kushner*, 305 F.3d 194, 198 (3d Cir. 2002); *United States v. Boone*, 279 F.3d 163, 192 (3d Cir. 2002); *United States v. Antar*, 53 F.3d 568, 582 (3d Cir. 1995); *United States v. Steele*, 685 F.2d 793, 803 (3d Cir. 1982); *United States v. Lowell*, 649 F.2d 950, 955 (3d Cir. 1981).

**Defendant's Prima Facie Showing Required to Give Instruction.** This instruction should be given when the defendant makes a prima facie showing of withdrawal before the commission of an overt act. It should also be given when the defendant makes a prima facie showing of withdrawal after which the period of limitations ran, by using the bracketed alternative, *"before / after (date)"* language. The Third Circuit has recognized that withdrawal

from the conspiracy starts the running of the statute of limitations as to the withdrawing defendant. *See, e.g., United States v. Kushner*, 305 F. 3d 194, 198 (3d Cir. 2002), citing *United States v. Read,* 658 F.2d 1225, 1233 (7th Cir.1981) ("Withdrawal becomes a complete defense only when coupled with the defense of the statute of limitations."); *United States v. Antar*, 53 F.3d 568, 582 (3d Cir. 1995) ("However, if a defendant properly and adequately terminates his or her involvement with the conspiracy, he or she no longer can be held responsible for acts of his or her co-conspirators and the statute of limitations begins to run in his behalf."); *United States v. Lowell*, 649 F.2d 950, 958 (3d Cir. 1981) (Third Circuit approved the trial court's instruction that, "If this withdrawal occurs more than five years before the defendant was indicted, he may not be convicted of the conspiracy, even though he at one time was part of it. Unless, within five years of the day on which he was indicted the defendant rejoined the conspiracy and participated in furtherance of it.")

If the trial court is not satisfied that the defendant made a prima facie showing of withdrawal, the court need not give a withdrawal instruction. *See, e.g., United States v. Boone*, 279 F.3d at 192-93 (holding defendant did not make the prima facie showing required under *Antar* to warrant an instruction on withdrawal). *See* discussion below.

**Withdrawal Standard.** In *United States v. Antar*, 53 F.3d 568 (3d Cir. 1995), the Third Circuit held that the trial judge properly refused to dismiss charges of conspiracy and substantive offenses committed by co-conspirators because of the statutes of limitations, finding that the defendant failed to make out a prima facie case of withdrawal. Although *Antar* involved an 18 U.S.C. § 1962(d) RICO conspiracy, not a section 371 conspiracy, the Third Circuit noted that, "[i]n this regard, section 1962(d) long has been interpreted against the backdrop of traditional conspiracy law and thus the same analysis applies both to the RICO and section 371 conspiracies." *Id.* at 582. With respect to the standard for withdrawal, the court stated (*id.*):

The Supreme Court long ago set forth a rigorous standard for demonstrating withdrawal. In 1912, in *Hyde v. United States,* 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912), the Court explained:

> Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act *to disavow or defeat the purpose* he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished, he is still offending. And, we think, consciously offending, offending as certainly ... as at the first moment of his confederation, and continuously through every moment of its existence.... Until he does withdraw there is conscious offending....

*Id.* at 369-70, 32 S.Ct. at 803 (emphasis added). Thus, we have held that "[m]ere cessation of activity in furtherance of an illegal conspiracy does not necessarily constitute withdrawal." *United States v. Steele,* 685 F.2d 793, 803 (3d Cir. 1982), *cert. denied,* 459 U.S. 908, 103 S.Ct. 213, 74 L.Ed.2d 170 (1982). Rather, "[t]he defendant must present

> evidence of some affirmative act of withdrawal on his part, *typically either a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals.* " *Id.* at 803-04 (emphasis added); *see also United States v. Heckman,* 479 F.2d 726, 729 (3d Cir.1973). Of course, there is no single way withdrawal can be established; in large part whether a particular action constitutes withdrawal depends on context. Thus, the Supreme Court has cautioned against placing "confining blinders" on the jury's consideration of evidence of withdrawal and has held that "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." *United States v. United States Gypsum Co.,* 438 U.S. 422, 464-65, 98 S.Ct. 2864, 2887, 57 L.Ed.2d 854 (1978).

In *United States v. United States Gypsum Co.,* 438 U.S. 422, 463-64 (1978), the Supreme Court held it was error to instruct the jury that, "In order to find that a defendant abandoned or withdrew from a conspiracy ... you must find, from the evidence, that he or it took some affirmative action to disavow or defeat its purpose. Mere inaction would not be enough to demonstrate abandonment. To withdraw, a defendant *either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials.*" The Court reasoned that, "The charge, fairly read, limited the jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy." *Id.*

**Burden of Proof.** In addition to articulating the standard for establishing withdrawal, the Third Circuit in *United States v. Antar*, 53 F.3d at 582, discussed the "two-stage burden of proof" with respect to withdrawal:

> We have divided the standard for showing withdrawal into two stages. First, the defendant must come forward with evidence evincing a prima facie showing of withdrawal. If the defendant makes this prima facie showing, the burden then shifts to the government to rebut the prima facie case, "either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal." *United States v. Local 560,* 974 F.2d 315, 338 (3d Cir.1992) (citing *Steele*, 685 F.2d at 804).

Also, *see, e.g., United States v. Jannotti*, 729 F.2d 213, 221 (3d Cir. 1984); *United States v. Steele*, 685 F.2d 793, 803-04 (3d Cir.1982). More specifically, the *Antar* court stated:

> When seen through the lens of a two-stage burden of proof, we believe the cases establish that if the defendant completely severs his or her relationship with the enterprise, he or she has established a prima facie showing of withdrawal from the conspiracy without showing any other affirmative act inconsistent with the conspiracy and without giving any further notice to his or her co-conspirators. Once the defendant makes this showing, the burden shifts to the government either to rebut the defendant's showing or to establish that

> the defendant continued to participate as a co-conspirator. However, if the defendant has not completely severed his ties with the enterprise, then in order to establish a prima facie case, he must demonstrate either that he gave notice to his co-conspirators that he disavows the purpose of the conspiracy or that he did acts inconsistent with the object of the conspiracy.

53 F.3d at 583.

Generally, the Circuits are split as to whether the defendant has the burden of proving withdrawal (based on the traditional characterization of withdrawal as an "affirmative defense") or whether, as stated in *Antar*, the government has the ultimate burden of disproving withdrawal after the defendant satisfies a burden of production (makes a prima facie showing). *See* Hon. Leonard Sand, John S. Siffert, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal* (2003) [hereinafter, Sand et al.], Inst 19-10, at 19-71. Prior to the first publication of this instruction in 2007, Sand included the Third Circuit with the Circuits that adhere to the traditional view that the defendant bears the burden of proving withdrawal, citing *United States v. Gillen*, 599 F.2d 541, 548 (3d Cir. 1979), and a district court case *United States v. Gatto*, 746 F.Supp 432 (D.N.J. 1990), which relied on *Gillen*. In its one paragraph discussion of the issue in *Gillen* (decided before *Antar* and *Steele*), the Third Circuit did state that the burden was on the defendant to prove withdrawal, citing *United States v. United States Gypsum Co.,* 438 U.S. at 463-64, in which the Supreme Court articulated the standard for withdrawal but did not discuss the burden of proof. 599 F.2d at 548. Also *see United States v. Heckman*, 479 F.2d 726, 729 (3d Cir.1973) (quoting *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964), in which Judge Friendly quoted *United States v. Hyde*, 225 U.S. at 369, for the proper withdrawal standard, but then added that the defendant has the burden of proof, a statement not found in the *Hyde* opinion).

The Third Circuit's discussion of the government's burden of proof in *Antar* may be dicta, because the court concluded that the defendant had not made a prima facie showing of withdrawal, and the court in *Antar* did not explicitly state that the government's burden to disprove withdrawal was beyond a reasonable doubt. However, the Third Circuit's detailed discussion of the "two-stage burden of proof" seems quite clear and followed the court's earlier decision in *United States v. Steele*, 685 F.2d 793, 803 (3d Cir.1982), reversing convictions because "[t]he government failed to produce evidence to rebut [defendant's] prima facie showing of withdrawal prior to the period of limitations. . . ." The Third Circuit stated in *Steele*, as it later reiterated in *Antar*: "When a defendant has produced sufficient evidence to make a prima facie case of withdrawal, however, the government cannot rest on its proof that he participated at one time in the illegal scheme; it must rebut the prima facie showing either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal." 685 F.2d at 804. *See also United States v. Detelich*, 351 Fed. Appx. 616, 620 (3d Cir. 2009) (non-precedential) (rejecting defendant's argument that the jury instructions on withdrawal shifted the burden of proof to the defendant, the Third Circuit stated, "The instructions left no doubt that if such evidence [of withdrawal] was presented, the government had the burden of proving beyond a reasonable doubt that Detelich

had not withdrawn prior to ....).

The Third Circuit's "two-stage burden of proof" with respect to withdrawal is also consistent with modern burden of proof principles. Withdrawal is a "defense" because it negates an element of the offense, the defendant's continued membership in the conspiracy at a critical time – either at a time before an overt act was committed, or before a co-conspirator committed the substantive offense charged, or more than the period of the statute of limitations before indictment. In order to sustain its burden of proving each element beyond a reasonable doubt, the government has the burden of disproving all properly raised "defenses" that would negate an element. *See, e.g., Dixon v. United States*, 126 S.Ct 2437, 2441-43 (2006) (burden of proof on duress can be placed on defendant because duress does not negate an element of the offense); *Cheek v. United States*, 498 U.S. 192, 202 (1991) ("[I]f the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement. But carrying this burden requires 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. . . . In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable."); *Patterson v. New York*, 432 U.S. 197 (1977) (where the state legislature redefined murder, eliminating the common law element malice, and added an extreme emotional disturbance defense to reduce murder to manslaughter, the burden of proof on this defense could be placed on the defendant because the defense did not negate an element of murder). Under *Antar*, as is often the case with respect to such "defenses," the defendant does have the initial burden of production on (the burden to make out a prima facie showing of) withdrawal.

(Revised 11/10)

**6.18.371K. Conspiracy – Acts And Statements Of Co-Conspirators**

**Evidence has been admitted in this case that certain persons, who are alleged to be co-conspirators of** *(name)***, did or said certain things. The acts or statements of any member of a conspiracy are treated as the acts or statements of all the members of the conspiracy, if these acts or statements were performed or spoken during the existence of the conspiracy and to further the objectives of the conspiracy.**

**Therefore, you may consider as evidence against** *(name)* **any acts done or statements made by any members of the conspiracy, during the existence of and to further the objectives of the conspiracy. You may consider these acts and statements even if they were done and made in** *(name)***'s absence and without** *(his) (her)* **knowledge. As with all the evidence presented in this case, it is for you to decide whether you believe this evidence and how much weight to give it.**

[*Acts done or statements made by an alleged co-conspirator before (name) joined the alleged conspiracy may also be considered by you as evidence against (name). However, acts done or statements made before the alleged conspiracy began or after it ended may only be considered by you as evidence against the person who performed that act or made that statement.*]

**Comment**

*See* 2 O'Malley et al, supra, § 31.06; Sand et al, supra, 19-9; Sixth Circuit § 3.14; Eighth Circuit § 5.06I.

**Trial Court's Determination of the Prerequisites for Admissibility.** Federal Rule of Evidence 801 provides: "(d) (Statements which are not hearsay) A statement is not hearsay if–

(2) Admission by party-opponent. The statement is offered against a party and is ... (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). In accordance with Federal Rule of Evidence 104(a) ( "Preliminary questions concerning ... the admissibility of evidence shall be determined by the court."), the Supreme Court held in *Bourjaily v. United States,* 483 U.S. 171, 175 (1987), that the trial judge, not the jury, decides whether the prerequisites for admissibility of co-conspirator statements are satisfied, and the judge must be able to find these requirements by a preponderance of the evidence. Thus, in *United States v. McGlory*, 968 F.2d 309, 333 (3d Cir. 1992), the Third Circuit stated with respect to co-conspirator statements, "Four requirements must be met before statements can be admitted under this exception. It must appear: (1) that a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy. The district court must be able to find these requirements by a preponderance of the evidence. *Bourjaily v. United States*...." Also *see, e.g., United States v. Kemp*, 500 F.3d 257, 298 (3d Cir. 2007).

Rule 801(d)(2)(E), also provides that, "The contents of the [co-conspirator] statement shall be considered but are not alone sufficient to establish ... the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E)." Fed. R. Evid. 801(d)(2)(E). Also, *see, e.g., Bourjaily v. United States,* 483 U.S. at 181 (where the Supreme Court stated, before this language was added to Rule 801(d)(2)(E), "It is sufficient for today to hold that a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted. As we have held in other cases concerning admissibility determinations, 'the judge should receive the evidence and give it such weight as his judgment and experience counsel.' *United States v. Matlock,* 415 U.S. [164 ], at 175 [1974 ].").

The court need not instruct regarding each prerequisite of admissibility of a co-conspirator statement, after the court has deemed such a statement admissible. The Third Circuit explained:

> [W]e have never "condemned" the practice of giving jury instructions on the admissibility of co-conspirator's statements against individual defendants. In *Continental Group*, we suggested in dicta that jury instructions concerning the factual foundation required for application of the co-conspirator exception to the hearsay rule are best omitted, as they give the jury the "opportunity to second-guess the court's decision to admit coconspirator declarations." 603 F.2d at 459. We observed, however, that such instructions could not give rise to reversible error because, if anything, they inure to the benefit of the defendant. *Id.*

*United States v. Pungitore*, 910 F.2d 1084, 1147 (3d Cir. 1990), quoting *United States v. Continental Group*, 603 F.2d 444, 459 (3d Cir. 1979). The model instruction provides some explanation to the jury of the permitted use of co-conspirator statements without providing unnecessary explication of the basis of admissibility.

In *United States v. Jannotti*, 729 F.2d 213, 221 (3d Cir. 1984), the Third Circuit noted, "The Supreme Court has held that 'the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy.' *United States v. United States Gypsum Co.,* 333 U.S. 364, 393, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). *See also United States v. Lester,* 282 F.2d 750, 753 (3d Cir.1960); *Lefco v. United States,* 74 F.2d 66, 68 (3d Cir.1934)."

**Admissibility Unaffected by *Crawford v. Washington*.** The admissibility of co-conspirator statements appears to be unaffected by the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct.1354 (2004) (holding that testimonial, out-of-court statements are inadmissible under the Confrontation Clause, unless the declarant is unavailable to testify at trial and the defendant had an opportunity to cross-examine the declarant). Although *Crawford* did not precisely define "testimonial" statements, it recognized that where, "[a] witness makes a formal statement to government officers [it] bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford,* 541 U.S. at 51, 124 S.Ct. at 1364. The Court also noted that "[m]ost of the hearsay exception covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy." *Id.* at 56.

In *United States v. Hendricks*, 395 F.3d 173 (3d Cir. 2005), the Third Circuit held that conversations between co-conspirators that were intercepted by law enforcement through authorized Title III wiretaps and co-conspirator statements in conversations recorded by a confidential informant were not testimonial statements. 395 F.3d at 180-84, citing, *cf. United States v. Robinson,* 367 F.3d 278, 292 n. 20 (5th Cir. 2004); *United States v. Reyes,* 362 F.3d 536, 541 n. 4 (8th Cir. 2004); *People v. Cook,* 815 N.E.2d 879, 893 (Ill. App. 2004). The Third Circuit noted, "Indeed, the *Crawford* Court referenced *Bourjaily* as an example of a case in which nontestimonial statements were correctly admitted against the defendant despite the lack of a prior opportunity for cross-examination. *See Crawford,* 541 U.S. at 58, 124 S.Ct. at 1368 (citing *Bourjaily,* 483 U.S. at 181-84, 107 S.Ct. 2775)." 395 F.3d at 183. *Bourjaily* had upheld the admissibility of admissions made unwittingly by a purported coconspirator to an informant. *Id.* It is rare that a testimonial co-conspirator statement (*e.g.,* a statement knowingly made by a co-conspirator to the authorities, describing criminal activity) would be admissible, except where the object of the conspiracy is to obstruct justice by making false statements to law enforcement. *See United States v. Stewart*, 433 F.3d 273, 293 (2d Cir. 2006) ("[W]hen the object of a conspiracy is to obstruct justice, mislead law enforcement officers, or commit similar offenses by making false statements to investigating officers, truthful statements made to such officers designed to lend credence to the false statements and hence advance the conspiracy are not rendered inadmissible by the Confrontation Clause.").

**Acts or Statements Outside the Presence of the Defendant.** O'Malley includes the following language in its instruction on "Acts and Declarations of Co-Conspirators:" "Since these acts may have been performed and these statements may have been made outside the presence of Defendant and even done or said without the defendant's knowledge, these acts or

statements should be examined with particular care by you before considering them against the defendant who did not do the particular act or make the particular statement." O'Malley § 31.06. There are no Third Circuit decisions that discuss the need for this additional admonition, which is contrary to the general rule that a co-conspirator is responsible for the acts of his confederates. *See United States v. Pecora*, 798 F.2d 614, 628-29 (3d Cir. 1986) (statement is admissible regardless of whether the defendant who is being spoken about is a party to the conversation, and regardless of whether the declarant is on trial). The general rule of admission rests on the theory that when a person joins a conspiracy, his co-conspirators become his agents and each is responsible for the acts and statements of the others. The rationale of the hearsay exception "is the common sense appreciation that a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not." *United States v. Trowery*, 542 F.2d 623, 626 (3d Cir. 1976).

(revised 12/09)

# Misapplication of Bank Funds (18 U.S.C. § 656)

## 6.18.656 Misapplication of Bank Funds (18 U.S.C. § 656)

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with wilful misapplication of bank funds, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following five elements beyond a reasonable doubt:**

**First: That** *(name)* **was** *(specify defendant's connection with bank; e.g., an employee)* **of** *(name of bank)***;**

**Second: That** *(name of bank)* **was** *(specify basis for finding national character of bank; e.g.,"a bank whose deposits are insured by the Federal Deposit Insurance Corporation")***;**

**Third: That** *(name)* **embezzled or wilfully misapplied the moneys, funds, assets, securities, or credits** *[(belonging to) (intrusted to the custody or care of)] (name of bank)***;**

**Fourth: That** *(name)* **did so with the intent to** *(injure or)* **defraud the bank; and**

**Fifth: That the amount embezzled or misapplied was more than $1,000.00.**

*[The term "embezzle" means to knowingly and deliberately take (or convert to one's own use) money or property that belongs to another and came into the embezzler's possession lawfully, by virtue of the embezzler's (office) (employment) (position of trust).]*

*[To "wilfully misapply" money or property means to intentionally convert such money or property for one's own use and benefit, or for the use and benefit of another, knowing that one had no right to do so.]*

**Comment**

Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions [hereinafter O'Malley et al., supra] §§ 33.03, 33.04; Fifth Circuit § 2.34.

18 U.S.C. § 656 provides:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, or a receiver of a national bank, insured bank, branch, agency, or organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank, branch, agency, or organization or holding company or any moneys, funds, assets or securities intrusted to the custody or care of such bank, branch, agency, or organization, or holding company or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $1,000, he shall be fined under this title or imprisoned not more than one year, or both.
>
> As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3 of the Federal Deposit Insurance Act.

In *United States v. Thomas*, 610 F.2d 1166 (3d Cir. 1979), the Third Circuit set out the four elements of the offense:

1. The bank must have been national in character;
2. The defendant must have been an officer of the bank;
3. The defendant must have willfully misapplied bank funds, credits, or moneys;
4. The defendant must have acted with intent to defraud the bank.

610 F.2d at 1174. *See also United States v. Schoenhut*, 576 F.2d 1010, 1024 (3d Cir. 1978). The instruction includes as a fifth element the requirement that the amount of the misapplication exceeded $1,000, the statutory threshold for a felony conviction under the statute. Where it is unclear whether the amount at issue exceeded $1,000, this instruction may be altered; one alternative is to provide the jury with a special interrogatory which allows the possibility of a lesser misdemeanor conviction. *See* Instruction 6.21.841C (Controlled Substances – Special Interrogatories and Verdict Forms With Respect to Weight).

The first two elements address the relationship of the defendant to the bank and the national character of the bank. The court should specify the way in which the government seeks to satisfy these two statutory requirements.

The third element is misapplication or embezzlement of funds. The court should instruct the jury on the meaning of embezzle or misapply. In *United States v. Northway*, 120 U.S. 327 (1886), the Supreme Court considered the meaning of embezzlement:

> In respect to the counts for embezzlement, it is quite clear that the allegation is sufficient, as it distinctly alleges that the moneys and funds charged to have been embezzled were at the time in the possession of the defendant as president and agent. This necessarily means that they had come into his possession in his official character, so that he held them in trust for the use and benefit of the association. In respect to those funds, the charge against him is that he embezzled them by converting them to his own use. This we think fully and exactly describes the offense of embezzlement under the act by an officer or agent of the association.

120 U.S. at 331.

In *United States v. Britton*, 107 U.S. 655, 666-67 (1883), the Court addressed the meaning of wilful misapplication:

> We think the willful misapplication made an offense by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. Therefore, to constitute the offense of willful misapplication, there must be a conversion to his own use or the use of

> some one else of the moneys and funds of the association by the party charged.

In *United States v. Krepps*, 605 F.2d 101 (3d Cir. 1979), the Third Circuit considered the meaning of the term:

> Of the various substantive offenses named by the statute, willful misapplication is the most flexible in its meaning, inasmuch as it has no common law ancestry. This Court has previously surmised that the term "willfully misapplies" was incorporated in the statute as "an attempt to enlarge the common law definition of embezzlement," and accordingly, the offense of willful misapplication has been described loosely as "a conversion by a bank employee even though he does not take the money for himself."

605 F.2d at 103. *See also United States v. Gallagher*, 576 F.2d 1028, 1044 (3d Cir. 1978). In T*homas*, the Third Circuit stated:

> The element of misapplication requires proof of conversion of bank funds, credits, or moneys. It is not necessary to prove, however, that the defendant himself was the beneficiary of the misapplication.

610 F.2d at 1174 (citations omitted); *see also Moore v. United States*, 160 U.S. 268, 269–70 (1895). The government is not required to prove loss under this section. *See United States v. Gallagher*, 576 F.2d 1028, 1038 n.5 (3d Cir. 1978).

The fourth element is an intent to defraud. The court should give Instruction 6.18.656-1 (Intent to Defraud Defined).

## 6.18.656-1 Misapplication of Bank Funds - Intent to Defraud Defined

**To act with intent to** *(injure or)* **defraud means to act knowingly and with the specific intent to deceive for the purpose of causing some financial or property loss. In deciding whether** *(name)* **had the requisite intent, you should consider what** *(he)(she)* **knew with respect to** *(briefly describe transaction which the prosecution alleges to be willful misapplication of bank funds; e.g., the loans to John Doe)***. If you find that** *(name)* **knowingly participated in deceptive or fraudulent act***(s)* **which had the natural tendency to injure the bank, you may, but are not required to, find that** *(he)(she)* **acted with intent to** *(injure or)* **defraud the bank.**

**You may also consider whether** *(name)* **acted in reckless disregard of the bank's interests. You may find intent to defraud from acts knowingly done with a reckless disregard for the interests of the bank.**

**The government is not required to prove that** *(name)* **intended to permanently deprive the bank of its property, or that the bank suffered a loss from the misapplication of funds, or that** *(name)* **personally profited by** *(his)(her)* **acts.**

### Comment

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 24-7 (Matthew Bender 2003).

In *United States v. Thomas*, 610 F.2d 1166 (3d Cir. 1979), the court elaborated on the

intent requirement:

> It is well-settled that intent to defraud the bank exists if the officer "'acts knowingly and if the natural result of his conduct would be to injure and defraud the bank even though this may not have been his motive,' and . . . '(s)uch intent may be inferred from facts and circumstances shown at trial and is basically a fact question for the jury.'" Moreover, "'(r)eckless disregard of the interests of the bank is equivalent to intent to injure or defraud,' and a conviction may be returned notwithstanding the fact that the bank has suffered no actual injury."

610 F.2d at 1174 (citations omitted). *See also Valansi v. Ashcroft*, 278 F.3d 203, 211 (3d Cir. 2002) ("a conviction may be established under 18 U.S.C. § 656 by proving that the defendant acted with either an intent to injure or an intent to defraud"); *United States v. Krepps*, 605 F.2d 101, 103-04 (3d Cir. 1979); *United States v. Schoenhut*, 576 F.2d 1010, 1024 (3d Cir. 1978).

If the prosecution is based on the issuance of improper loans, the court should modify the instruction to clearly convey that the jury should not convict unless convinced that the bank employee knew the recipients could not or did not intend to repay the loans. *See United States v. Gallagher*, 576 F.2d 1028, 1046 (3d Cir. 1978). However, if the beneficiary of the loan is the defendant-bank officer, the government need not prove that the recipient was unable or did not intend to repay the loan. *Krepps*, 605 F.2d at 102.

## Theft From Interstate Shipment (18 U.S.C. §659)

| | |
|---|---|
| 6.18.659A | Theft From Interstate Shipment (18 U.S.C. §659) (First Paragraph) |
| 6.18.659B | Possession of Property Stolen from an Interstate Shipment (18 U.S.C. §659) (Second Paragraph) |
| 6.18.659B -1 | Possession of Property Stolen from an Interstate Shipment - Inference of Knowledge from Possession of Recently Stolen Property |

**6.18.659A Theft from Interstate Shipment (18 U.S.C. § 659) (First Paragraph)**

**Count** *(number)* **of the indictment charges the defendant** *(name)* **with** *(briefly state offense; e.g., theft from interstate shipment)***, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:**

**First: That** *(name) [(stole) (embezzled) (unlawfully took) (carried away) (concealed) obtained through fraud or deception)]* **the property described in the indictment from** *(specify location set forth in statute, e.g., a railroad car)* **as alleged in the indictment;**

**Second: That at that time this property was** *(moving as) (was a part of)* **an interstate** *(a foreign)* **shipment of freight;**

**Third: That** *(name)* **knew the property was not** *(his)(hers)* **and had the intent to permanently deprive the owner of the use and benefit of the property; and**

**Fourth: That the property then had a value of $1,000 or more.**

*[The word "value" means (use appropriate language: the face, par, or market value, or cost price, either wholesale or retail, whichever is greater).]*

*[Use the following language where appropriate:*

*To "embezzle" means to wrongfully, intentionally take property of another after the property has lawfully come within the possession or control of the person taking it.*

*To "steal" means to wrongfully take money or property, belonging to another with intent to permanently deprive the owner of its use or benefit. Any appreciable change of the location of the property with the intent to deprive constitutes a stealing whether or not there is actual removal of it from the owner's premises.]*

*"An interstate (a foreign) shipment" means goods or property which are in the process of being shipped from one state (country) to another.*

*The interstate (or foreign) character of a shipment begins when the goods or property are (is) first identified and set aside for the shipment from one state (country) to another; and the interstate (or foreign) character of the shipment continues until the shipment arrives at its final destination and is there delivered.*

*While the government must prove the interstate (or foreign) character of the shipment, the government is not required to prove that (name) knew that the goods were a part of such a shipment at the time of the alleged [(theft) (embezzlement) (unlawfully taking) (carrying away) (concealing through fraud or deception)].*

**Comment**

Fifth Circuit § 2.36.

The first paragraph of 18 U.S.C. § 659 provides:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, trailer, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from

> any aircraft, air cargo container, air terminal, airport, aircraft terminal or air navigation facility, or from any intermodal container, trailer, container freight station, warehouse, or freight consolidation facility, with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property

commits a federal offense. 18 U.S.C. § 659 further provides that the sentence for a violation is a fine and/or up to 10 years in prison if the value of the property is $1,000 or more.

The first element is that the defendant stole, embezzled, unlawfully took, carried away, concealed, or obtained through fraud or deception the property alleged from a location that satisfies the requirements of the statute. In *United States v. Manuszak*, 234 F.2d 421, 423 (3d Cir. 1956), the Third Circuit reversed a conviction under Section 659 holding that "[u]nder … (18 U.S.C.A. Section 659), it is not a federal crime to steal goods from an interstate shipment of freight unless the goods are taken from one of the specifically enumerated places or facilities. Other thefts, although of goods which are part of an interstate shipment, are not federal crimes. That being so, an indictment which only charges a theft of goods from an interstate shipment of freight without alleging that the goods were taken from one of the specifically enumerated places or facilities does not charge all the essential ingredients of a crime so far as the federal government is concerned." *See also United States v. Allegrucci*, 258 F.2d 70, 75 (3d Cir. 1958) (faulting the district court for failing to follow the mandate of *Manuszak* and instruct the jury that it must determine that the stolen goods were taken from a platform, a place specified in the statute). The instruction reflects this requirement.

The second element is that the property was moving as or was a part of an interstate or foreign shipment. *See United States v. Garber*, 626 F.2d 1144, 1147 (3d Cir. 1980). In *Garber*, the Third Circuit explained that literal movement is not required and suggested that each case must be decided based on a common sense assessment of a variety of factors, including "the indicia of interstate or foreign commerce at the time of the theft," whether the property has been delivered to a carrier, and the physical location of the property at the time of the theft. 626 F.2d at 1147. *See also United States v. Kapp*, 781 F.2d 1008, 1011 (3d Cir. 1986). An interstate shipment is in interstate commerce until it reaches its ultimate destination. 626 F.2d at 1147-48. If jurisdiction rests on movement in foreign commerce, the government does not need to show interstate movement in addition to movement from a foreign country to the United States. 626 F.2d at 1148 n.3.

The third element is that the defendant knew the property was not his/hers and had the intent to permanently deprive the owner of the use and benefit of the property. In *United States v. Kemble*, 197 F.2d 316, 321 (3d Cir. 1952), the Third Circuit held that the trial court's instruction on intent was error. The court noted that "[i]n United States v. Cohen, 3 Cir., 274 F. 596, 597 this court defined the statutory offense of stealing an interstate shipment to be the 'unlawful taking and carrying away with intent to covert to the use of the taker and permanently deprive the owner.'" The court also quoted the Supreme Court's statement in *Morissette v.*

*United States*, 342 U.S. 246, 271 (1952), that "[p]robably every stealing is a conversion, but certainly not every knowing conversion is a stealing." In *Kembler*, the Third Circuit held that the trial court's instruction was plain error because "the jury should have been required to find that [the defendant] possessed a specific intent to steal the whiskey." 197 F.2d at 322. Other circuits have held that intent permanently to deprive is not required. *See, e.g., United States v. Cook*, 967 F.2d 431 (10th Cir. 1992); *United States v. Waronek*, 582 F.2d 1158 (7th Cir. 1978). However, the Third Circuit has never overruled *Kemble*.

The fourth element is value of $1000 or more. In *United States v. Scanzello*, 832 F.2d 18, 23 (3d Cir. 1987), the Third Circuit held that "the value of the goods stolen is a necessary element for conviction of a felony under 18 U.S.C. § 659" or under a 18 U.S.C. § 371 conspiracy to violate § 659. If the government establishes all the elements except for the fourth, the defendant is guilty of a misdemeanor. *Scanzello*, 832 F.2d at 23.

In some cases, the court will want to guide the jury's consideration of the value of the property. The definition of value is taken from 18 U.S.C. § 641. That statute addresses theft or embezzlement of public money, property or records and provides "[t]he word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

## 6.18.659B Possession of Property Stolen from an Interstate Shipment (18 U.S.C. § 659) (Second Paragraph)

**Count** *(number)* **of the indictment charges the defendant** *(name)* **with** *(briefly state offense; e.g., possessing property stolen from an interstate shipment)***, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That someone** *(stole) (embezzled)* **the property described in the indictment from** *(specify location set forth in statute, e.g., a railroad car)***, as alleged in the indictment, while such property** *(was moving as) (was a part of)* **an interstate** *(or foreign)* **shipment of freight;**

**Second: That** *(name)* **thereafter** *(bought) (received) (possessed)* **such property knowing that it had been** *(stolen) (embezzled)***; and**

**Third: That the property then had a value of $1,000 or more.**

*[The word "value" means the face, par, or market value, or cost price, either wholesale or retail, whichever is greater.]*

**"An interstate** *(a foreign)* **shipment" means goods or property which are in the process of being shipped from state** *(country)* **to another.**

**The interstate** *(or foreign)* **character of a shipment begins when the goods or property are** *(is)* **first identified and set aside for shipment from one state** *(country)* **to another; and the interstate** *(or foreign)* **character of the shipment**

**continues until the shipment arrives at its final destination and is there delivered.**

**While the government must prove the interstate** *(or foreign)* **character of the shipment, the government is not required to prove that either the person who stole the property or the defendant knew that the goods were a part of such a shipment at the time they were stolen. But the government must prove that** *(name)* **knew the property was stolen property at the time** *(he)(she) [(bought) (received) (possessed)]* **it.**

*[Use the following language where appropriate:*

*To "embezzle" means to wrongfully, intentionally take property of another after the property has lawfully come within the possession or control of the person taking it.*

*To "steal" means to wrongfully take money or property, belonging to another with intent to permanently deprive the owner of its use or benefit.*

*Any appreciable change of the location of the property with the intent to deprive constitutes a stealing whether or not there is actual removal of it from the owner's premises.]*

**Comment**

Fifth Circuit § 2.37.

The second paragraph of 18 U.S.C. § 659 provides

> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen

commits a federal offense. 18 U.S.C. § 659 further provides that the sentence for a violation is a fine and/or up to 10 years in prison if the value of the property is $1,000 or more.

The first element is that the property was stolen, embezzled, unlawfully taken, carried away, or concealed through fraud or deception from a location that satisfies the requirements of the statute. In *United States v. Manuszak*, 234 F.2d 421, 423 (3d Cir. 1956), the Third Circuit reversed a conviction under Section 659 holding that "[u]nder . . . (18 U.S.C.A. Section 659), it is not a federal crime to steal goods from an interstate shipment of freight unless the goods are taken from one of the specifically enumerated places or facilities. Other thefts, although of goods which are part of an interstate shipment, are not federal crimes. That being so, an indictment which only charges a theft of goods from an interstate shipment of freight without alleging that the goods were taken from one of the specifically enumerated places or facilities does not charge all the essential ingredients of a crime so far as the federal government is concerned." *See also United States v. Allegrucci*, 258 F.2d 70, 75 (3d Cir. 1958) (faulting the district court for failing to follow the mandate of *Manuszak* and instruct the jury that it must determine that the stolen goods were taken from a platform, a place specified in the statute). The instruction reflects this requirement.

The second element is that the defendant bought, received, or possessed property taken from an interstate shipment or shipment in foreign commerce knowing that it had been stolen or embezzled. In *United States v. Allegrucci*, 258 F.2d 70 (3d Cir. 1958), the Third Circuit addressed the element of intent. The court wrote:

> An essential element of proof of a violation of Section 659 is that the defendant knew that the goods of which he was in possession were stolen, but it is clear that such knowledge may be proved by circumstantial evidence. Unexplained possession of recently stolen goods permits the jury to infer that the possession is guilty possession; that the defendant knew that the goods were stolen. It is not necessary to establish that defendant knew the goods were in interstate commerce when they were stolen.

258 F.2d at 73.

The third element is value of $1000 or more. In *United States v. Scanzello*, 832 F.2d 18, 23 (3d Cir. 1987), the Third Circuit held that "the value of the goods stolen is a necessary element for conviction of a felony under 18 U.S.C. § 659." If the government establishes all the elements except for the fourth, the defendant is guilty of a misdemeanor. *Scanzello*, 832 F.2d at 23.

In some cases, the court will want to guide the jury's consideration of the value of the property. The definition of value is taken from 18 U.S.C. § 641. That statute addresses theft or embezzlement of public money, property or records and provides "[t]he word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

**6.18.659B -1 Possession of Property Stolen from an Interstate Shipment - Inference of Knowledge from Possession of Recently Stolen Property**

**You have heard evidence that** *(name)* **was in possession of property recently stolen from interstate** *(foreign)* **commerce. If the government proves beyond a reasonable doubt that the property in question had recently been stolen from interstate** *(foreign)* **commerce, and that** *(name)* **was in unexplained possession of that recently stolen property, then you may, although you need not, find that** *(name)* **knew the property was stolen.**

**The term "recently" has no fixed meaning. Whether the property may be considered recently stolen depends upon the nature of the property and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful the connection between the defendant's possession of the property and the theft.**

**Let me emphasize that you may, but are not required, to make the connection between the defendant's unexplained possession of recently stolen property and knowledge that the property was stolen. The mere fact that I am telling you about this connection does not mean that I am encouraging you to make it. You have the right to reject this connection if you deem it appropriate to do so, even if you find that** *(name)* **was in possession of the property in question and has not offered any satisfactory explanation for this possession. Consider all the facts and**

**circumstances shown by the evidence in making this determination. Remember that, at all times, the government has the burden of proving beyond a reasonable doubt that *(name)* knew the property was stolen, and that *(name)* is not required to offer any explanation at all.**

**Comment**

*See* Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 25-11 (Matthew Bender 2003).

In *United States v. Rispo*, 470 F.2d 1099, 1101 (3d Cir. 1973), a case addressing the defendants' challenge to convictions for, among other charges, transporting a stolen firearm, the Third Circuit considered the inference to be drawn from possession of recently stolen goods. The court noted that "such an instruction would be improper, absent proof of actual or constructive possession of the stolen property." The court went on to conclude that "[c]onsidering the evidence of such possession in this case, the court correctly charged that possession of the recently stolen property, not satisfactorily explained, was a circumstance from which the jury could infer that the persons in possession knew the property was stolen." *See also Barnes v. United States*, 412 U.S. 837 (1973) (upholding instruction permitting inference of knowledge from unexplained possession of recently stolen mail); *United States v. Whitfield*, 378 F. Supp. 184, 188 (E.D. Pa. 1974) (holding permissive inference instruction proper)*; see also United States v. Allegrucci*, 258 F.2d 70, 72-73 (3d Cir. 1958) (condemning instruction that created presumption from possession of recently stolen property).

# Elements of Offenses - 18 U.S.C. § 666A et seq.

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|---|---|
| 6.18.666A1A | Theft Concerning a Program Receiving Federal Funds (18 U.S.C. §666(a)(1)(A)) |
| 6.18.666A1A-1 | Theft Concerning a Program Receiving Federal Funds - Agent of Organization or Government Defined |
| 6.18.666A1A-2 | Theft Concerning a Program Receiving Federal Funds - Received Federal Funds Defined |
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| 6.18.666A1A-5 | Theft Concerning a Program Receiving Federal Funds - Determining Value of Property |
| 6.18.666A1B | Solicitation of a Bribe by an Agent of a Program Receiving Federal Funds (18 U.S.C. §666(a)(1)(B)) |
| 6.18.666A1B-1 | Solicitation of a Bribe - Thing of Value Defined |
| 6.18.666A1B-2 | Solicitation of a Bribe - Corruptly with Intent to be Influenced Defined |
| 6.18.666A1B-3 | Solicitation of a Bribe - Determining Value of Transaction |
| 6.18.666A2 | Bribery of an Agent of a Program Receiving Federal Funds (18 U.S.C. §666(a)(2)) |
| 6.18.666A2-1 | Bribery of an Agent - Thing of Value Defined |
| 6.18.666A2-2 | Bribery of an Agent - Corruptly with Intent to Influence Defined |
| 6.18.666A2-3 | Bribery of an Agent - Determining Value of Transaction |

## 6.18.666A1A Theft Concerning a Program Receiving Federal Funds (18 U.S.C. §666(a)(1)(A))

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with** *(describe offense; e.g., embezzling from a federally funded program)***, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following five elements beyond a reasonable doubt:**

**First: That at the time alleged in the indictment,** *(name)* **was an agent of** *(specify organization, government, or agency)***;**

**Second: That in a one-year period** *(specify organization, government, or agency)* **received federal benefits in excess of $10,000;**

**Third: That** *(name) [(stole) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)]* **property;**

**Fourth: That the property** *[(stolen) (embezzled) (knowingly converted) (intentionally misapplied)] [(was owned by) (was in the care, custody or control of)] (specify organization, government or agency)***; and**

**Fifth: That the value of the property** *(stolen) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)* **was at least $5,000.**

**Comment**

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy

Batterman, Modern Federal Jury Instructions - Criminal Volumes 27A-2 (Matthew Bender 2003) [hereinafter, Sand et al., supra].

18 U.S.C. § 666(a) provides:

> Whoever, if the circumstance described in subsection (b) of this section exists--
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--
>
> > (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that–
> >
> > > (I) is valued at $5,000 or more, and
> > > (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency

commits a federal offense.

18 U.S.C. § 666 (b) provides:

> The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. § 666(d) provides the following definitions of government agency, local, and State:

> (2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;
>
> (3) the term "local" means of or pertaining to a political subdivision within a State;
>
> (4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

In addition to the elements instruction, the court should give the following instructions as appropriate: Instructions 6.18.666A1A-1 (Theft Concerning a Program Receiving Federal Funds - Agent of Organization or Government Defined), 6.18.666A1A-2 (Theft Concerning a Program Receiving Federal Funds - Received Federal Funds Defined), 6.18.666A1A-3 (Theft Concerning a Program Receiving Federal Funds - Stole, Embezzled, Converted, and Misapplied Defined), 6.18.666A1A-4 (Theft Concerning a Program Receiving Federal Funds - Belonging to and In the Care, Custody, or Control of Defined), and 6.18.666A1A-5 (Theft Concerning a Program Receiving Federal Funds - Determining Value of Property).

The embezzled or stolen funds need not be traceable to the federal funds. *Sabri v. United States*, 541 U.S. 600 (2004); *see also Salinas v. United States*, 522 U.S. 52 (1997). It is sufficient federal involvement if the organization receives over $10,000 of federal funds in the year.

The agent need not be someone in a position of trust, and a breach of trust is not a requirement for violation of the statute. *See United States v. Brann*, 990 F.2d 98 (3d Cir. 1993).

## 6.18.666A1A-1 Theft Concerning a Program Receiving Federal Funds - Agent of Organization or Government Defined

**The first element the government must prove beyond a reasonable doubt is that at the time alleged in the indictment,** *(name)* **was an agent of** *(specify organization, government or agency)***.**

**An "agent" is a person authorized to act on behalf of another person, organization or government. Employees, partners, directors, officers, managers, and representatives are all agents of the organization or government with which they are associated.**

*[An agent does not necessarily have any control over the federal funds received by the (organization) (government) (agency).]*

*[A person may be an agent of more than one government agency. An employee of one agency within a larger government department is an agent of that larger department as well.]*

*[Elected officials are agents of the government which they were elected to serve.]*

*[A person may be an agent of an organization without being an employee of that organization. An outside consultant who exercises significant managerial responsibility within the organization is an agent of that organization if the consultant is authorized to act on behalf of the organization.]*

**Comment**

Sand et al., supra, 27A-3.

18 U.S.C. § 666(d)(1) provides that as used in this section

> the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative.

The court should include any portions of the bracketed language that are appropriate.

In *United States v. Vitillo*, 490 F.3d 314 (3d Cir. 2007), the Third Circuit considered the definition of agent as used in 18 U.S.C. § 666. The defendants were charged with submitting fraudulent invoices for work they never performed while serving as engineers and engineering consultants for a regional airport that received federal funds. The court concluded that the defendants could qualify as agents under the statute even though they had no control over the federal funds and had to bill for the federal funds they received on an hourly basis. The court pointed out that "'agent' is merely a person with authority to act on behalf of the organization receiving federal funds, and can include, inter alia, an 'employee,' 'officer,' 'manager' or 'representative' of that entity." The court also held that an independent contractor could qualify as an agent.

The agent need not be someone in a position of trust. *See United States v. Brann*, 990 F.2d 98 (3d Cir. 1993).

## 6.18.666A1A-2 Theft Concerning a Program Receiving Federal Funds - Received Federal Funds Defined

**The second element the government must prove beyond a reasonable doubt is that in a one-year period,** *(specify organization, government, or agency)* **received federal benefits in excess of $10,000.**

**To prove this element, the government must establish that the** *(organization) (government) (agency)* **received, during a one-year period** *(beginning on (specify start date))***, benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or some other form of federal assistance.**

*[The government is not required to prove that the benefits were paid directly to (specify organization, government, or agency) by the federal government, but it must prove that the funds paid to the (organization) (government) (agency) through an intermediary government did in fact originate as federal benefits under (specify federal program). If some of the funds paid to (specify organization, government or agency) originated with the federal government and some from the state government, it is for you to determine which were federal benefits and that those federal benefits were in excess of $10,000.]*

*[The one-year period must begin no more than 12 months before the defendant began committing the offense and must end no more than 12 months after the defendant*

*stopped committing the offense. The one-year period may include time both before and after the commission of the offense.]*

**Comment**

Sand et al., supra, 27A-4.

18 U.S.C. § 666(d)(5) provides that as used in this section

> the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

The court should include any portions of the bracketed language that are appropriate.

In *Fischer v. United States*, 529 U.S. 667 (2000), the Court held that the receipt of Medicare funds by a hospital was sufficient to satisfy this requirement of the statute even though the patients were also beneficiaries of the federal funds. Federal funds may have more than one beneficiary. In *Fischer*, the Court noted that "[t]he payments are made not simply to reimburse for treatment of qualifying patients but to assist the hospital in making available and maintaining a certain level and quality of medical care, all in the interest of both the hospital and the greater community." 529 U.S. at 680. The Court further explained:

> Our discussion should not be taken to suggest that federal funds disbursed under an assistance program will result in coverage of all recipient fraud under § 666(b). Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance. To determine whether an organization participating in a federal assistance program receives "benefits," an examination must be undertaken of the program's structure, operation, and purpose. The inquiry should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program. Health care organizations participating in the Medicare program satisfy this standard.

529 U.S. at 681.

The government does not need to establish a nexus between the criminal activity and the federal funds. *Sabri v. United States*, 541 U.S. 600 (2004); *Salinas v. United States*, 522 U.S. 52

(1997). It is sufficient federal involvement if the organization receives over $10,000 of federal funds in the year.

**6.18.666A1A-3 Theft Concerning a Program Receiving Federal Funds - Stole, Embezzled, Converted, and Misapplied Defined**

**The third element the government must prove beyond a reasonable doubt is that** *(name) [(stole) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)]* **property.**

*[To steal money or property means to take someone else's money or property without the owner's consent with the intent to deprive the owner of the value of that money or property.]*

*[To embezzle money or property means to intentionally take or convert to one's own use money or property of another after that money or property lawfully came into the possession of the person taking it by virtue of some office, employment, or position of trust.]*

*[To obtain by fraud means to intentionally take something by false representations, suppression of the truth, or deliberate disregard for the truth.]*

*[To knowingly convert money or property means to knowingly appropriate or use such money or property without proper authority for the benefit of oneself or any other person who was not the rightful owner with the intent to deprive the rightful owner of the money or property.]*

*[To intentionally misapply money or property means to intentionally use money or property of (specify organization, government, or agency) knowing that such use is*

*unauthorized or unjustifiable or wrongful. Misapplication includes the wrongful use of the money or property for an unauthorized purpose, even if such use benefitted the (organization) (government) (agency).]*

*[Property includes other things of value besides money and tangible objects. It also includes intangible things like the value of an employee's time and services.]*

**Comment**

Sand et al., supra, 27A-5.

The court should include any portions of the bracketed language that are appropriate.

## 6.18.666A1A-4 Theft Concerning a Program Receiving Federal Funds - Belonging to and In the Care, Custody, or Control of Defined

**The fourth element the government must prove beyond a reasonable doubt is that the property** *[(stolen) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)][(was owned by) (was in the care, custody, or control of) (specify organization, government or agency)]*.

*[Although the words "care," "custody," and "control" have slightly different meanings, for the purposes of this element they express a similar idea. That is that the (organization) (government) (agency) had control over and responsibility for the property [even though it was not the actual owner of the property at the time of (name)'s actions.]]*

**Comment**

Sand et al., supra, 27A-6.

**6.18.666A1A-5 Theft Concerning a Program Receiving Federal Funds - Determining Value of Property**

**The fifth and final element the government must prove beyond a reasonable doubt is that the value of the property** *[(stolen) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)]* **was at least $5,000. The government is not required to prove the exact amount of money or the value of the property at issue, but the government must prove beyond a reasonable doubt that the value of the money or property was $5,000 or more.**

**The word "value" means face, par or market value, or cost price, either wholesale or retail, whichever is greater. "Market value" means the price a willing buyer would pay a willing seller at the time the property was stolen.**

*[Property does not include legitimate salary, wages, fees, or other compensation paid or expenses paid or reimbursed in the ordinary course of business.]*

*[If you find that (name) devised a scheme or plan to take sums of money or property from (specify organization, government, or agency), on a recurring basis through a series of acts, you may aggregate or add up the value of property obtained from this series of acts by (name) to meet this $ 5,000 requirement so long as those acts occur within the same one-year time period.]*

**The government does not have to prove that the property** *[(stolen) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)]* **by** *(name)* **was received by the** *(organization) (government) (agency)* **as federal benefits or derived**

**from the federal benefits received by the** *(organization) (government) (agency)***. What the government must prove beyond a reasonable doubt is that the defendant** *[(stole) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)]* **from** *(specify organization, government, or agency)* **at the same time that the** *(specify organization, government, or agency)* **received federal benefits in excess of $10,000 during a one-year period. In other words, the government does not need to establish a connection between the criminal activity and the federal funds.**

**Comment**

Sand et al., supra, 27A-7.

18 U.S.C. § 666 does not define the term "value." 18 U.S.C. § 641, which deals with theft or conversion of public money, property, or records, provides that "[t]he word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

18 U.S.C. § 666(c) provides:

> This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

If the defendant's scheme involves a number of smaller thefts or conversions, the value may be aggregated to reach the required minimum value of $5,000. *See United States v. Sanderson*, 966 F.2d 184, 189 (6th Cir. 1992); *United States v. Webb*, 691 F. Supp. 1164 (N.D. Ill. 1988).

The Supreme Court has held that the funds in question need not be traceable to the federal funds. *Sabri v. United States*, 541 U.S. 600 (2004); *see also Salinas v. United States*, 522 U.S. 52 (1997).

The court should include any portions of the bracketed language that are appropriate.

## 6.18.666A1B Solicitation of a Bribe by an Agent of a Program Receiving Federal Funds (18 U.S.C. § 666(a)(1)(B))

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with** *(describe offense; e.g., soliciting a bribe while acting as an agent for a federally funded program)***, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following five elements beyond a reasonable doubt:**

**First: That at the time alleged in the indictment,** *(name)* **was an agent of** *(specify organization, government, or agency)***;**

**Second: That** *(specify organization, government, or agency)* **received federal benefits in excess of $10,000 in a one-year period;**

**Third: That** *(name) [(accepted) (agreed to accept) (solicited) (demanded)]* **something of value from** *(specify person)***;**

**Fourth: That** *(name)* **acted corruptly with the intent to be influenced or rewarded in connection with** *(the business) (a transaction) (series of transactions)* **of** *(specify organization, government, or agency)***; and**

**Fifth: That the value of the** *(business) (transaction) (series of transactions)* **to which the payment related was at least $5,000.**

**Comment**

Sand et al., supra, 27A-9.

18 U.S.C. § 666(a) provides:

> Whoever, if the circumstance described in subsection (b) of this section exists--
>
> > (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--
> >
> > * * *
> >
> > > (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more

commits a federal offense.

18 U.S.C. § 666 (b) provides:

> The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

The court should also give Instruction 6.18.666A1B-1 (Solicitation of a Bribe - Corruptly with Intent to be Influenced Defined) and the following instructions as appropriate: Instructions 6.18.666A1A-1 (Theft Concerning a Program Receiving Federal Funds - Agent Defined), 6.18.666A1A-2 (Theft Concerning a Program Receiving Federal Funds - Received Federal Funds Defined), and 6.18.666A1A1B-2 (Solicitation of a Bribe - Determining Value of Transaction).

In *United States v. Cicco*, 938 F.2d 441, 444 (3d Cir. 1991), the Third Circuit stated the elements of this offense:

> The district court observed, and the government agrees, that the following elements comprise a violation of § 666(a)(1)(B): 1) corrupt solicitation; 2) of anything of value; 3) with the intention of being influenced in connection with any transaction of a local government or organization receiving at least $10,000 in federal funds annually; 4) where the transaction involves anything of value of $5,000 or more.

The model instruction treats the federal funding requirement as a separate element, resulting in a requirement that the government prove five elements. The agent need not be someone in a

position of trust, and a breach of trust is not a requirement for violation of the statute. *See United States v. Brann*, 990 F.2d 98 (3d Cir. 1993).

The government does not need to establish a nexus between the criminal activity and the federal funds. *Sabri v. United States*, 541 U.S. 600 (2004); *Salinas v. United States*, 522 U.S. 52 (1997). It is sufficient federal involvement if the organization receives over $10,000 of federal funds in the year.

**6.18.666A1B-1 Solicitation of a Bribe - Thing of Value Defined**

**The third element the government must prove beyond a reasonable doubt is that** *(name) [(accepted) (agreed to accept) (solicited) (demanded)]* **something of value from** *(specify person)***. The thing of value may be tangible property, intangible property, or services, of any dollar value, so long as it has value.**

**The government is not required to prove that the thing of value that the defendant allegedly illegally** *(solicited) (demanded) (accepted) (agreed to accept)* **was "federal benefits,"or that the illegal acts directly affected the federal benefits that the entity received. Rather, the government is required to prove only that the defendant illegally** *(solicited) (demanded) (accepted) (agreed to accept)* **a thing of value while** *(he) (she)* **was an agent of an entity that received in excess of $10,000 in federal benefits. Finally, the government is not required to prove that the defendant knew that the entity received in excess of $10,000 in federal benefits.**

**Comment**

18 U.S.C. § 666 does not define "anything of value" or prescribe an approach to attaching value to the transaction. The term includes intangibles that may be difficult to value. *See United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996) (discussing meaning of term and holding that conjugal visits for which prisoner paid defendant $6,000 a month and $1,000 per visit satisfied this element of offense); *United States v. Coyne*, 4 F.3d 100, 111 (2d Cir. 1993) ("an interest-free loan of $30,000 without contemporaneously documented terms is 'something of value'"). The transaction influenced need not involve federal funds. *See United States v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988).

## 6.18.666A1B-2 Solicitation of a Bribe - Corruptly with Intent to be Influenced Defined

The fourth element the government must prove beyond a reasonable doubt is that *(name)* **accepted** *(agreed to accept) (solicited) (demanded)* **something of value corruptly and with the intent to be influenced or rewarded in connection with some business or transaction of** *(specify organization, government, or agency)***.**

**To act corruptly means simply to act knowingly and intentionally with the purpose either of accomplishing an unlawful end or unlawful result or of accomplishing some otherwise lawful end or lawful result influenced by the receipt of the thing of value.**

**Corrupt acts are ordinarily motivated by a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit to another.**

*[In considering this element, remember that the government must prove that (name) intended at least in part to be influenced or rewarded, but the government is not required to prove that (name) or (specify organization, government, or agency) took any particular action. The government does not have to prove that the defendant received the bribe or that the bribe actually influenced (specify organization, government, or agency). It is not even necessary that the defendant had the authority to perform the act sought.]*

*[Also, if you find that the defendant accepted the payment with the intent to be rewarded for a decision already made, it does not matter that the payment was not*

*accepted or solicited until after the transaction occurred.]*

**Comment**

Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions [hereinafter O'Malley et al., supra] § 27.09; Sand et al., supra, 27A-13.

The court should include any portions of the bracketed language that are appropriate.

A good faith instruction is not necessary if the trial court instructs the jury concerning the intent requirement. *See United States v. Plaskett*, 355 F. App'x. 639, 643 (3d Cir. 2009) (non-precedential). In *Plaskett*, the trial court gave instructions that were described as "virtually identical" to the model instructions on the offense and instructed thoroughly on the meaning of acting corruptly. 355 F. App'x. at 643-44 (setting out instruction).

(Revised 11/2010)

**6.18.666A1B-3 Solicitation of a Bribe - Determining Value of Transaction**

**The fifth element the government must prove beyond a reasonable doubt is that the value of the** *(business) (transaction) (series of transactions)* **to which the payment related was at least $5,000.**

**To establish this element, the government must prove that** *(name)* **intended to be influenced or rewarded in connection with any business or transaction or series of transactions of** *(specify organization, government, or agency*) **involving anything of value of $5,000 or more. If you find that the** *(business) (transaction) (series of transactions)* **in question had a value of at least $5,000, this element is satisfied.**

**The government is not required to prove that** *(name)* **received at least $5,000. It is the value of the** *(business) (transaction) (series of transactions)* **that the bribe was intended to influence or reward that is important for the purposes of this element.**

**Comment**

Sand et al., supra, 27A-14.

18 U.S.C. § 666 does not define "anything of value" or prescribe an approach to attaching value to the transaction. The term includes intangibles that may be difficult to value. *See United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996) (discussing meaning of term and holding that conjugal visits for which prisoner paid defendant $6,000 a month and $1,000 per visit satisfied this element of offense); *United States v. Coyne*, 4 F.3d 100, 111 (2d Cir. 1993) ("an interest-free loan of $30,000 without contemporaneously documented terms is 'something of value'"). The transaction influenced need not involve federal funds. *See United States v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988).

18 U.S.C. § 666(c) provides:

> This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of

business.

In some cases, there may be a question of whether the court should instruct the jury:

> In determining whether the business or transaction was valued at $5,000, do not include legitimate salary, wages, fees, or other compensation paid or expenses paid or reimbursed in the ordinary course of business.

## 6.18.666A2 Bribery of an Agent of a Program Receiving Federal Funds (18 U.S.C. §666(a)(2))

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with** *(describe offense; e.g., bribing an agent of a federally funded program)***, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following five elements beyond a reasonable doubt:**

**First: That at the time alleged in the indictment,** *(name of agent)* **was an agent of** *(specify organization, government, or agency)***;**

**Second: That** *(specify organization, government or agency)* **received federal benefits in excess of $10,000 in a one-year period;**

**Third: That** *(name) [(gave) (agreed to give) (offered)]* **something of value to** *(name of agent)***;**

**Fourth: That** *(name)* **acted corruptly with the intent to influence or reward** *(name of agent)* **with respect to** *(the business) (a transaction) (a series of transactions)* **of** *(specify organization, government or agency)***;**

**Fifth: That the value of the** *(business) (transaction) (series of transactions)* **to which the payment related was at least $5,000.**

**Comment**

Eight Circuit § 6.18.666C.

18 U.S.C. § 666(a) provides:

> Whoever, if the circumstance described in subsection (b) of this section exists--
>
> * * *
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more

commits a federal offense.

18 U.S.C. § 666 (b) provides:

> The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

The court should also give Instruction 6.18.666A2-1 (Bribery of an Agent - Corruptly with Intent to Influence Defined) and the following instructions as appropriate: Instructions 6.18.666A1A-1 (Theft Concerning a Program Receiving Federal Funds - Agent Defined), 6.18.666A1A-2 (Theft Concerning a Program Receiving Federal Funds - Received Federal Funds Defined), and 6.18.666A2-2 (Bribery of an Agent - Determining Value of Transaction).

In *United States v. Cicco*, 938 F.2d 441, 444 (3d Cir. 1991), the Third Circuit stated the elements of solicitation of a bribe by an agent:

> The district court observed, and the government agrees, that the following elements comprise a violation of § 666(a)(1)(B): 1) corrupt solicitation; 2) of anything of value; 3) with the intention of being influenced in connection with any transaction of a local government or organization receiving at least $10,000 in federal funds annually; 4) where the transaction involves anything of value of $5,000 or more.

The model instruction adapts these elements for the crime of bribing an agent. In addition, the instruction treats the federal funding requirement as a separate element, resulting in a requirement that the government prove five elements.

The agent need not be someone in a position of trust, and a breach of trust is not a requirement for violation of the statute. *See United States v. Brann*, 990 F.2d 98 (3d Cir. 1993)

The government does not need to establish a nexus between the criminal activity and the federal funds. *Sabri v. United States*, 541 U.S. 600 (2004); *see also Salinas v. United States*, 522 U.S. 52 (1997). It is sufficient federal involvement if the organization receives over $10,000 of federal funds in the year.

### 6.18.666A2-1 Bribery of an Agent - Thing of Value Defined

**The third element the government must prove beyond a reasonable doubt is that** *(name) [(gave) (offered) (agreed to give)]* **something of value to** *(specify person)***.**

**The thing of value may be tangible property, intangible property, or services, of any dollar value, so long as it has value.**

**The government is not required to prove that the thing of value that the defendant allegedly illegally** *(gave) (offered) (agreed to give)* **directly affected the federal benefits that the entity received. Rather, the government is required to prove only that the defendant illegally** *(gave) (offered) (agreed to give)* **a thing of value to an agent of an entity that received in excess of $10,000 in federal benefits. Finally, the government is not required to show that** *(name)* **knew that the entity received in excess of $10,000 in federal benefits.**

**Comment**

18 U.S.C. § 666 does not define "anything of value" or prescribe an approach to attaching value to the transaction. The term includes intangibles that may be difficult to value. *See United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996) (discussing meaning of term and holding that conjugal visits for which prisoner paid defendant $6,000 a month and $1,000 per visit satisfied this element of offense); *United States v. Coyne*, 4 F.3d 100, 111 (2d Cir. 1993) ("[A]n interest-free loan of $30,000 without contemporaneously documented terms is 'something of value.'"). The transaction influenced need not involve federal funds. *See United States v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988).

**6.18.666A2-2 Bribery of an Agent - Corruptly with Intent to Influence Defined**

**The fourth element the government must prove beyond a reasonable doubt is that** *(name)* **gave** *(agreed to give) (offered)* **something of value to** *(name of agent)* **knowingly and corruptly and with the intent to influence or reward** *(name of agent)***'s actions in connection with some** *(business) (transaction) (series of transactions)* **of** *(specify organization, government, or agency)***.**

**To act corruptly means simply to act knowingly and intentionally with the purpose either of accomplishing an unlawful end or unlawful result or of accomplishing some otherwise lawful end or lawful result by influencing or rewarding** *(name of agent)***'s actions.**

**Corrupt acts are ordinarily motivated by a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit to another.**

*[In considering this element, remember that the government must prove that (name) intended at least in part to influence (name of agent)'s actions, but the government is not required to prove that (name of agent) or (specify organization, government, or agency) took any particular action. The government does not have to prove that (name of agent) accepted the bribe offer or that the bribe actually influenced the final decision of (specify organization, government, or agency). It is not even necessary that (name of agent) had the authority to perform the act which the defendant sought.]*

*[Also, if you find that the defendant acted with the intent to reward (name of agent) for a decision already made, it does not matter that the payment was not made or offered until after the (business) (transaction) (series of transactions) occurred.]*

**Comment**

O'Malley et al., supra, § 27.09; Sand et al., supra, 27A-20.

The court should include any portions of the bracketed language that are appropriate.

**6.18.666A2-3 Bribery of an Agent - Determining Value of Transaction**

**The fifth element the government must prove beyond a reasonable doubt is that the value of the** *(business) (transaction) (series of transactions)* **to which the payment related was at least $5,000.**

**To establish this element, the government must prove that *(name)* intended to influence or reward** *(name of agent)* **in connection with any business or transaction or series of transactions of** *(specify organization, government, or agency)* **involving anything of value of $5,000 or more. If you find that the** *(business) (transaction) (series of transactions)* **in question had a value of at least $5,000, this element is satisfied.**

**The government is not required to prove that** *(name)* **paid or offered at least $5,000. It is the value of the business or transaction that the bribe was intended to influence or reward that is important for the purposes of this element.**

**Comment**

Sand et al., supra, 27A-21.

18 U.S.C. § 666 does not define "anything of value" or prescribe an approach to attaching value to the transaction. The term includes intangibles that may be difficult to value. *See United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996) (discussing meaning of term and holding that conjugal visits for which prisoner paid defendant $6,000 a month and $1,000 per visit satisfied this element of offense); *United States v. Coyne*, 4 F.3d 100, 111 (2d Cir. 1993) ("[A]n interest-free loan of $30,000 without contemporaneously documented terms is 'something of value.'"). The transaction influenced need not involve federal funds. *See United States v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988).

18 U.S.C. § 666(c) provides:

> This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

In some cases, there may be a question of whether the court should instruct the jury:

> In determining whether the (business) (transaction) (series of transactions) was valued at $5,000, do not include legitimate salary, wages, fees, or other compensation paid or expenses paid or reimbursed in the ordinary course of business.

## Firearm Offenses (18 U.S.C. §§ 922, 924)

6.18.922A False Statement in Purchase of a Firearm (18 U.S.C. § 922(a)(6))
6.18.922A-1 Firearm Offenses – Dealer Defined
6.18.922A-2 Firearm Offenses – Firearm Defined
6.18.922A-3 Firearm Offenses – Material Defined
6.18.922D Sale of Firearm to Convicted Felon (18 U.S.C. § 922(d)(1))
6.18.922D-1 Firearm Offenses – Reasonable Cause to Believe Defined
6.18.922G Felon In Possession of Firearm (18 U.S.C. § 922(g)) (non-bifurcated proceeding)
6.18.922G-1 Felon In Possession of Firearm (18 U.S.C. § 922(g)) (bifurcated proceeding)
6.18.922G-2 Proof of Prior Conviction
6.18.922G-3 Evidence of Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))
6.18.922G-4 Firearm Offenses – Knowing Possession Defined
6.18.922G-5 Firearm Offenses – In or Affecting Interstate or Foreign Commerce Defined
6.18.922J Possession of Stolen Firearm (18 U.S.C. § 922(j))
6.18.922K Possession of Firearm With Serial Number Removed, Obliterated, or Altered (18 U.S.C. § 922(k))
6.18.924A Possession of a Firearm In Furtherance of Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1))
6.18.924A-1 "In Furtherance of" Defined
6.18.924B Using or Carrying a Firearm During Any Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1))

*See also* 6.26.5861 Possession of an Unregistered Firearm (26 U.S.C. § 5861)

**6.18.922A False Statement in Purchase of a Firearm (18 U.S.C. § 922(a)(6))**

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with making a false statement in connection with the purchase** *(acquisition)* **of a firearm, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:**

**First: That** (*seller)* **was a licensed** *[(dealer) (collector) (importer) (manufacturer)]***;**

**Second: That** *(name) [(made a false statement) (used false identification)]* **while acquiring a firearm from** *(seller)***;**

**Third: That** *(name)* **knew that** *[(the statement) (the identification)]* **was false; and**

**Fourth: That the false** *(statement) (identification)* **was intended or likely to deceive** *(seller)* **with respect to any fact material to the lawfulness of the sale of the firearm.**

**Comment**

Ninth Circuit § 8.52; Eleventh Circuit § 34.3; Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 35-34 (Matthew Bender 2003) [hereinafter, Sand et al., supra].

> 18 U.S.C. § 922(a)(6) provides that it is unlawful:
> for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or

> written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

In large part, the instruction adapts the language of the statute. The prosecution must establish that seller was a licensed dealer, that the item purchased was a firearm, and that the false statement related to a material fact. *See United States v. Letky*, 371 F. Supp. 1286 (W.D. Pa. 1974) (dismissing charge because prosecution introduced no evidence the seller was a licensed dealer). The definitions of these terms are found in Instructions 6.18.922A-1 (Firearm Offenses – Dealer Defined), 6.18.922A-2 (Firearm Offenses – Firearm Defined), and 6.18.922A-3 (Firearm Offenses – Material Defined).

The term "acquisition" used in the statute includes both sales and other types of transactions, such as the redemption of a firearm from a pawnshop. *See Huddleston v. United States*, 415 U.S. 814, 819-20 (1974).

The statute includes the mental state requirement that the defendant knew the statement or identification was false. The Third Circuit has not addressed the precise mental state required under this section of the statute. Other courts agree that the false statement must be made knowingly. In *United States v. Wright*, 537 F.2d. 1144, 1145-46 (1st Cir. 1976), the First Circuit noted that the statute requires that the false statements be made knowingly and went on to note that the required knowledge could be demonstrated by proof of the defendant's reckless disregard for the truth. *See also United States v. Rahman*, 83 F.3d 89, 92 (4th Cir. 1996); *United States v. Petijean*, 883 F.2d 1341, 1345 (7th Cir. 1989). Proof that the defendant acted with "deliberate disregard for whether it was true or false or with a conscious purpose to avoid learning the truth" will establish this element of the offense. *See United States v. Thomas*, 484 F.2d 909, 913 (3d Cir. 1973); *see also United States v. Hester*, 880 F.2d 799, 802-03 (4th Cir. 1989) (summarizing authority). See Chapter 5 for instructions on mental states. In an appropriate case, the court may want to give Instruction 5.06 (Willful Blindness).

In addition, the false statement must be intended to deceive or likely to deceive a federally licensed firearms dealer. In *Rahman*, the court upheld a jury instruction stating that the requirements of 922(a)(6) could be satisfied if the government demonstrated that the defendant's false statement was "intended or likely to deceive" a federally licensed firearms dealer. 83 F.3d at 92. In *United States v. Ortiz-Loya*, 777 F.2d 973, 979 (5th Cir. 1985), the Fifth Circuit stated that in order to determine whether the defendant had violated §922(a)(6) the government must demonstrate that the statements in question "either (1) were given with the intent to deceive [the dealer] or (2) were "likely to deceive" [the dealer]. *See also Petijean*, 883 F.2d at 1345. The courts have also held that §922(a)(6) does not require specific intent. *See, e.g., United States v. Elias*, 917 F.2d 1514, 1518 (10th Cir. 1991); *United States v. Petitjean*, 883 F.2d at 1346; *United States v. Lawrence,* 680 F.2d 1126, 1128 (6th Cir.1982) (per curiam); *United States v. Behenna*, 552 F.2d 573 (4th Cir. 1977).

A question may arise concerning whether the defendant properly responded "no" to the question of whether the defendant has a prior felony conviction where the prior conviction was expunged or the defendant's civil rights had been restored. Section 921(a)(20) provides:

> What constitutes a conviction shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

In *Beecham v. United States*, 511 U.S. 368 (1994), the Supreme Court held that the defendants did not qualify under Section 921(a)(20) as having their civil rights restored even though their civil rights had been restored under state law. The Court concluded that the defendants, who had been convicted under federal law, could only qualify if their civil rights were restored under federal law and that restoration of rights under state law did not bring the defendants within the provision. In *United States v. Leuschen*, 395 F.3d 155 (3d Cir. 2005), the court considered this question in the context of a challenge to the defendant's conviction under 18 U.S.C. § 922(g)(1) for being a felon in possession of a firearm. The Third Circuit concluded that the defendant's civil rights had not been restored within the meaning of section 921(a)(20) where the Pennsylvania conviction had stripped the defendant of the right to serve on a jury - a core civil right - and that right had not been restored. The fact that Pennsylvania imposed no restrictions on the defendant's firearm rights as a result of the conviction was irrelevant where his core civil right had not been restored. *See also United States v. Essig*, 10 F.3d 968 (3d Cir. 1993). In *Caron v. United States*, 524 U.S. 308 (1998), the defendant's civil rights had been restored but the Court held that the "unless" clause applied because state law forbad the defendant to possess handguns outside his home or business. The Court concluded that the "unless" clause operates if the state restricts the defendant's possession of firearms in any way.

In *Logan v. United States*, 552 U.S. 23 (2007), the Supreme Court held that a conviction that never deprived the defendant of any civil rights can qualify as a predicate offense and is not subject to the exemption in § 921(a)(20). Not having been lost, the defendant's civil rights cannot be restored. *Logan*, 552 U.S. at 481-82. In *Logan*, the Court also noted that whether "§ 921(a)(20)'s 'unless' clause is triggered whenever state law provides for the continuation of firearm proscriptions, or only when the State provides individual notice to the offender of the firearms disabilities" remains an open question. *Logan*, 552 U.S. at 483 n.4.

(revised 12/09)

**6.18.922A-1 Firearm Offenses - Dealer Defined**

**A "dealer" is any person engaged in the business of selling firearms at wholesale or retail. The term "licensed dealer" means any dealer who is licensed under the provisions of the Gun Control Act of 1968.**

**Comment**

18 U.S.C. § 921(a)(11) provides:

> The term "dealer" means (A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

**6.18.922A-2 Firearm Offenses - Firearm Defined**

**The term "firearm" means any weapon which will expel, or is designed to or may readily be converted to expel, a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon** *[ or any firearm muffler or firearm silencer]***.**

**Comment**

18 U.S.C. § 921(a)(3) defines the term "firearm" for offenses falling within Title 18 as:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

For purposes of Title 26 of the United States Code, firearm is defined differently. *See* Instruction 6.26.5861 (Possession of an Unregistered Firearm (26 U.S.C. § 5861)).

To establish that the defendant used or possessed a firearm, the government need not produce the actual gun but can meet its burden of proof with testimony concerning the firearm. *See United States v. Beverly*, 99 F.3d 570 (3d Cir. 1996).

The Eighth Circuit makes the following suggestion for simplifying the instructions and limiting the number of definition instructions:

> The most effective way to avoid definitions relating to firearms is to use the most specific designation available. For example, assume that a defendant is being tried for transporting a rocket having a propellant charge of more than four ounces in violation of 18 U.S.C. § 922(a)(4). Examples of the ways the judge might instruct the jury on one of the elements are as follows:
> (1) "The defendant transported a firearm." It will then be necessary to have an additional instruction that a rocket having a propellant charge of more than four ounces is a firearm. *See* 18 U.S.C. § 921(a)(4)(A)(iii); or
> (2) "The defendant transported a destructive device." Even here, it will then be necessary to instruct that a rocket having a propellant charge of more than four ounces is a destructive device. *Id.*; or
> (3) "The defendant transported a rocket having a propellant charge of more than four ounces." Using the third alternative, no additional instruction is necessary.

Eighth Circuit § 843.

18 U.S.C. § 921(a)(4) defines the term "destructive device" for purposes of offenses falling within Title 18 as:

> (A) any explosive, incendiary, or poison gas–
> (I) bomb,
> (ii) grenade,
> (iii) rocket having a propellant charge of more than four ounces,
> (iv) missile having an explosive or incendiary charge of more than one-quarter ounce,
> (v) mine, or
> (vi) device similar to any of the devices described in the preceding clauses;
> (B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and
> (C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.
>
> The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

If the firearm providing the basis for the offense charged is a destructive device as defined in section 921(a)(4), the Government may be required to prove that the defendant intended to use the components as a weapon. In *United States v. Urban,* 140 F.3d 229, 233 (3d Cir. 1998), the Third Circuit addressed the proof necessary to establish possession of an unregistered destructive device in violation of 26 U.S.C. § 5861 and held that "intent is a required element when the components are commercial in nature and are not designed or redesigned for use as a weapon." However, the court also made it clear that if there is no ambiguity concerning the nature of the device, the government need not prove that the defendant intended to use the components as a weapon. 140 F.3d at 234. For example, in *Urban*, where it was "undisputed that the parts were clearly designed to create a grenade," the trial court was not required to instruct on intent to use the components as a weapon. 140 F.3d at 234.

In *United States v. Hull*, 456 F.3d 133, 143-44 (3d Cir. 2006), the Third Circuit further clarified the intent requirement under section 5861. The court rejected the defendant's argument for additional intent instructions and explained:

> The Government was required to prove that Hull knew of the features that made what he was making, possessing, or transferring, a "firearm," . . . and indeed the District Court instructed the jury accordingly. However, Hull claims that the Government also had to prove that he intended for the unassembled parts of the pipe bomb to be assembled into a fully functioning pipe bomb. This is simply not an element of 26 U.S.C. § 5861.* * * Accordingly, we discern no error in the District Court's refusal to instruct the jury that the Government must prove Hull intended that the parts be converted into a destructive device. (Citations omitted.)

The statute does not apply to antique firearms, which are defined in 18 U.S.C. § 921(a)(16) as follows:

> (A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or
> (B) any replica of any firearm described in subparagraph (A) if such replica--
> (I) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or
> (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or
> (C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

The government does not initially bear the burden of establishing that the firearm is not an antique firearm. That a weapon qualifies as an antique falling within the exemption is an affirmative defense in the sense that the defendant bears the burden of production. *United States v. Lawrence*, 349 F.3d 109, 122 (3d Cir. 2003). Thus, the defendant must introduce some evidence that the weapon qualifies for the exemption before the government has the burden of establishing beyond a reasonable doubt that it is not an antique; it is not enough for the defendant to raise merely the possibility that the firearm is an antique. 349 F.3d at 123.

**6.18.922A-3 Firearm Offenses – Material Defined**

**A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in connection with the sale of the firearm. In determining whether a fact was material to the lawfulness of the sale of the firearm, you may consider that**

*[Include language that applies:*

*(the law prohibits any person who has been convicted of a felony, that is, a crime punishable by a term of imprisonment exceeding one year, from possessing any firearm. (Name the felony of which the defendant was proven to have been convicted) is a crime punishable by imprisonment for a term exceeding one year.)*

*(a firearm sale is unlawful unless the seller records, among other matters, the name and age of the buyer. The fact that the buyer could lawfully obtain a firearm under (his)(her) true name and age does not make (his)(her) giving a false name and age immaterial. It is no defense with respect to this element that the buyer may have been eligible to acquire the firearm. A buyer who is eligible to lawfully acquire a firearm must nonetheless properly identify (himself)(herself) by name and age, among other matters.)]*

**Comment**

Sand et al., supra, 44-4.

This instruction treats the question of "materiality" as a question for the jury and includes language to guide it in assessing materiality. In *United States v. Gaudin*, 515 U.S. 506 (1995), the Supreme Court held that the question of materiality in false statement cases under 18 U.S.C. § 1001 is for the jury. In *United States v. Klais*, 68 F.3d 1282 (11th Cir. 1995), the Eleventh Circuit distinguished *Gaudin* and held that the question of materiality under § 922(a)(6) is for the

court. However, in *United States v. McLaughlin,* 386 F.3d 547, 552 (3d Cir. 2004), the Third Circuit held that the trial court committed error when it treated materiality as a question of law in a prosecution for perjury and for violation of the Labor-Management Reporting and Disclosure Act. The court concluded that materiality was an element of the offense because the statute "expressly requires that the fact allegedly withheld be 'material.'" 386 F.3d at 552. Because § 922(a)(6) expressly requires materiality, the court should treat it as a question for the jury, unless the statement is clearly not material as a matter of law.

**6.18.922D Sale of Firearm to Convicted Felon (18 U.S.C. § 922(d)(1))**

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with selling a firearm to** *(a convicted felon) (a person who was under indictment for a felony)*, **which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **knowingly sold a firearm to** *(name of buyer)*;

**Second: That** *(name of buyer)* **was** *[(convicted of a felony) (a person who was under indictment for a felony)]*, **that is, a crime punishable by imprisonment for a term exceeding one year; and**

**Third: That at the time of the sale,** *(name)* **knew or had reasonable cause to believe that** *(name of buyer)* **was** *[(a convicted felon) (a person who was under indictment for a felony)]*.

**Comment**

Fifth Circuit § 2.46.

18 U.S.C. § 922(d)(1) provides:

> (d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person–
>
> > (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.

The court should also instruct the jury on the definition of firearm Instruction 6.18.922A-2 (Firearm Offenses – Firearm Defined).

The instruction is based on the statutory language. In *United States v. Xavier*, 2 F.3d

1281, 1286 (3d Cir. 1993), the Third Circuit noted that a defendant cannot be convicted under § 922(d)(1) "without knowledge or reason to know of the transferee's status." The Third Circuit has not addressed the other requirements of the statute. Instruction 6.18.922D-1 (Firearm Offenses – Reasonable Cause to Believe Defined) defines reasonable cause to believe.

**6.18.922D-1 Firearm Offenses – Reasonable Cause to Believe Defined**

**To have "reasonable cause to believe" that** *(someone is a convicted felon)(someone is under indictment for a felony)(a firearm is stolen)* **means to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person, knowing the same things, to reasonably conclude that** *(the other person was in fact a convicted felon)(the other person was in fact under indictment for a felony)(the firearm was stolen)***.**

**Comment**

Eleventh Circuit § 34.5.

This instruction should be given when the defendant is charged with a violation of 18 U.S.C. § 922(d)(1) (sale of a firearm to a convicted felon) or § 922(j) (possession of a stolen firearm). Section 922(d)(1) requires proof that the defendant knew or had reasonable cause to believe that the defendant was a convicted felon or was under indictment for a felony. Section 922(j) requires proof that the defendant knew or had reasonable cause to believe that the firearm was stolen. The instruction should be tailored to the charges in the case.

## 6.18.922G Felon In Possession of Firearm (18 U.S.C. § 922(g)) (non-bifurcated proceeding)

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with being a felon in possession of a firearm, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **has been convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year;**

**Second: That after this conviction,** *(name)* **knowingly** *(possessed)(received)* **the firearm described in Count** *(No.)* **of the indictment; and**

**Third: That** *(name)***'s** *(possession)(receipt*) **was in or affecting interstate or foreign commerce.**

### Comment

In some cases, the court may bifurcate a trial involving charges under 18 U.S.C. § 922(g). *See* Instruction 18.922G-1 (Felon In Possession of Firearm (18 U.S.C. § 922(g) (bifurcated proceeding)) and accompanying comment. Instruction 18.922G-1 should be given if the proceeding is not bifurcated. In addition, the court should give Instructions 6.18.922A-2 (Firearm Offenses – Firearm Defined*)*, 6.18.922G-5 (Firearm Offenses – In or Affecting Interstate or Foreign Commerce Defined), 6.18.922G-4 (Firearm Offenses – Possession Defined), 6.18.922G-2 (Proof of Prior Conviction), and 5.02 (Knowingly).

To obtain a conviction under Section 922(g), the government must prove beyond a reasonable doubt that (1) the defendant had previously been convicted of a crime punishable by imprisonment for a term exceeding one year; (2) the defendant knowingly possessed a firearm; and (3) the firearm had previously passed in interstate commerce. *See United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000).

The first element under Section 922(g) is that the defendant is a convicted felon. Evidence that the defendant is a convicted felon tends to prejudice the defendant, generating a

risk that the jury will conclude that the defendant is more likely to have committed the offense(s) for which the defendant is on trial simply because the defendant has previously been convicted. Despite this risk of prejudice, of course, the government must be allowed to prove the felony conviction at some point. If the trial is not bifurcated, the court should give Instruction 2.13 (Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C.A. § 922(g))) during the trial and Instruction 6.18.922G-3 (Evidence of Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))) in the concluding instructions to mitigate the risk of prejudice.

Because of this risk of prejudice, defendants generally request bifurcation of the issues to reduce the prejudicial impact of the prior conviction, seeking to have evidence of the prior conviction withheld until the jury has resolved the other issues in the case. A defendant who is charged only with violating Section 922(g) is not entitled to bifurcation of the issues. *See United States v. Jacobs*, 44 F.3d 1219 (3d Cir. 1995). However, if the felon in possession charge under § 922(g) is joined with other charges, the court should strongly consider bifurcating the trial. If the court does not bifurcate the trial, the Third Circuit has expressed a preference for severance, unless the evidence of the prior conviction would be admissible even if the counts were tried separately. *See United States v. Busic*, 587 F.2d 577, 585 (3d Cir. 1978). The defendant is not entitled to severance if the trial court bifurcates the trial. *See United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992). If the defense does not request bifurcation, the judge may want to colloquy the defendant and defense counsel to establish on the record that they do not desire bifurcation.

The defendant may establish the defense of justification to the charge of being a felon in possession of a firearm by establishing the following four elements:

> (1) he was under unlawful and present threat of death or serious bodily injury;
> (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct;
> (3) he had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and
> (4) there is a direct causal relationship between the criminal action and the avoidance of the threatened harm.

*United States v. Paolello*, 951 F.2d 537, 540 (3d Cir. 1991). The defendant has the burden of establishing these elements by a preponderance of the evidence. *United States v. Dodd*, 225 F.3d 340, 348 (3d Cir. 2000). An instruction on justification is found at 8.08 (Legal Justification).

The Third Circuit has not recognized the innocent possession defense to a felon-in-possession charge but has not expressly rejected it. *See United States v. Brantley*, 2009 WL 2618811 (3d Cir. 2009) (non-precedential); *United States v. Broadus*, 291 F. App'x. 486 (3d Cir. 2008) (non-precedential).

(revised 11/10)

**6.18.922G-1 Felon In Possession of Firearm (18 U.S.C. § 922(g)) (bifurcated proceeding)**

**Alternative 1: Bifurcation as to prior conviction only.**

**Instruction to be included in first phase of trial:**

**In addition to your verdict on Count***(s) (No.s of the other counts of the indictment)* **the verdict form asks you to answer two special interrogatories or questions. Those two questions are:**

**One, did the defendant,** *(name)***, on or about** *(date)***, knowingly possess** *(describe firearm charged in the indictment)***?**

**and**

**Two, did the defendant,** *(name)***, possess that firearm in or affecting interstate or foreign commerce, as defined in these instructions?**

**Please be aware that, after you complete your deliberations, there may be some additional evidence presented and an additional matter about which you will have to deliberate.**

**Instruction to be given after the jury completes initial deliberations if, but only if, the jury answers both special interrogatories in the affirmative:**

**Now that you have completed your initial deliberations, there is one additional matter for you to consider: Count** *(No.)* **of the indictment. Count** *(No.)* **of the indictment charges the defendant** *(name)* **with being a felon in possession of a firearm, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **was previously convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year;**

**Second: That after this conviction,** *(name)* **knowingly** *[(possessed)(received)] (describe firearm)***; and**

**Third: That** *(name)***'s** *(possession)(receipt*) **was in or affecting interstate or foreign commerce.**

**By answering the two special interrogatories on the verdict form in the affirmative, you have already determined that the government has satisfied its burden of proving the second and third elements of this offence. The only remaining issue for you to decide with respect to Count** *(No.)* **is whether the government has satisfied its burden of proving the first element of the offense beyond a reasonable doubt, that is, whether** *(name)* **had been convicted of a crime punishable by imprisonment for a term exceeding one year prior to the date charged in the indictment. The government may now present evidence to you on that question.**

<u>Alternative 2:</u> **Bifurcation as to entire charge under Section 922(g).**

**Instruction to be included in first phase of trial:**

**Please be aware that, after you complete your deliberations, there may be some additional evidence presented and an additional matter about which you will**

**have to deliberate.**

**<u>Instruction to be given after the jury completes initial deliberations</u>:**

**Now that you have completed your initial deliberations, you must consider Count** *(No.)* **of the indictment.** *[The court should then give the jury the preliminary instructions on Section 922(g) before taking evidence on that charge.]*

**Comment**

18 U.S.C. §922(g) provides in part:

> It shall be unlawful for any person--
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> (2) who is a fugitive from justice;
> (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
> * * *
> (6) who has been discharged from the Armed Forces under dishonorable conditions;
> * * *
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

*See also* 18 U.S.C. § 924(a)(1)(B) (prescribing the penalty for a knowing violation of §922(g)). This instruction addresses only the most commonly prosecuted violation of Section 922(g), being a felon in possession of a firearm. The instruction may be modified as required for violations of the other provisions of Section 922(g). For the reasons discussed below, the court may bifurcate the proceeding. The appropriate instructions (Alternative 1 or Alternative 2) will depend on how the trial is bifurcated. Instruction 18.922G-1 should be given if the proceeding is not bifurcated. If the trial is bifurcated, the court should give the instructions outlined above. In addition, the court should give Instructions 6.18.922A-2 (Firearm Offenses – Firearm Defined), 6.18.922G-5 (Firearm Offenses – In or Affecting Interstate or Foreign Commerce Defined), 6.18.922G-4 (Firearm Offenses – Possession Defined), and 6.18.922G-2 (Proof of Prior Conviction). The timing of these instructions depends on whether the second phase of the trial addresses all three elements of the felon in possession charge or only the question of the defendant's prior conviction.

To obtain a conviction under Section 922(g), the government must prove beyond a

reasonable doubt that (1) the defendant had previously been convicted of a crime punishable by imprisonment for a term exceeding one year; (2) the defendant knowingly possessed a firearm; and (3) the firearm had previously passed in interstate commerce. *See United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000).

The first element under Section 922(g) is that the defendant is a convicted felon. Evidence that the defendant is a convicted felon tends to prejudice the defendant, generating a risk that the jury will conclude that the defendant is more likely to have committed the offense(s) for which the defendant is on trial simply because the defendant has previously been convicted. Despite this risk of prejudice, of course, the government must be allowed to prove the felony conviction at some point. If the trial is not bifurcated, the court should give Instruction 2.13 (Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))) during the trial and Instruction 6.18.922G-3 (Evidence of Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))) in the concluding instructions to mitigate the risk of prejudice.

Because of this risk of prejudice, defendants generally request bifurcation of the issues to reduce the prejudicial impact of the prior conviction, seeking to have evidence of the prior conviction withheld until the jury has resolved the other issues in the case. A defendant who is charged only with violating Section 922(g) is not entitled to bifurcation of the issues. *See United States v. Jacobs*, 44 F.3d 1219 (3d Cir. 1995). However, if the felon in possession charge under § 922(g) is joined with other charges, the court should strongly consider bifurcating the trial. If the court does not bifurcate the trial, the Third Circuit has expressed a preference for severance, unless the evidence of the prior conviction would be admissible even if the counts were tried separately. *See United States v. Busic*, 587 F.2d 577, 585 (3d Cir. 1978). The defendant is not entitled to severance if the trial court bifurcates the trial. *See United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992). If the defense does not request bifurcation, the judge may want to colloquy the defendant and defense counsel to establish on the record that they do not desire bifurcation.

If the court agrees to bifurcate the trial, the court may bifurcate only the question of the defendant's prior conviction (Alternative 1) or the entire felon in possession charge (Alternative 2). The court should give the corresponding instructions above.

Alternative 1: If the court bifurcates only the question of the defendant's prior conviction, the jury should first hear evidence concerning the other counts of the indictment as well as the questions of knowing possession of the firearm and whether it was in or affecting interstate or foreign commerce. The jury should then deliberate on the other counts of the indictment and answer special interrogatories concerning those two elements of the felon in possession charge.[1]

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[1] Verdict Form

Count*(s) (No.(s))* of the Indictment

1. On Count *(include for each count other than the felon in possession charge)* of the indictment, we, the jury, find the defendant *(name)*:

_____ Guilty

If the jury answers the special interrogatories in the affirmative, the court would then proceed to the question of the defendant's prior conviction, giving the additional instructions included in Alternative 1 above. After the presentation of evidence on the question of the defendant's prior conviction, the court should instruct the jury on proof of prior conviction, Instruction 6.18.922G-2 (Proof of Prior Conviction).

Alternative 2: If the court bifurcates the entire felon in possession charge, the jury should first hear evidence and deliberate concerning the other counts of the indictment, and only then hear evidence and instruction and deliberate concerning the count charging a violation of Section 922(g). *See, e.g., United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992). In the first phase of the trial, the court should give the instruction indicated above, informing the jury that there may be a further proceeding. Once the jury completes its initial deliberation, the court should then give the instruction set out above, followed by the preliminary instructions on the felon in possession charge. The court should then receive evidence relating to the felon in possession charge, followed by final instructions on that charge. *See* Instruction 6.18.922G-1 (Felon In Possession of Firearm (18 U.S.C. § 922(g))(bifurcated proceeding)).

The second element under Section 922(g) is the knowing possession of a firearm. Section 924(a)(1)(B) provides that to obtain a conviction under Section 922(g) the government must prove the defendant acted "knowingly." The government is not required to prove the defendant knew that possession or receipt of a firearm was unlawful or that the firearm possessed or received had traveled in interstate commerce. The government must prove that the defendant knew that he possessed or received a firearm. In *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000), the Third Circuit stated:

> The requirement that the government must show that the defendant "knowingly possessed a firearm" means only that the government must prove the defendant's awareness that he possessed the firearm; the government need not demonstrate that the defendant possessed the firearm with an intent to cause harm, or with knowledge that such possession was unlawful.

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_____ Not guilty

Special Interrogatories:

1. Did the defendant, *(name)*, on or about *(date)*, knowingly possess *(describe firearm charged in the indictment)*?

_____ Yes
_____ No

If your answer is yes, go on to Special Interrogatory No. 2. If your answer is no skip Special Interrogatory No. 2 and have your foreperson sign and date this verdict form.

2. Was the firearm described in Special Interrogatory No. 1 possessed in or affecting interstate or foreign commerce?

_____ Yes
_____ No

If there is a question concerning the defendant's knowledge, the court may want to add language elaborating on the knowledge requirement.

Simultaneous possession or receipt of multiple firearms constitutes a single violation of Section 922(g). *See United States v. Frankenberry*, 696 F.2d 239 (3d Cir. 1982). In some cases, the court may wish to instruct the jury on willful blindness. *See* Instruction 5.06 (Willful Blindness).

> The defendant may establish the defense of justification to the charge of being a felon in possession of a firearm by establishing the following four elements:
>
> (1) he was under unlawful and present threat of death or serious bodily injury;
> (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct;
> (3) he had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and
> (4) there is a direct causal relationship between the criminal action and the avoidance of the threatened harm.

*United States v. Paolello*, 951 F.2d 537, 540 (3d Cir. 1991). The defendant has the burden of establishing these elements by a preponderance of the evidence. *United States v. Dodd*, 225 F.3d 340, 348 (3d Cir. 2000). An instruction on justification is found at 8.08 (Legal Justification).

The Third Circuit has not recognized the innocent possession defense to a felon-in-possession charge but has not expressly rejected it. *See United States v. Brantley*, 2009 WL 2618811 (3d Cir. 2009) (non-precedential); *United States v. Broadus*, 291 F. App'x. 486 (3d Cir. 2008) (non-precedential).

(revised 11/10)

**6.18.922G-2 Proof of Prior Conviction**

**In order to find the defendant guilty of this offense, you must find that the government proved that before the date** *(name)* **is charged with possessing** *(receiving) (transporting)* **the firearm,** *(name)* **had been convicted of a crime punishable by imprisonment for a term exceeding one year.**

**The government contends that the defendant was convicted of** *(insert crime)* **in state** *(federal)* **court. I charge you that as a matter of law,** *(insert crime)* **is a crime punishable by imprisonment for a term exceeding one year. However, you must determine beyond a reasonable doubt if** *(name)* **was convicted of this crime.**

**To satisfy this** *(first)* **element, you need only find beyond a reasonable doubt that** *(name)* **was, in fact, convicted of that crime and that the conviction was prior to the possession of the weapon as charged in the indictment. It is not necessary that the government prove that** *(name)* **knew that the crime was punishable by imprisonment for more than one year, nor is it necessary for** *(name)* **to have been sentenced to imprisonment for more than one year.** *(A plea of guilty has the same consequences as a conviction after trial.)*

[*If the parties stipulate, substitute:*

*The parties have stipulated that (name) was convicted of a crime in state (federal) court and that this crime is punishable by imprisonment for a term exceeding one year. The parties have also stipulated that this felony conviction occurred prior to the time that (name) is alleged to have possessed the firearm charged in the indictment.]*

**Comment**

Sand et al., supra, 35-48.

This instruction includes language for cases in which the defendant's prior conviction is the subject of proof at trial and alternative language for cases in which the parties stipulate to the prior conviction. The instruction should be modified accordingly.

The first element under Section 922(g) is that the defendant is a convicted felon.[2] In *United States v. Small*, 544 U.S. 385 (2005), the Supreme Court held that the government must establish that the defendant was convicted in a domestic court; the statute does not extend to foreign convictions.

In some cases, a defendant may be able to argue that state law has removed the status of being a convicted felon under the statute. 18 U.S.C. § 921(a)(20) provides:

> What constitutes a conviction shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

In *Beecham v. United States*, 511 U.S. 368 (1994), the Supreme Court held that the defendants did not qualify under Section 921(a)(20) as having their civil rights restored even though their civil rights had been restored under state law. The Court concluded that the defendants, who had been convicted under federal law, could only qualify if their civil rights were restored under federal law and that restoration of rights under state law did not bring the defendants within the provision. In *United States v. Leuschen*, 395 F.3d 155 (3d Cir. 2005), the Third Circuit concluded that the defendant was properly convicted of being a felon in possession. The court held that defendant's civil rights had not been restored within the meaning of section 921(a)(20) where the Pennsylvania conviction had stripped the defendant of the right to serve on a jury - a core civil right - and that right had not been restored. The fact that Pennsylvania imposed no restrictions on the defendant's firearm rights as a result of the conviction was irrelevant where his core civil right had not been restored. *See also United States v. Essig*, 10 F.3d 968 (3d Cir. 1993). In *Caron v. United States*, 524 U.S. 308 (1998), the defendant's civil rights had been restored but the Court held that the "unless" clause applied because state law forbad the defendant to possess handguns outside his home or business. The Court concluded that the "unless" clause operates if the state restricts the defendant's possession of firearms in any way.

In *Logan v. United States*, 552 U.S. 23 (2007), the Supreme Court held that a conviction

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[2] Specified misdemeanor convictions involving domestic abuse may also bring a defendant within the statute. *See* 18 U.S.C. §§ 921(33)(A), 922(g)(9).

that never deprived the defendant of any civil rights can qualify as a predicate offense and is not subject to the exemption in § 921(a)(20). Not having been lost, the defendant's civil rights cannot be restored. *Logan*, 552 U.S. at 481-82. In *Logan*, the Court also noted that whether "§ 921(a)(20)'s 'unless' clause is triggered whenever state law provides for the continuation of firearm proscriptions, or only when the State provides individual notice to the offender of the firearms disabilities" remains an open question. *Logan*, 552 U.S. at 483 n.4.

(revised 12/09)

## 6.18.922G-3 Evidence of Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))

**You heard evidence** *(through a stipulation)* **that the defendant was convicted before this incident in** *(name of court; e.g., a court of the Commonwealth of Pennsylvania)* **of a crime punishable by imprisonment for a term exceeding one year. This prior conviction was brought to your attention only because it tends to establish one of the elements of the crime of possession of a firearm by a convicted felon as set forth in the indictment. You are not to speculate as to the nature of the conviction. You may not consider the prior conviction in deciding whether** *(name of defendant)* **was in knowing possession of the firearm that** *(he) (she)* **is charged in this case with possessing, which is a disputed issue in this case.**

**The fact that the defendant was found guilty of another crime on another occasion does not mean that** *(he)(she)* **committed this crime on** *(date of offense charged in indictment)***, and you must not use** *(his)(her)* **guilt of the other crime as proof of the crime charged in this case except for the one element of this crime which I have mentioned. You may find the defendant guilty of this crime only if the government has proved beyond a reasonable doubt all of the elements of this crime.**

### Comment

This instruction is based on the instruction approved in *United States v. Belk*, 346 F.3d 305, 309 n.4 (2d Cir. 2003).

This instruction should be given in the final charge to the jury if the government

introduced evidence that the defendant is a convicted felon as required to prove a violation of 18 U.S.C. § 922 (g). Evidence of the prior conviction tends to prejudice the defendant, generating a risk that the jury will conclude that the defendant is more likely to have committed the offense(s) for which the defendant is on trial simply because the defendant has previously been convicted. Despite this risk of prejudice, the government must be allowed to prove the felony conviction.

When the defendant is charged only with a violation of Section 922(g), the defendant is not entitled to bifurcation of the issues. *See United States v. Jacobs*, 44 F.3d 1219 (3d Cir. 1995). The court should give Instruction 2.13 (Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))) when the evidence of the prior conviction is introduced and should include this instruction in the final charge to the jury.

If the felon in possession charge under § 922(g) is joined with other charges, the court should consider bifurcating the trial. In the bifurcated trial, the jury should first hear evidence and deliberate concerning the other counts of the indictment and the determination of knowing possession of a firearm. Of course, if the trial is bifurcated, voir dire cannot include any questions related to the prior conviction, and the government must not mention that element in its opening statement. Only if the jury finds knowing possession of the firearm at the end of the first phase of the trial will it hear evidence of the defendant's criminal record and deliberate concerning the final element of the Section 922(g) charge. *See, e.g., United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992). In a bifurcated proceeding, Instruction 2.13 (Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))) should be given when the prior conviction is introduced, and this instruction should be included in the final charge to the jury.

There are additional steps that the court should take to reduce the prejudice. In *Old Chief v. United States*, 519 U.S. 172 (1997), the Supreme Court recognized the risk of prejudice and held that, where the defendant offered to stipulate that he was a convicted felon, it was reversible error to admit evidence of the name and nature of the offense of which the defendant was convicted. In *United States v. Smith,* 104 F. App'x. 266, 275 (3d Cir. 2004), a non-precedential decision, the Third Circuit noted that "careful *voir dire* can help insure that jurors who would be influenced by knowledge of the element of a prior felony conviction are not chosen for the jury."

**6.18.922G-4 Firearm Offenses – Knowing Possession Defined**

**To establish the second element of the offense, the government must prove that** *(name)* **possessed the firearm in question. To "possess" means to have something within a person's control. The government does not have to prove that** *(name)* **physically held the firearm, that is, had actual possession of it. As long as the firearm was within** *(name)***'s control,** *(he)(she)* **possessed it. If you find that** *(name)* **either had actual possession of the firearm or had the power and intention to exercise control over it, even though it was not in** *(name)***'s physical possession - that is, that** *(name)* **had the ability to take actual possession of the object when** *(name)* **wanted to do so - you may find that the government has proven possession. Possession may be momentary or fleeting.**

*[The law also recognizes that possession may be sole or joint. If one person alone possesses a firearm, that is sole possession. However, more than one person may have the power and intention to exercise control over a firearm. This is called joint possession. If you find that (name) had such power and intention, then (he)(she) possessed the firearm even if (he)(she) possessed it jointly with another.]*

*[Mere proximity to the firearm or mere presence on the property where it is located or mere association with the person who does control the firearm or the property, is insufficient to support a finding of possession.]*

**Proof of ownership of the firearm is not required.**

**The government must prove that** *(name)* **knowingly possessed the firearm**

**described in the indictment. This means that *(name)* possessed the firearm purposely and voluntarily, and not by accident or mistake. It also means that *(name)* knew the object was a firearm.**

**Comment**

Sand et al., supra, 35-49; *United States v. Mercado*, 412 F.3d 243, 251 (1st Cir. 2005).

The government must establish that the defendant possessed the firearm. Possession may be actual or constructive. To establish constructive possession the government must prove that the defendant knew of the object and had control over it. In *United States v. Brown*, 3 F.3d 673 (3d Cir. 1993), a case involving possession of drugs, the Third Circuit stated:

> Although the government need not show proof of actual possession, to show "constructive" possession of an illegal substance the government must submit sufficient evidence to support an inference that the individual "knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons. Constructive possession necessarily requires both 'dominion and control' over an object and knowledge of that object's existence."

3 F.3d at 680 (citing *United States v. Iafelice*, 978 F.2d 92 (3d Cir. 1992)). *See also United States v. Heilman*, 2010 WL 1583097 (3d Cir. 2010) (non-precedential) (affirming firearm possession charges based on constructive possession); *United States v. Smith,* 352 F. App'x. 709 (3d Cir. 2009) (non-precedential); *United States v. Basley*, 357 F. App'x. 455, 461-62 (3d Cir. 2009) (non-precedential) (concluding that defendant had constructive possession of one of two guns, but not the other); *United States v. Brightwell*, 104 F. App'x. 823 (3d Cir. 2004) (affirming conviction for possessing a firearm in relation to a drug trafficking crime on basis of constructive possession); *United States v. Garth*, 188 F.3d 99, 112 (3d Cir.1999) (holding that prosecution had failed to establish that defendant had constructive possession).

In *United States v. Lowery*, 265 F. App'x. 111 (3d Cir. 2008), the Third Circuit rejected the defendant's challenge to the following instruction on possession:

> To possess means to have something within a person's control. This does not necessarily mean that the defendant must hold it physically, that is, have actual possession of it. Possession includes sole and joint possession. Possession also 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. So

whenever I use the term "possession" in these instructions, I mean actual as well as constructive possession.

If the government's case rests heavily on the defendant's presence in combination with other circumstances, the court may wish to include the optional language instructing the jury that mere presence or association is not sufficient to establish possession. It is clear that mere presence or association is insufficient to prove possession. *See United States v. Davis*, 461 F.2d 1026, 1036 (3d Cir. 1972) (addressing possession of drugs). In *United States v. Stewart*, 131 F. App'x. 350, 354 (3d Cir. 2005), a non-precedential decision, however, the court held that the defendant was not entitled to a "mere presence" instruction because the jury instructions given adequately conveyed the requirements for constructive possession:

> The instructions concerning actual and constructive possession were legally correct and complete. The District Court made clear that, in order to have actual possession of an object, a person must have direct physical control or authority over the object, such as the control one has when one holds an object in one's hands. And in order to have "constructive" possession over an object, the District Court explained, a person must have the ability to take actual possession of the object when the person wants to do so. Because mere proximity, mere presence, or mere association is not enough for even constructive possession, these instructions adequately conveyed to the jury that constructive possession is not established by mere proximity, mere presence, or mere association.

The instruction does not use the terms "constructive possession" or "dominion," which are commonly used by the courts when discussing the legal concept of possession. Jurors cannot be expected to understand these terms. However, if the attorneys have used either or both of these terms during the trial, the court may choose to modify the instruction accordingly.

Section 922(g) requires proof of that the possession was "knowing." *See United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000). The Supreme Court has held that to establish a violation of 26 U.S.C. § 5861(d), the Government must prove beyond a reasonable doubt that the defendant knowingly possessed the item and also knew "the item he possessed had the characteristics that brought it within the statutory definition of a firearm" but need not prove that the defendant knew that the item fell within the statutory definition. *See Rogers v. United States*, 522 U.S. 252, 254-55 (1998); *Staples v. United States*, 511 U.S. 600, 619 (1994). Section 922(g) thus appears to require that the government prove both that the defendant possessed the firearm purposely and that the defendant knew the object was a firearm. *See United States v. Tomlinson*, 67 F.3d 508, 513 (4th Cir. 1995) (holding *Staples*' scienter requirement applies to prosecutions under 922(g) and requires proof that defendant was aware of character of firearm possessed); *see also United States v. Field*, 39 F.3d 15, 17 (1st Cir. 1994).

(revised 11/10)

## 6.18.922G-5 Firearm Offenses – In or Affecting Interstate or Foreign Commerce Defined

**The** *(specify which element; i.e., second)* **element that the government must prove beyond a reasonable doubt is that the firearm specified in the indictment**

*[For 18 U.S.C. § 922(g)(1) use the following language:*

*was in or affecting interstate (foreign) commerce. This means that the government must prove that at some time before the defendant's possession, the firearm had traveled in interstate commerce.*

*For 18 U.S.C. §§ 922(j) and (k) use the following language:*

*had at some time traveled in interstate commerce.]*

**It is sufficient for the government to satisfy this element by proving that at any time prior to the date charged in the indictment, the firearm crossed a state line** *(the United States border)***. The government does not need to prove that** *(name) (himself)(herself)* **carried it across a state line** *(the border)***, or to prove who carried it across or how it was transported. It is also not necessary for the government to prove that** *(name)* **knew that the firearm had traveled in interstate commerce.**

**In this regard, there has been evidence that the firearm in question was manufactured in a different state** *(country)* **than the state where** *(name)* **is charged with possessing it. You are permitted to infer from this fact that the firearm traveled in interstate commerce; however, you are not required to do so.**

**Comment**

Sand et al., supra, 35-50.

18 U.S.C. §921(a)(2) provides:

> The term "interstate or foreign commerce" includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

The government must prove the connection to interstate commerce to establish a violation of 18 U.S.C. § 922(g)(1), (j) or (k). The government must meet that obligation regardless of whether it charges the defendant with possessing, receiving or transporting the firearm. *United States v. Bass*, 404 U.S. 336 (1971).

The government need only show that the firearm has been, at some time, in interstate commerce, a minimal nexus. In *Scarborough v. United States*, 431 U.S. 563 (1977), the Court held that the defendant was properly convicted of being a felon in possession of a firearm even though he had acquired the firearm before his conviction and it had not moved in interstate commerce since that time. In *United States v. Singletary*, 268 F.3d 196, 200 (3d Cir. 2001), the Third Circuit noted:

> [T]he *Scarborough* Court established the proposition that the transport of a weapon in interstate commerce, however remote in the distant past, gives its present intrastate possession a sufficient nexus to interstate commerce to fall within the ambit of the statute.

In *Singletary*, the court affirmed the defendant's conviction, rejecting a constitutional challenge to Section 922(g). In that case, the defendant was charged on the basis of his possession of a gun that was manufactured in Brazil and shipped to Texas, but could not be traced beyond that point until it was found in Pennsylvania. The trial court gave the following instruction on the question of interstate or foreign commerce:

> To prove that the firearm was possessed in or affecting interstate or foreign commerce, the Government must prove that at some time prior to defendant's possession of the firearm, the firearm had traveled in interstate or foreign commerce ... that at any time prior to the date charged in the Indictment, the firearm crossed a state line.

*Singletary*, 268 F.3d at 198.

**6.18.922J Possession of Stolen Firearm (18 U.S.C. § 922(j))**

**Count** *(No.)* **of the indictment charges** *(name)* **with possession of a stolen firearm, which is a violation of federal law.**

**In order to find** *(name)* **guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt.**

**First: That** *(name)* **knowingly possessed the firearm described in the indictment. This means that** *(name)* **possessed the firearm purposely and voluntarily, and not by accident or mistake. It also means that** *(name)* **knew the object was a firearm.**

**Second: That at the time** *(name)* **possessed it, the firearm was stolen and** *(name)* **knew or had reasonable cause to believe that the firearm was stolen. However, the government is not required to prove that** *(name)* **knew** *(he)(she)* **was breaking the law.**

**Third: That the firearm had at some time traveled in interstate commerce.**

**Comment**

Sand et al., supra, 35-53, 35-56.

18 U.S.C. §922(j) provides:

> It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or

ammunition was stolen.

In addition to this instruction, the court should also give Instruction 5.02 (Knowingly), Instruction 6.18.922A-2 (Firearm Offenses – Firearm Defined), Instruction 6.18.922G-4 (Firearm Offenses – Possession Defined), and Instruction 6.18.922G-5 (Firearm Offenses – In or Affecting Interstate or Foreign Commerce Defined).

In *United States v. Howard*, 214 F.3d 361, 363 (2d Cir.), *cert. denied,* 531 U.S. 909 (2000), the Second Circuit explained the knowledge requirement:

> The government did not have to establish that appellant knew that possessing a stolen firearm was unlawful or "adduce specific evidence to prove that 'an evil-meaning mind' directed the 'evil-doing hand' "; rather, the government had merely to show that appellant knew or had reason to know that the gun that he possessed was stolen. (Citations omitted.)

The Third Circuit has not addressed the knowledge requirement under Section 922(j). In other contexts, the court has held that circumstantial evidence may be sufficient to establish that the defendant knew or should have known that property was stolen. *See United States v. Clemmons*, 892 F.2d 1153, 1159 (3d Cir. 1989).

## 6.18.922K Possession of Firearm With Serial Number Removed, Obliterated, or Altered (18 U.S.C. § 922(k))

**Count** *(No.)* **of the indictment charges** *(name)* **with possessing a firearm which had the serial number removed or altered, which is a violation of federal law. In order to find** *(name)* **guilty of this charge, you must find that the government has proved each of the following four elements beyond a reasonable doubt:**

**First: That** *(name)* **knowingly possessed the firearm described in the indictment. This means that** *(name)* **possessed the firearm purposely and voluntarily, and not by accident or mistake. It also means that** *(name)* **knew that the object was a firearm.**

**Second: That the serial number of the firearm in question had been removed, obliterated, or altered;**

**Third: That** *(name)* **knew that the serial number had been removed, obliterated, or altered. However, the government is not required to prove that** *(name) (himself)(herself)* **removed, obliterated or altered the serial number.**

**Fourth: That the firearm had at some time traveled in interstate commerce.**

**Comment**

See Ninth Circuit § 8.62, 2 Sand et al., supra, 35-59, 35-62.

18 U.S.C. § 922(k) provides in part:

> It shall be unlawful for any person knowingly . . . to possess or receive any firearm which has had the importer's or manufacturer's serial number removed,

obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

In addition to this instruction, the court should also give Instruction 5.02 (Knowingly), Instruction 6.18.922A-2 (Firearm Offenses – Firearm Defined), Instruction 6.18.922G-4 (Firearm Offenses – Possession Defined), and Instruction 6.18.922G-5 (Firearm Offenses – In or Affecting Interstate or Foreign Commerce Defined).

The Third Circuit does not appear to have considered the knowledge requirement under Section 922(k). Other courts have held that in addition to knowingly possessing the firearm, the defendant must know that the serial number has been removed. *See United States v. Moore,* 54 F.3d 92 (2d Cir. 1995), *cert. denied*, 516 U.S. 1081 (1996); *United States v. Lanoue,* 71 F.3d 966 (1st Cir. 1995).

In *United States v. Marzzarella*, --- F.3d ----, 2010 WL 2947233 (3d Cir. 2010), the Third Circuit rejected a constitutional challenge to Section 922(k) based on the Second Amendment.

(revised 11/10)

## 6.18.924A Possession of a Firearm in Furtherance of Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1))

**Count** *(No.)* **of the indictment charges** *(name of defendant)* **with possessing a firearm in furtherance of a** *(crime of violence) (drug trafficking crime)*, **which is a violation of federal law. The offense alleged in Count** *(No. of count charging predicate crime)* **is a** *(crime of violence)(drug trafficking crime)*.

**In order to find** *(name)* **guilty of this offense, you must find that the government proved each of the following two elements beyond a reasonable doubt:**

**First: That** *(name)* **committed the crime of** *(name of crime)* **as charged in Count** *(No. of count charging predicate crime)* **of the indictment; and**

**Second: That** *(name of defendant)* **knowingly possessed a firearm in furtherance of this crime. If you find** *(name of defendant)* **possessed the firearm, you must consider whether the possession was in furtherance of** *(name of crime)*.

**Comment**

Tenth Circuit § 2.45.1.

18 U.S.C. §924(c)(1)(A) provides in part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> (I) be sentenced to a term of imprisonment of not less than 5 years;
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less

than 7 years; and
(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

*See also United States v. Mainor*, 2010 WL 3449138 (3d Cir. 2010) (non-precedential) (stating elements); *United States v. Basley*, 357 F. App'x. 455, 461 (3d Cir. 2009) (non-precedential) (recognizing elements of charge under § 924(c)(1)(A)).

This instruction should be used if the defendant is charged with possessing the firearm in furtherance of the crime. Instruction 6.18.924B (Using or Carrying a Firearm During Any Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1))) should be used if the defendant is charged with using or carrying the firearm.[3] In addition to this instruction, the court should also give Instruction 5.02 (Knowingly), Instruction 6.18.922A-2 (Firearm Offenses – Firearm Defined), Instruction 6.18.922G-4 (Firearm Offenses – Possession Defined), and Instruction 6.18.924A-1 ("In Furtherance of" Defined).

The question of whether the predicate offense qualifies as a crime of violence[4] or a drug trafficking offense[5] is a question of law for the court. *See United States v. Moore,* 38 F.3d 977

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[3]18 U.S.C. § 924 was amended in 1998 to expand the bases of criminal liability. The statute now makes it a crime to possess a firearm in furtherance of as well as to use or carry a firearm in relation to any crime of violence or drug trafficking crime. Although most future prosecutions are likely to be brought under the possession in furtherance prong of the statute, we have included both instructions. It is critical that the instruction given match the offense charged. *See United States v. Jenkins*, 2009 WL 2518529 (3d Cir 2009) (non-precedential) (concluding that court committed reversible error when it instructed the jury on the "during and in relation to" language of § 924(c)(1)(A), instead of on the "in furtherance of" language charged in the indictment).

[4]18 U.S.C. §924 (c)(3) provides:

For purposes of this subsection the term "crime of violence" means an offense that is a felony and--
(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

[5]18 U.S.C. §924 (c)(2) provides:

For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901 et seq.).

(8th Cir. 1994); *United States v. Weston*, 960 F.2d 212 (1st Cir. 1992). If the predicate crime is not charged in the indictment, the court must instruct the jury concerning the elements of the predicate crime.

In some cases, the defendant may raise the question of whether the jury must unanimously agree on the type of gun possessed by the defendant. In *United States v. Wise*, 515 F.3d 207 (3d Cir. 2008), the defendants were each charged with possessing and brandishing a firearm in furtherance of a drug trafficking offense. The Third Circuit held that the jury need not agree unanimously on the particular kind of weapon possessed by the defendant because the type of firearm is not an element of the offense. *Wise*, 515 F.3d at 214. The court explained:

> This court has previously remarked in dicta that a district court had properly instructed the jury that it must unanimously agree on which weapon a defendant had used during a drug trafficking crime in order to convict him under 18 U.S.C. § 924(c)(1) (1986). *United States v. Theodoropoulos*, 866 F.2d 587, 597 (3d Cir.1989), overruled on other grounds by *United States v. Price*, 76 F.3d 526, 528 (3d Cir.1996). But we did not state that such an instruction is required in every case, nor do we believe, in light of the Supreme Court's subsequent opinion in *Richardson*, that such an instruction was required in this case. The two defendants, charged both as principals and aiders and abettors, were found with two firearms. Eyewitness testimony described each of them brandishing the firearms during their drug dealing. Further specificity about the weapons is not necessary to sustain a conviction under the statute.

*Wise*, 515 F.3d at 214-15.[6]

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[6]In some cases, however, the trial court may choose to give a unanimity instruction. In *United States v. Ross*, 323 F. App'x. 117 (3d Cir. 2009) (non-precedential), the indictment charged the defendant with possession of two different firearms. The district court instructed the jury that it must agree unanimously on which of the two firearms the defendant possessed and provided the jury with a special verdict form. The court's instruction was as follows:

> The Government is not required to prove that both firearms were possessed as alleged in Count Seven of the indictment, but only one of them. However, you must unanimously agree that the same means or methods, in other words, the same firearm alleged in Count Seven of the indictment was in fact possessed by Mr. Ross in committing the crime charged in Count Seven. You need not unanimously agree on each means and method, but in order to convict Mr. Ross under Count Seven, you the jury must unanimously agree upon which firearm he possessed in furtherance of the controlled substance offense. Unless the Government has proven the same means or method to each of you beyond a reasonable doubt you must acquit Mr. Ross of the crime alleged in Count Seven.

Even though a particular defendant did not personally possess the firearm, the defendant may be found guilty of violating § 924(c) under the theory of *Pinkerton v. United States*, 328 U.S. 640 (1946), which holds defendants liable for the foreseeable actions of their coconspirators in furtherance of the conspiracy. *See United States v. Ramos,* 147 F.3d 281, 286 (3d Cir.1998); *United States v. Casiano*, 113 F.3d 420, 427 (3d Cir. 1997). To impose liability under *Pinkerton*, the jury must find that the coconspirator possessed a firearm during and in relation to the conspiracy, in furtherance of or as a natural, foreseeable consequence of the conspiracy, and that the defendant was a member of the conspiracy at the time. *See United States v. Goines*, 988 F.2d 750, 774 (7th Cir. 1993). *See* Instruction 7.03 (Responsibility for Substantive Offenses Committed by Co-Conspirators (*Pinkerton* Liability).

Under 18 U.S.C. §924(c)(1)(A), the defendant may receive a higher sentence for brandishing or discharging the firearm. In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court held that brandishing the firearm is a sentencing factor rather than an element of the offense. *See also United States v. St. Jean*, 353 F. App'x. 765, 768 (3d Cir. 2009) (non-precedential) (holding that accomplice may be held liable for aiding and abetting brandishing and treating issue as subject only to proof by a preponderance of the evidence). The ongoing viability of *Harris* has been questioned in light of *United States v. Booker*, 543 U.S. 220 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004), which built on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), defining the defendant's right under the Sixth Amendment to have issues submitted to the jury rather than determined by the court. However, *Harris* has not been overruled, and the Third Circuit has held that *Harris* remains binding, absent action of the Supreme Court. *United States v. Williams*, 464 F.3d 443, 449 (3d Cir. 2006). As a result, the determination of whether a defendant brandished the firearm is for the court and need not be submitted to the jury. Nevertheless, the court may prefer to submit an interrogatory to the jury on whether the firearm was brandished

Section 924(c) separately provides for higher mandatory penalties where certain types of weapons, such as a machine gun, are involved. In *United States v. O'Brien*, 130 S.Ct. 2169 (2010), the Supreme Court held that this provision defines an element of the offense rather than a sentencing factor. The court should therefore offer special interrogatories regarding those provisions.

(revised 11/10)

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The district court further reinforced the unanimity requirement by later instructing the jury that "[i]n order to return a verdict, it is necessary that each juror agree to it. Your verdict, in other words, must be unanimous and it must [be] unanimous in each respect as you go through the verdict form."

**6.18.924A-1 "In Furtherance of" Defined**

**Possession "in furtherance of" means for the purpose of assisting in, promoting, accomplishing, advancing, or achieving the goal or objective of** *(name of crime)***.**

**Mere presence of a firearm at the scene is not enough to find possession in furtherance of a** *(crime of violence)(drug trafficking crime)***. The firearm's presence may be coincidental or entirely unrelated to the underlying crime. Some factors that may help you determine whether possession of a firearm furthers a** *(crime of violence)(drug trafficking crime)* **include, but are not limited to:**

**1. the type of criminal activity that is being conducted;**

**2. accessibility of the firearm;**

**3. the type of firearm;**

**4. whether the firearm is stolen;**

**5. whether the defendant possesses the firearm legally or illegally;**

**6. whether the firearm is loaded;**

**7. the time and circumstances under which the firearm is found; and**

**8. proximity to drugs or drug profits.**

**Comment**

*See United States v. Sparrow*, 371 F.3d 851 (3d Cir. 2004).

The offense of possessing a firearm in furtherance of a crime of violence or drug trafficking offense is intended to reach situations not covered by the crimes of using or carrying a

firearm during and in relation to any crime of violence or drug trafficking crime. In *Bailey v. United States*, 516 U.S. 137, 143 (1995), the Supreme Court construed "use" narrowly under the statute, holding that the term connotes more than mere possession of a firearm by a person who commits a drug offense and concluding that the government must show "active employment of the firearm." 516 U.S. at 144. In 1998, in direct response to *Bailey* (*see* H.R. Rep. No. 105-344 (1997)), Congress amended the statute and added the phrase "or who, in furtherance of any such crime, possesses a firearm . . . ." Pub. L. 105-386, 112 Stat. 3469 (1998). The stated purpose and effect of this amendment was to overcome the *Bailey* court's restrictive interpretation of the scope of the statute and to extend its reach to any drug trafficking or violent crime in which the defendant merely possesses a firearm "in furtherance of any such crime."

In *United States v. Sparrow*, 371 F.3d 851, 853 (3d Cir. 2004), the Third Circuit stated:

> Under § 924(c), the 'mere presence' of a gun is not enough. 'What is instead required is evidence more specific to the particular defendant, showing that his or her possession actually furthered the drug trafficking offense.' Put another way, the evidence must demonstrate that possession of the firearm advanced or helped forward a drug trafficking crime. In making this determination, the following nonexclusive factors are relevant: the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found. (Citations omitted).

The firearm need not be immediately accessible to the defendant during the crime. *Sparrow*, 371 F.3d at 853. In *Sparrow*, the court noted that the firearm "was strategically located." The firearm was in a compartment under the floor with the defendant's cache of drugs and money, so the defendant was able to access the firearm whenever he reached into the compartment for drugs or money. The court concluded that it was "reasonable to assume the firearm was placed in the floor compartment for that purpose and was possessed in furtherance of [the defendant]'s drug activities." 371 F.3d at 854. *See also United States v. Iglesias*, 535 F.3d 150, 157 (3d Cir. 2008); *United States v. Bobb*, 471 F.3d 491, 494 (3d Cir.2006). In addition, the Third Circuit has repeatedly relied on *Sparrow* in non-precedential decisions to affirm convictions under this prong of § 924. *See, e.g., United States v. Barrett,* 2010 WL 3622993 (3d Cir. 2010) (non-precedential); *United States v. Arzola,* 361 F. App'x. 309, 311-14 (3d Cir. 2009) (non-precedential);*United States v. Basley*, 357 F. App'x. 455, 462 (3d Cir. 2009) (non-precedential).

(revised 11/10)

## 6.18.924B Using or Carrying a Firearm During Any Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1))

**Count** *(No.)* **of the indictment charges** *(name of defendant)* **with** *(using)(carrying)* **a firearm during** *(a crime of violence)(a drug trafficking crime)*, **which is a violation of federal law. The offense alleged in Count** *(No. of count charging predicate crime)* **is a** *(crime of violence)(drug trafficking crime)*.

**In order to find** *(name)* **guilty of the offense charged in the indictment, you must find that the government proved each of the following three elements beyond a reasonable doubt.**

**First: That** *(name)* **committed the crime of** *(name of crime)* **as charged in Count** *(No. of count charging predicate crime)* **of the indictment, and**

**Second: That during and in relation to the commission of that crime,** *(name)* **knowingly** *(used)(carried)* **a firearm. The phrase "uses or carries a firearm" means having a firearm, or firearms, available to assist or aid in the commission of the crime of** *(name of crime)*. **"Use" means more than mere possession of a firearm by a person who commits a crime; to establish use, the government must show active employment of the firearm. If the defendant did not either disclose or mention the firearm or actively employ it, the defendant did not use the firearm. "Carry" means that the defendant** *(had the firearm on (his)(her) person) (possessed the firearm).*

**Third: That** *(name) (used)(carried)* **the firearm during and in relation to the crime of** *(name of crime).* **During and in relation to means that the firearm must**

**have had some purpose or effect with respect to** *(name of crime)*. **The firearm must have at least facilitated or had the potential of facilitating** *(name of crime)***.**

**In determining whether** *(name)* **used or carried a firearm in relation to the** *(name of crime)***, you may consider all of the factors received in evidence in the case including the nature of the underlying crime,** *(name of crime)***, how close** *(name)* **was to the firearm in question, the usefulness of the firearm to** *(name of crime)***, and the circumstances surrounding the presence of the firearm.**

**The government is not required to show that** *(name)* **actually displayed or fired the weapon. However, the government must prove beyond a reasonable doubt that the firearm was in** *(name)***'s possession or under** *(his)(her)* **control at the time that the crime of** *(name of crime)* **was committed and that the firearm facilitated or had the potential of facilitating the** *(name of crime)***.**

**Comment**

Eleventh Circuit § 35.2; O'Malley et al., supra, § 39.20; *United States v. Williams*, 344 F.3d 365 (3d Cir. 2003).

18 U.S.C. §924(c)(1)(A) provides in part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> (I) be sentenced to a term of imprisonment of not less than 5 years;
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less

than 7 years; and
(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

This instruction should be used if the defendant is charged with using or carrying the firearm. Instruction 6.18.924A (Possession of a Firearm In Furtherance of Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1))) should be used if the defendant is charged with possessing the firearm in furtherance of the crime.[7] For instructions defining the legal terms of the offense, *see* Instructions 6.18.922A-2 (Firearm Offenses – Firearm Defined) and 5.02 (Knowingly).

The question of whether the predicate offense qualifies as a crime of violence[8] or a drug trafficking offense[9] is a question of law for the court. *See United States v. Moore,* 38 F.3d 977 (8th Cir. 1994); *United States v. Weston*, 960 F.2d 212 (1st Cir. 1992). While the government must prove the predicate offense, that offense need not be separately charged in the indictment. *United States v. Lake*, 150 F.3d 269, 275 (3d Cir. 1998). If the court's charge to the jury covers the elements of the predicate offense elsewhere, the court need not reiterate those elements in the instruction on § 924. *Lake*, 150 F.3d at 274. However, if the predicate crime is not charged in the indictment and therefore not covered elsewhere in the instructions, the court must instruct the jury concerning the elements of the predicate crime as part of the instructions on § 924.

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[7] It is critical that the instruction given match the offense charged. *See United States v. Jenkins*, 2009 WL 2518529 (3d Cir 2009) (non-precedential) (concluding that court committed reversible error when it instructed the jury on the "during and in relation to" language of § 924(c)(1)(A), instead of on the "in furtherance of" language charged in the indictment).

[8] 18 U.S.C. §924 (c)(3) provides:

For purposes of this subsection the term "crime of violence" means an offense that is a felony and–

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

[9]18 U.S.C. §924 (c)(2) provides:

For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

The courts have been called upon to clarify what constitutes using or carrying a firearm under the statute. The two terms are not interchangeable. "Use" is the narrower of the two terms. In *Bailey v. United States*, 516 U.S. 137, 143 (1995), the Supreme Court stated that "'use' must connote more than mere possession of a firearm by a person who commits a drug offense."[10] The Court concluded that the government must show "active employment of the firearm." 516 U.S. at 144. The Court also stated:

> Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.,* when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.,* when an offender keeps a gun hidden in his clothing throughout a drug transaction. 516 U.S. at 146.

In *United States v. Garth*, 188 F.3d 99, 110 (3d Cir. 1999), the Third Circuit explained:

> "[T]he active employment understanding of 'use' certainly includes brandishing, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." However, "if the gun is not disclosed or mentioned by the offender, it is not actively employed and it is not 'used.' " Accordingly, "[i]t is no longer enough that the weapon be available to the defendant; rather, it must have played an active role in the perpetration of the predicate offense beyond emboldening the perpetrator." (Citations omitted.)

Trading a firearm to acquire drugs constitutes use of the firearm in connection with drug trafficking in violation of the statute. *See Smith v. United States*, 508 U.S. 223 (1993); *United States v. Sumler*, 294 F.3d 579 (3d Cir. 2002). However, in *United States v. Watson*, 552 U.S. 74 (2007), the Supreme Court held that the converse is not true; one who trades drugs in order to acquire a firearm does not use the firearm in violation of the statute.

In *Muscarello v. United States*, 524 U.S. 125 (1998), the Supreme Court considered whether having a firearm in the locked glove compartment or the trunk of a car ready for use in a drug transaction could constitute carrying the firearm within the meaning of the statute. The Court concluded that the statute did not require that the firearm be carried on the defendant's person. The Court nevertheless stated that the term "implies personal agency and some degree of possession." *Muscarello,* 524 U.S. at 134. The Court further stated that "having construed 'use'

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[10]In 1998, Congress responded to *Bailey* by amending the statute in several respects, including the insertion of the phrase "or who, in furtherance of any such crime, possesses a firearm . . . ." *See* H.R. Rep. No. 105-344 (1997); Pub. L. 105-386, 112 Stat. 3469 (1998). The stated purpose and effect of this amendment was to overcome the *Bailey* court's restrictive interpretation of the scope of the statute and to extend its reach to any drug trafficking or violent crime in which the defendant merely possesses a firearm "in furtherance of any such crime." For instruction on this offense, *see* Instruction 6.18.924A (Possession of a Firearm In Furtherance of Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1))).

narrowly in *Bailey*, we cannot also construe 'carry' narrowly without undercutting the statute's basic objective." 524 U.S. 136. In *Garth*, the court also discussed the definition of "carrying," quoting from *Muscarello* but acknowledging that it was not clear what type of possession would constitute and expressly reserving judgment on whether constructive possession would satisfy this requirement. 188 F.3d at 110.

In *United States v. Williams*, 344 F.3d 365, 369-70 (3d Cir. 2003), the Third Circuit rejected the defendant's challenge to his conviction for carrying a firearm in relation to a crime of violence. The evidence showed that the defendant had a gun in the getaway car with him as he fled from the police after a bank robbery. The court also discussed whether the defendant carried the gun "in relation to" the robbery, since he had not had it with him during the robbery. The court emphasized that "in relation to" requires "some purpose or effect" as to, and must have at least "'facilitate[d], or [had] the potential of facilitating,'" the underlying offense. *Williams*, 344 F.3d at 371 (citations omitted). *See also United States v. Ressam*, 128 S. Ct. 1858 (2008) (noting relational requirement in § 924(c)).

In *Williams*, the court also considered the jury instructions and concluded that the trial court did not commit reversible error by instructing the jury that it could find the defendant carried the firearm if, inter alia, it was available "to aid or embolden the defendant in making his escape." 344 F.3d at 377. Nevertheless, the court did not approve that language. Rather, the court emphasized that the trial court's instructions on the term "carry" were lengthy and pointed to other language in the court's instructions:

Importantly, the trial judge also instructed the jury that:

> If you find that the defendant carried a firearm, you must determine whether the carrying of the firearm was during and in relation to the unarmed bank robbery. During and in relation to means that the firearm must have had some purpose or effect with respect to the unarmed bank robbery. The firearm must have at least facilitated or had the potential of facilitating the unarmed bank robbery.

344 F.3d at 377 (noting also that instruction tracked the language of *Smith v. United States*, 508 U.S. 223, 237 (1993)).

Under 18 U.S.C. §924(c)(1)(A), the defendant may receive a higher sentence for brandishing (7 years) or discharging (10 years) the firearm. In *Dean v. United States*, 129 S. Ct. 1849 (2009), the Court held that §924(c)(1)(A)(iii) does not require proof that the defendant intended to discharge the firearm, noting, however, that the definition of "brandish" at § 924(c)(4) includes an intent requirement. *Dean*, 129 S. Ct. at 1853. *See also United States v. St. Jean*, 353 F. App'x. 765, 768 (3d Cir. 2009) (non-precedential) (holding that accomplice may be held liable for aiding and abetting brandishing and treating issue as subject only to proof by a preponderance of the evidence). It is not clear whether the court must instruct the jury on the aggravating factors under §924(c)(1)(A). In *Harris v. United States*, 536 U.S. 545 (2002), the

Supreme Court held that brandishing the firearm is a sentencing factor rather than an element of the offense. The ongoing viability of *Harris* has been questioned in light of *United States v. Booker*, 543 U.S. 220 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004), which built on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), defining the defendant's right under the Sixth Amendment to have issues submitted to the jury rather than determined by the court. However, *Harris* has not been overruled, and the Third Circuit has held that *Harris* remains binding, absent action of the Supreme Court. *United States v. Williams*, 464 F.3d 443, 449 (3d Cir. 2006). In *Dean*, the Court did not address the question. As a result, it appears that the determination of whether a defendant brandished or discharged the firearm is for the court and need not be submitted to the jury. Nevertheless, the court may prefer to submit an interrogatory to the jury on whether the firearm was brandished.

Section 924(c) separately provides for higher mandatory penalties where certain types of weapons, such as a machine gun, are involved. In *United States v. O'Brien*, 130 S.Ct. 2169 (2010), the Supreme Court held that this provision defines an element of the offense rather than a sentencing factor. The court should therefore offer special interrogatories regarding those provisions.

(Revised 11/10)

## Fraud Offenses - Mail, Wire, Bank and Health Care *(18 U.S.C. §§ 1341, 1343, 1344, 1347)*

## 6.18.1341 Mail Fraud – Elements of the Offense (18 U.S.C. § 1341)

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with mail fraud, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **knowingly devised a scheme to defraud or to obtain money or property** *(or the intangible right of honest services)* **by materially false or fraudulent pretenses, representations or promises** *(or wilfully participated in such a scheme with knowledge of its fraudulent nature)***;**

**Second: That** *(name)* **acted with the intent to defraud; and**

**Third: That in advancing, furthering, or carrying out the scheme,** *(name)* **used the mails** *(a private or commercial interstate carrier)***, or caused the mails** *(a private or commercial interstate carrier)* **to be used.**

**Comment**

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 44-3 (Matthew Bender 2003) [hereinafter, Sand et al., supra].

18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be

> or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

The court should also give the following instructions: 6.18.1341-1 (Mail, Wire, or Bank Fraud – "Scheme to Defraud or to Obtain Money or Property" Defined), 6.18.1341-4 (Mail or Wire Fraud – "Intent to Defraud" Defined), and 6.18.1341-5 (Mail Fraud – "Use of the Mails" Defined). The court should give the following instructions when appropriate: 6.18.1341-2 (Mail, Wire, or Bank Fraud- Unanimity Required), 6.18.1341-3 (Mail or Wire Fraud – Protected Interests: Honest Services), and 6.18.1341-6 (Mail Fraud – Each Use of the Mails a Separate Offense). In addition, if the indictment charges violation through use of a private or commercial interstate carrier, the language of the instruction should be modified by replacing the word "mail" with the term "private or commercial interstate carrier" throughout. If the indictment charges that the violation affected a financial institution, the court should add language instructing the jury of the additional element and may also wish to instruct on ordinary mail fraud as a lesser included offense. *See* Instruction 3.11 (Lesser Included Offenses).

18 U.S.C. § 1346 provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

If the prosecution proceeds on the theory that the defendant defrauded the victim of honest services, the instruction should be modified accordingly. If the prosecution neither alleges nor proves deprivation of intangible rights, it is error to instruct on fraud through the deprivation of intangible rights. *See United States v. Leahy*, 445 F.3d 634, 655 (3d Cir. 2006) (recognizing error but holding it harmless).

In *Pereira v. United States*, 347 U.S. 1, 8 (1954), the Supreme Court stated that "[t]he elements of the offense of mail fraud . . . are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." However, the Third Circuit has adopted a three-element statement of the offense, clarifying the intent requirement:

> The essential elements of an offense under 18 U.S.C. § 1341 are (1) the existence of a scheme to defraud; (2) the participation by the defendant in the particular scheme charged with the specific intent to defraud; and (3) the use of the United States mails in furtherance of the fraudulent scheme.

*United States v. Hannigan*, 27 F.3d 890, 892 (3d Cir. 1994); *see also United States v. Riley*, --- F.3d ----, 2010 WL 3584066 (3d Cir. 2010) (stating elements); *United States v. Pharis*, 298 F.3d 228, 234 (3d Cir. 2002); *United States v. Copple*, 24 F.3d 535, 544 (3d Cir. 1994). In *United States v. Pearlstein*, 576 F.2d 531, 537 (3d Cir. 1978), the court explained that the prosecution must establish either that the defendant devised the fraudulent scheme or that the defendant "wilfully participated in it with knowledge of its fraudulent nature."

> 18 U.S.C. § 2326 provides enhanced penalties for certain violations of § 1341:
>
> A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing--
> (1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and
> (2) in the case of an offense under any of those sections that--
> (A) victimized ten or more persons over the age of 55; or
> (B) targeted persons over the age of 55,
> shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

If the indictment alleges any of these circumstances, the instruction should be modified to add the aggravating factor as an element essential for conviction. The court may then also wish to give a lesser included offense instruction. *See* Instruction 3.11 (Lesser Included Offenses).

(revised 11/10)

**6.18.1341-1 Mail, Wire, or Bank Fraud – "Scheme to Defraud or to Obtain Money or Property" Defined**

**The first element that the government must prove beyond a reasonable doubt is that** *(name)* **knowingly devised** (or wilfully participated in) **a scheme to defraud** *(the victim)* **of money or property** *(or the intangible right of honest services)* **by materially false or fraudulent pretenses, representations or promises.**

**A "scheme" is merely a plan for accomplishing an object.**

**"Fraud" is a general term which embraces all the various means by which one person can gain an advantage over another by false representations, suppression of the truth, or deliberate disregard for the truth.**

**Thus, a "scheme to defraud" is any plan, device, or course of action to deprive another of money or property** *(or the intangible right of honest services)* **by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence.**

**In this case, the indictment alleges that the scheme to defraud was carried out by making false** *(or fraudulent)* **statements** *(representations) (claims) (documents)***. The representations which the government charges were made as part of the scheme to defraud are set forth in the indictment** *(which I have already read to you)***. The government is not required to prove every misrepresentation charged in the indictment. It is sufficient if the government proves beyond a reasonable doubt that one or more of the alleged material misrepresentations were made in furtherance of**

**the alleged scheme to defraud. However, you cannot convict the defendant unless all of you agree as to at least one of the material misrepresentations.**

**A statement, representation, claim or document is false if it is untrue when made and if the person making the statement, representation, claim or document or causing it to be made knew it was untrue at the time it was made.**

**A representation or statement is fraudulent if it was falsely made with the intention to deceive.**

**In addition, deceitful statements of half truths or the concealment of material facts or the expression of an opinion not honestly entertained may constitute false or fraudulent statements. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance.**

**The deception need not be premised upon spoken or written words alone. If there is deception, the manner in which it is accomplished is immaterial.**

*[The failure to disclose information may constitute a fraudulent representation if the defendant was under a legal, professional or contractual duty to make such a disclosure, the defendant actually knew such disclosure ought to be made, and the defendant failed to make such disclosure with the intent to defraud.]*

**The false or fraudulent representation** *(or failure to disclose)* **must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the**

**representation or statement in making a decision** *(describe relevant decision; e.g., with respect to a proposed investment)***.**

**This means that if you find that a particular statement of fact was false, you must determine whether that statement was one that a reasonable person** *(or investor)* **might have considered important in making his or her decision. The same principle applies to fraudulent half truths or omissions of material facts.**

**In order to establish a scheme to defraud, the government must also prove that the alleged scheme contemplated depriving another of money or property** *(or of the intangible right of honest services)***.**

**However, the government is not required to prove that** *(name) (himself)(herself)* **originated the scheme to defraud. Furthermore, it is not necessary that the government prove that** *(name)* **actually realized any gain from the scheme or that** *(the)(any)* **intended victim actually suffered any loss.** *(In this case, it so happens that the government does contend that the proof establishes that persons were defrauded and that (name) profited. Although whether or not the scheme actually succeeded is really not the question, you may consider whether it succeeded in determining whether the scheme existed.)*

**If you find that the government has proved beyond a reasonable doubt that the** *(overall)* **scheme to defraud charged in the indictment did exist and that the defendant knowingly devised or participated in the** *(overall)* **scheme charged in the**

**indictment, you should then consider the second element.**

**Comment**

Sand et al., supra, 44-4.

This instruction seeks to provide a comprehensive definition of the first element of the offense – the existence of a scheme to defraud or to obtain money or property or the intangible right of honest services. The instruction contains optional language that may be used if the prosecution rests at least in part on the defendant's failure to disclose information.

The two phrases in the statute – "any scheme or artifice to defraud" and "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" are not used in the disjunctive. *United States v. Monostra*, 125 F.3d 183, 187 (3d Cir. 1997). Instead, Congress added the second phrase to the statute "simply [to make] it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *See Monostra*, 125 F.3d at 187 (quoting *McNally v. United States*, 483 U.S. 350, 359 (1987)).

In *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987), the Third Circuit noted that "[t]he term 'scheme to defraud' . . . is not capable of precise definition." In *United States v. Leahy*, 445 F.3d 634, 649 (3d Cir. 2006), a bank fraud case, the court gave the following instruction over the defendants' objection, and the defendants challenged the instruction, arguing that the trial court committed error by including the italicized language:

> Members of the jury, the first element is that the government must prove beyond a reasonable doubt that there was a scheme or artifice to defraud a financial institution, or a scheme or artifice to obtain any of the money owned by or under the custody or control of a financial institution by means of false or fraudulent pretenses, representation or promises.
> . . .
> The term false or fraudulent pretenses, representations or promises, means a statement or an assertion which concerns a material or important fact, or material or important aspect of the matter in question that was either known to be untrue at the time that it was made or used, or that it was made or used with reckless indifference as to whether it was, in fact, true or false and made or used with the intent to defraud.
> . . .
> The fraudulent nature of a scheme is not defined according to any technical standards. *Rather, the measure of a fraud in any fraud case is whether the scheme shows a departure from moral uprightness, fundamental honesty, fair play and candid dealings in a general light of the community.*
> Fraud embraces all of the means which human ingenuity can devise to gain

> advantage over another by false representation, suggestions or suppression of truth or deliberate disregard or omission of truth. (Emphasis added).

The Third Circuit affirmed the convictions, considering the challenged language in the context of the entire instruction, but expressed disapproval of the italicized language. *Leahy*, 445 F.3d at 350-51. This language, found in a number of older cases, has not been included in the model instruction.

In *United States v. Newmark*, 2010 WL 850200 (3d Cir. 2010) (non-precedential), a mail fraud case, the trial court failed to instruct the jury that a "scheme to defraud" is a scheme "reasonably calculated to deceive persons of ordinary prudence and comprehension." The court included in its instructions the statement that "[i]t is immaterial that the alleged victims may have acted gullibly, carelessly, naively or negligently, which led to their being defrauded." The defense did not object to the instructions at trial, and the Third Circuit held that the trial court had not committed plain error. However, the court rejected the prosecution's argument that the instruction setting out the material fact requirement and defining material fact adequately covered the concept of "ordinary prudence," declining to adopt the position taken in *United States v. Zomber*, 358 F. Supp.2d 442, 459 (E.D. Pa.2005). The court explained:

> The materiality instruction concerns whether a reasonable person would consider a fact important, whereas the "ordinary prudence" instruction concerns whether a reasonable person would be deceived by a scheme. Moreover, because of the apparent tension between an instruction that a victim's gullibility or negligence is no defense and an instruction that a scheme must be calculated to deceive a person of ordinary prudence and comprehension, there is some force to [the defendant]'s argument that the error was compounded by the district court's inclusion of the former instruction.

In *Cleveland v. United States*, 531 U.S. 12, 15 (2000), the Supreme Court clarified the meaning of the term "property" in the statute, holding that state and municipal licenses in general are not "property" within Section 1341. The Court stated:

> It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim.

531 U.S. at 15. In *Pasquantino v. United States*, 544 U.S. 349 (2005), the Court held that a scheme to smuggle liquor from the United States into Canada to avoid Canadian taxes constituted a scheme to defraud in violation of the wire fraud statute. Canada's right to the uncollected taxes constituted property within the meaning of the statute. 544 U.S. at 354-55. *See also United States v. Tulio Landscaping, Inc.*, 263 F. App'x. 258 (3d Cir. 2008) (holding that the jury could find the defendant, a contractor,guilty of a scheme to defraud a governmental agency where: (1) the governmental agency required contractors to participate in a program using minority subcontractors; (2) defendant submitted bids to the agency representing that the

requisite percentage of work would be subcontracted to a minority subcontractor; (3) defendant paid a fee to a minority subcontractor to use that company's name in making false representations to the governmental agency; (4) the work was actually done by the defendant; and, (5) defendant never intended to use a minority subcontractor but submitted fraudulent documents to the agency to prove that it had done so.)

The statute also reaches schemes to deprive another of the "intangible right of honest services." 18 U.S.C. § 1346. If the prosecution proceeds on the theory that the defendant defrauded the victim of honest services, the court should give Instruction 6.18.1341-3 (Mail or Wire Fraud – Protected Interests: Honest Services).

The scheme "need not be fraudulent on its face." However, it must involve "fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978) (citation omitted). The instruction incorporates this objective standard. Some circuits permit the jury to convict even if the misrepresentations would not deceive an ordinary reasonable person. *See United States v. Brown*, 79 F.3d 1550, 1557 (11th Cir. 1996) (discussing circuit split and adopting an objective standard). Although the Third Circuit does not appear to have addressed this issue directly, in *Pearlstein* the court included an objective standard in its statement of the requirements for a mail fraud conviction. 576 F.2d at 535.

The representations must relate to material facts. The Supreme Court held in *Neder v. United States*, 527 U.S. 1, 25 (1999), that materiality is an essential element of the crime of mail fraud, wire fraud, and bank fraud to be decided by the jury. *See also United States v. Riley*, --- F.3d ----, 2010 WL 3584066 (3d Cir. 2010) (discussing materiality requirement).

The prosecution need not prove that the defendant benefitted personally from the scheme to defraud. *United States v. Riley*, --- F.3d ----, 2010 WL 3584066 (3d Cir. 2010).

The last paragraph of the instruction refocuses the jury on the question of the defendant's involvement in the scheme charged in the indictment as well as the existence of that scheme. If the evidence in the case on trial may lead the jury to convict a defendant for involvement in some lesser scheme rather than the scheme charged in the indictment, the court may insert the adjective "overall" to emphasize that the conviction cannot rest on involvement in some scheme other than the overall scheme charged. Alternatively, depending on the particular facts, the court should make clear that the jury must find that the defendant joined the particular scheme charged in the indictment, and not some other fraudulent scheme. In *United States v. Dobson*, 419 F.3d 231, 237 (3d Cir. 2005), the court explained:

> [T]he relevant inquiry is not whether the defendant acted knowingly in making any misstatement, but whether she did so with respect to the overarching fraudulent scheme-that is, the particular "illicit enterprise" charged in the indictment.

In *Dobson*, the court held that the instructions to the jury were deficient because they

> nowhere advised the jury that it could convict only on finding that [the defendant] in fact knew of [the broader] fraudulent scheme [alleged in the indictment]. * * * [T]he language of the charge easily, but erroneously, encompassed the possibility that [the defendant's] own misrepresentations, without knowledge of [the charged scheme's] broader illicit purpose, could constitute her creation of, or participation "in a scheme to defraud, or to obtain money or property by materially false or fraudulent[ ] pretenses, misrepresentations, or promises . . . ."

419 F.3d at 238.

In *United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007), the Third Circuit rejected a challenge based on *Dobson*. The court held that the trial court's instructions adequately protected the defendant against the risk that the defendant would be convicted for aiding and abetting a different scheme from that charged.[1]

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[1] The court described the instructions as follows:

> The District Court defined honest services fraud extensively, and then referred the jurors to the verdict sheet, which, as relevant here, charged Hawkins with aiding and abetting honest services wire fraud. The Court explained that:
>
> > [O]nly a public official owes a duty of honest services to the people he serves. Thus, of the defendants in this case, only Kemp is a public official. Each of the other defendants, who are private citizens, by himself or herself may not commit a substantive offense of honest services fraud as charged in the indictment.
> >
> > However, you may nevertheless find one or more of the other defendants guilty of honest services fraud, if you find beyond a reasonable doubt that such a defendant aided and abetted; that is, assisted a public official who was committing this crime to commit this crime.
>
> The District Court went on to instruct the jury that:
>
> > Before a defendant may be held responsible for aiding and abetting others in the commission of a crime, it is necessary that the government prove beyond a reasonable doubt that the defendant knowingly and deliberately associated himself or herself in some way with the crime charged and participated in

In some cases, the defendant may claim to have withdrawn from the scheme to defraud. In *United States v. Steele*, 685 F.2d 793, 803-04 (3d Cir. 1982), the Third Circuit discussed the correct way to address such a claim:

> The controlling precepts are familiar and require only a brief restatement. Mere cessation of activity in furtherance of an illegal conspiracy does not necessarily constitute withdrawal. The defendant must present evidence of some affirmative act of withdrawal on his part, typically either a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals. When a defendant has produced sufficient evidence to make a prima facie case of withdrawal, however, the government cannot rest on its proof that he participated at one time in the illegal scheme; it must rebut the prima facie showing either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal. (Citations omitted.)

In *United States v. Detelich*, 351 F.App'x. 616, 620 (3d Cir. 2009) (non-precedential), the Third Circuit rejected the defendant's argument that the jury instruction on the question of withdrawal improperly shifted the burden:

> The District Court instructed the jury that they must find that Detelich "completely withdrew from the scheme. A partial or temporary withdrawal is not sufficient." The Court continued, "If you find that the defendant produced

---

> it with the intent to commit the crime.
>
> In order to be found guilty of aiding and abetting the commission of a crime, the government must prove beyond a reasonable doubt that the defendant:
> First, knew that the crime charged was to be committed or was being committed.
> Second, knowingly did some act for the purpose of aiding the commission of that crime.
> And third, acted with the intention of causing the crime charged to be committed.
>
> These instructions contained the direct link between Hawkins's actions and the specific scheme that was charged in the indictment-the scheme to deprive the public of Kemp's honest services-that was lacking in Dobson. The instructions left no danger that Hawkins would be convicted for aiding and abetting some other scheme.

*Kemp*, 500 F.3d at 300.

evidence that he withdrew from this scheme before November 3, 2000, the government cannot rest on its proof that he participated at one time in the illegal scheme. In that circumstance, the government has the burden to prove beyond reasonable doubt that the defendant was participating in the scheme on or after November 3, 2000."

*See also* Instruction 6.18.371J (Withdrawal Before the Commission of an Overt Act as a Defense to Conspiracy).

(revised 11/10)

**6.18.1341-2 Mail, Wire, or Bank Fraud – Unanimity Required**

**Count** *(No.)* **of the indictment, charging** *(name)* **with** *(mail) (wire) (bank)* **fraud, alleges a number of separate** *(schemes or plans to defraud) (schemes or plans to obtain money or property by means of false or fraudulent pretenses, representations, or promises)***.**

**The government is not required to prove** *(all of the schemes or plans to defraud) (all of the schemes or plans to obtain money or property by means of false or fraudulent pretenses, representations or promises) (all of the false or fraudulent pretenses, representations, or promises)* **that are alleged.**

**However, each of you must agree with each of the other jurors that the same** *(scheme or plan to defraud) (scheme or plan to obtain money or property by means of false or fraudulent pretenses, representations, or promises)* **alleged in Count** *(No.)* **was, in fact, employed by** *(name)***. The jury need not unanimously agree on each scheme or plan, but, in order to convict, must unanimously agree upon at least one such scheme or plan as a scheme or plan that was knowingly used by the defendant.**

**Unless each of you agrees that the government has proven the same** *(scheme or plan to defraud) (scheme or plan to obtain money or property by means of false or fraudulent pretenses, representations, or promises)* **beyond a reasonable doubt, you must find the defendant not guilty of the** *(mail) (wire) (bank)* **fraud charged in Count** *(No.)* **of the indictment.**

**Comment**

Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions § 47.17 [hereinafter O'Malley et al., supra].

A criminal defendant has a constitutional right to a unanimous verdict. *See United States v. Edmonds*, 80 F.3d 810, 814 (3d Cir. 1996). In some cases, that right requires the court to instruct the jury regarding the need for unanimity on specific questions. *Edmonds*, 80 F.3d at 814; *United States v. Russell*, 134 F.3d 171, 177 (3d Cir. 1998); *United States v. Ryan*, 828 F.2d 1010, 1020 (3d Cir. 1987) (cautioning courts to give "augmented unanimity instruction" if requested). *See also Richardson v. United States*, 526 U.S. 813 (1999) (discussing need for unanimity instruction on aspects of continuing criminal enterprise prosecution).

In *United States v. Pedroni*, 45 F. App'x. 103, 107-08 (3d Cir. 2002), a non-precedential decision, the Third Circuit rejected the defendant's argument that the trial court had not adequately instructed the jury concerning the unanimity requirement. The court noted that the trial court had told the jury that it "must be unanimous as to which one of the objects of the conspiracy the defendant agreed to pursue" and that the "verdict must be unanimous." The court concluded that these instructions were adequate.

**6.18.1341-1 Mail, Wire, or Bank Fraud – "Scheme to Defraud or to Obtain Money or Property" Defined**

**The first element that the government must prove beyond a reasonable doubt is that** *(name)* **knowingly devised** (or wilfully participated in) **a scheme to defraud** *(the victim)* **of money or property** *(or the intangible right of honest services)* **by materially false or fraudulent pretenses, representations or promises.**

**A "scheme" is merely a plan for accomplishing an object.**

**"Fraud" is a general term which embraces all the various means by which one person can gain an advantage over another by false representations, suppression of the truth, or deliberate disregard for the truth.**

**Thus, a "scheme to defraud" is any plan, device, or course of action to deprive another of money or property** *(or the intangible right of honest services)* **by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence.**

**In this case, the indictment alleges that the scheme to defraud was carried out by making false** *(or fraudulent)* **statements** *(representations) (claims) (documents)***. The representations which the government charges were made as part of the scheme to defraud are set forth in the indictment** *(which I have already read to you)***. The government is not required to prove every misrepresentation charged in the indictment. It is sufficient if the government proves beyond a reasonable doubt that one or more of the alleged material misrepresentations were made in furtherance of**

**the alleged scheme to defraud. However, you cannot convict the defendant unless all of you agree as to at least one of the material misrepresentations.**

**A statement, representation, claim or document is false if it is untrue when made and if the person making the statement, representation, claim or document or causing it to be made knew it was untrue at the time it was made.**

**A representation or statement is fraudulent if it was falsely made with the intention to deceive.**

**In addition, deceitful statements of half truths or the concealment of material facts or the expression of an opinion not honestly entertained may constitute false or fraudulent statements. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance.**

**The deception need not be premised upon spoken or written words alone. If there is deception, the manner in which it is accomplished is immaterial.**

*[The failure to disclose information may constitute a fraudulent representation if the defendant was under a legal, professional or contractual duty to make such a disclosure, the defendant actually knew such disclosure ought to be made, and the defendant failed to make such disclosure with the intent to defraud.]*

**The false or fraudulent representation** *(or failure to disclose)* **must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the**

**representation or statement in making a decision** *(describe relevant decision; e.g., with respect to a proposed investment)***.**

**This means that if you find that a particular statement of fact was false, you must determine whether that statement was one that a reasonable person** *(or investor)* **might have considered important in making his or her decision. The same principle applies to fraudulent half truths or omissions of material facts.**

**In order to establish a scheme to defraud, the government must also prove that the alleged scheme contemplated depriving another of money or property** *(or of the intangible right of honest services)***.**

**However, the government is not required to prove that** *(name) (himself)(herself)* **originated the scheme to defraud. Furthermore, it is not necessary that the government prove that** *(name)* **actually realized any gain from the scheme or that** *(the)(any)* **intended victim actually suffered any loss.** *(In this case, it so happens that the government does contend that the proof establishes that persons were defrauded and that (name) profited. Although whether or not the scheme actually succeeded is really not the question, you may consider whether it succeeded in determining whether the scheme existed.)*

**If you find that the government has proved beyond a reasonable doubt that the** *(overall)* **scheme to defraud charged in the indictment did exist and that the defendant knowingly devised or participated in the** *(overall)* **scheme charged in the**

**indictment, you should then consider the second element.**

**Comment**

Sand et al., supra, 44-4.

This instruction seeks to provide a comprehensive definition of the first element of the offense – the existence of a scheme to defraud or to obtain money or property or the intangible right of honest services. The instruction contains optional language that may be used if the prosecution rests at least in part on the defendant's failure to disclose information.

The two phrases in the statute – "any scheme or artifice to defraud" and "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" are not used in the disjunctive. *United States v. Monostra*, 125 F.3d 183, 187 (3d Cir. 1997). Instead, Congress added the second phrase to the statute "simply [to make] it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *See Monostra*, 125 F.3d at 187 (quoting *McNally v. United States*, 483 U.S. 350, 359 (1987)).

In *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987), the Third Circuit noted that "[t]he term 'scheme to defraud' . . . is not capable of precise definition." In *United States v. Leahy*, 445 F.3d 634, 649 (3d Cir. 2006), a bank fraud case, the court gave the following instruction over the defendants' objection, and the defendants challenged the instruction, arguing that the trial court committed error by including the italicized language:

> Members of the jury, the first element is that the government must prove beyond a reasonable doubt that there was a scheme or artifice to defraud a financial institution, or a scheme or artifice to obtain any of the money owned by or under the custody or control of a financial institution by means of false or fraudulent pretenses, representation or promises.
> . . .
> The term false or fraudulent pretenses, representations or promises, means a statement or an assertion which concerns a material or important fact, or material or important aspect of the matter in question that was either known to be untrue at the time that it was made or used, or that it was made or used with reckless indifference as to whether it was, in fact, true or false and made or used with the intent to defraud.
> . . .
> The fraudulent nature of a scheme is not defined according to any technical standards. *Rather, the measure of a fraud in any fraud case is whether the scheme shows a departure from moral uprightness, fundamental honesty, fair play and candid dealings in a general light of the community.*
> Fraud embraces all of the means which human ingenuity can devise to gain

> advantage over another by false representation, suggestions or suppression of truth or deliberate disregard or omission of truth. (Emphasis added).

The Third Circuit affirmed the convictions, considering the challenged language in the context of the entire instruction, but expressed disapproval of the italicized language. *Leahy*, 445 F.3d at 350-51. This language, found in a number of older cases, has not been included in the model instruction.

In *United States v. Newmark*, 2010 WL 850200 (3d Cir. 2010) (non-precedential), a mail fraud case, the trial court failed to instruct the jury that a "scheme to defraud" is a scheme "reasonably calculated to deceive persons of ordinary prudence and comprehension." The court included in its instructions the statement that "[i]t is immaterial that the alleged victims may have acted gullibly, carelessly, naively or negligently, which led to their being defrauded." The defense did not object to the instructions at trial, and the Third Circuit held that the trial court had not committed plain error. However, the court rejected the prosecution's argument that the instruction setting out the material fact requirement and defining material fact adequately covered the concept of "ordinary prudence," declining to adopt the position taken in *United States v. Zomber*, 358 F. Supp.2d 442, 459 (E.D. Pa.2005). The court explained:

> The materiality instruction concerns whether a reasonable person would consider a fact important, whereas the "ordinary prudence" instruction concerns whether a reasonable person would be deceived by a scheme. Moreover, because of the apparent tension between an instruction that a victim's gullibility or negligence is no defense and an instruction that a scheme must be calculated to deceive a person of ordinary prudence and comprehension, there is some force to [the defendant]'s argument that the error was compounded by the district court's inclusion of the former instruction.

In *Cleveland v. United States*, 531 U.S. 12, 15 (2000), the Supreme Court clarified the meaning of the term "property" in the statute, holding that state and municipal licenses in general are not "property" within Section 1341. The Court stated:

> It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim.

531 U.S. at 15. In *Pasquantino v. United States*, 544 U.S. 349 (2005), the Court held that a scheme to smuggle liquor from the United States into Canada to avoid Canadian taxes constituted a scheme to defraud in violation of the wire fraud statute. Canada's right to the uncollected taxes constituted property within the meaning of the statute. 544 U.S. at 354-55. *See also United States v. Tulio Landscaping, Inc.*, 263 F. App'x. 258 (3d Cir. 2008) (holding that the jury could find the defendant, a contractor,guilty of a scheme to defraud a governmental agency where: (1) the governmental agency required contractors to participate in a program using

minority subcontractors; (2) defendant submitted bids to the agency representing that the requisite percentage of work would be subcontracted to a minority subcontractor; (3) defendant paid a fee to a minority subcontractor to use that company's name in making false representations to the governmental agency; (4) the work was actually done by the defendant; and, (5) defendant never intended to use a minority subcontractor but submitted fraudulent documents to the agency to prove that it had done so.)

The statute also reaches schemes to deprive another of the "intangible right of honest services." 18 U.S.C. § 1346. If the prosecution proceeds on the theory that the defendant defrauded the victim of honest services, the court should give Instruction 6.18.1341-3 (Mail or Wire Fraud – Protected Interests: Honest Services).

The scheme "need not be fraudulent on its face." However, it must involve "fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978) (citation omitted). The instruction incorporates this objective standard. Some circuits permit the jury to convict even if the misrepresentations would not deceive an ordinary reasonable person. *See United States v. Brown*, 79 F.3d 1550, 1557 (11th Cir. 1996) (discussing circuit split and adopting an objective standard). Although the Third Circuit does not appear to have addressed this issue directly, in *Pearlstein* the court included an objective standard in its statement of the requirements for a mail fraud conviction. 576 F.2d at 535.

The representations must relate to material facts. The Supreme Court held in *Neder v. United States*, 527 U.S. 1, 25 (1999), that materiality is an essential element of the crime of mail fraud, wire fraud, and bank fraud to be decided by the jury. *See also United States v. Riley*, --- F.3d ----, 2010 WL 3584066 (3d Cir. 2010) (discussing materiality requirement).

The prosecution need not prove that the defendant benefitted personally from the scheme to defraud. *United States v. Riley*, --- F.3d ----, 2010 WL 3584066 (3d Cir. 2010).

The last paragraph of the instruction refocuses the jury on the question of the defendant's involvement in the scheme charged in the indictment as well as the existence of that scheme. If the evidence in the case on trial may lead the jury to convict a defendant for involvement in some lesser scheme rather than the scheme charged in the indictment, the court may insert the adjective "overall" to emphasize that the conviction cannot rest on involvement in some scheme other than the overall scheme charged. Alternatively, depending on the particular facts, the court should make clear that the jury must find that the defendant joined the particular scheme charged in the indictment, and not some other fraudulent scheme. In *United States v. Dobson*, 419 F.3d 231, 237 (3d Cir. 2005), the court explained:

> [T]he relevant inquiry is not whether the defendant acted knowingly in making any misstatement, but whether she did so with respect to the overarching fraudulent scheme-that is, the particular "illicit enterprise" charged in the

indictment.

In *Dobson*, the court held that the instructions to the jury were deficient because they

> nowhere advised the jury that it could convict only on finding that [the defendant] in fact knew of [the broader] fraudulent scheme [alleged in the indictment]. * * * [T]he language of the charge easily, but erroneously, encompassed the possibility that [the defendant's] own misrepresentations, without knowledge of [the charged scheme's] broader illicit purpose, could constitute her creation of, or participation "in a scheme to defraud, or to obtain money or property by materially false or fraudulent[ ] pretenses, misrepresentations, or promises . . . ."

419 F.3d at 238.

In *United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007), the Third Circuit rejected a challenge based on *Dobson*. The court held that the trial court's instructions adequately protected the defendant against the risk that the defendant would be convicted for aiding and abetting a different scheme from that charged.[2]

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[2] The court described the instructions as follows:

> The District Court defined honest services fraud extensively, and then referred the jurors to the verdict sheet, which, as relevant here, charged Hawkins with aiding and abetting honest services wire fraud. The Court explained that:
>
> > [O]nly a public official owes a duty of honest services to the people he serves. Thus, of the defendants in this case, only Kemp is a public official. Each of the other defendants, who are private citizens, by himself or herself may not commit a substantive offense of honest services fraud as charged in the indictment.
> >
> > However, you may nevertheless find one or more of the other defendants guilty of honest services fraud, if you find beyond a reasonable doubt that such a defendant aided and abetted; that is, assisted a public official who was committing this crime to commit this crime.
>
> The District Court went on to instruct the jury that:
>
> > Before a defendant may be held responsible for aiding and abetting others in the commission of a crime, it is necessary that the government prove beyond a reasonable doubt that the

In some cases, the defendant may claim to have withdrawn from the scheme to defraud. In *United States v. Steele*, 685 F.2d 793, 803-04 (3d Cir. 1982), the Third Circuit discussed the correct way to address such a claim:

> The controlling precepts are familiar and require only a brief restatement. Mere cessation of activity in furtherance of an illegal conspiracy does not necessarily constitute withdrawal. The defendant must present evidence of some affirmative act of withdrawal on his part, typically either a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals. When a defendant has produced sufficient evidence to make a prima facie case of withdrawal, however, the government cannot rest on its proof that he participated at one time in the illegal scheme; it must rebut the prima facie showing either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal. (Citations omitted.)

In *United States v. Detelich*, 351 F.App'x. 616, 620 (3d Cir. 2009) (non-precedential), the Third Circuit rejected the defendant's argument that the jury instruction on the question of withdrawal improperly shifted the burden:

> The District Court instructed the jury that they must find that Detelich
>
> ---
>
> > defendant knowingly and deliberately associated himself or herself in some way with the crime charged and participated in it with the intent to commit the crime.
> >
> > In order to be found guilty of aiding and abetting the commission of a crime, the government must prove beyond a reasonable doubt that the defendant:
> > First, knew that the crime charged was to be committed or was being committed.
> > Second, knowingly did some act for the purpose of aiding the commission of that crime.
> > And third, acted with the intention of causing the crime charged to be committed.
>
> These instructions contained the direct link between Hawkins's actions and the specific scheme that was charged in the indictment-the scheme to deprive the public of Kemp's honest services-that was lacking in Dobson. The instructions left no danger that Hawkins would be convicted for aiding and abetting some other scheme.

*Kemp*, 500 F.3d at 300.

> "completely withdrew from the scheme. A partial or temporary withdrawal is not sufficient." The Court continued, "If you find that the defendant produced evidence that he withdrew from this scheme before November 3, 2000, the government cannot rest on its proof that he participated at one time in the illegal scheme. In that circumstance, the government has the burden to prove beyond reasonable doubt that the defendant was participating in the scheme on or after November 3, 2000."

*See also* Instruction 6.18.371J (Withdrawal Before the Commission of an Overt Act as a Defense to Conspiracy).

(revised 11/10)

**6.18.1341-4 Mail or Wire Fraud – "Intent to Defraud" Defined**

**The second element that the government must prove beyond a reasonable doubt is that *(name)* acted with the specific intent to defraud.**

**To act with an "intent to defraud" means to act knowingly and with the intention or the purpose to deceive or to cheat.**

**In considering whether *(name)* acted with an intent to defraud, you may consider, among other things, whether *(name)* acted with a desire or purpose to bring about some gain or benefit to *(himself)(herself)* or someone else or with a desire or purpose to cause some loss to someone.**

**Comment**

O'Malley et al., supra, § 47.14.

The government must prove specific intent to defraud. *United States v. Hannigan*, 27 F.3d 890, 892 (3d Cir. 1994). Specific intent may be inferred from "a material misstatement of fact made with reckless disregard for the truth." *Hannigan*, 27 F.3d at 892 n.1. In some cases, the court may also consider instructing on willful blindness. *United States v. Stewart*, 185 F.3d 112 (3d Cir. 1999). *See* Instruction 5.06 (Willful Blindness).

A good faith defense instruction is generally not necessary in mail and wire fraud cases and has therefore not been included. In *Gross v. United States*, 961 F.2d 1097 (3d Cir. 1992), the Third Circuit stated:

> We are persuaded by the majority view, and agree that a jury finding of good faith is inconsistent with a finding that the defendant acted knowingly and willfully. Therefore, in this case, we conclude that failure to give the instruction on the good faith defense did not constitute an abuse of discretion. By giving a detailed instruction on the elements of the crime with which Gross was charged, the court ensured that a jury finding of good faith would lead to an acquittal. Consistent with our well-established practice of evaluating the jury charge as a whole, we find that the district court's charge was within the bounds of its discretion.

> While it is not reversible error for the district court to refuse to give the good faith instruction in this case, we commend the district judges in the exercise in the discretion of its use as a supplement to the 'knowing and wilful' charge in future cases.

*Gross*, 961 F.2d at 1103 (citation omitted). In *United States v. Leahy*, 445 F.3d 634, 651 (3d Cir. 2006), a bank fraud case, the Third Circuit also rejected the defendant's argument that the trial court's refusal to instruct on good faith constituted error. The court stated:

> In *United States v. Gross*, 961 F.2d 1097 (3d Cir.1992), we held, adopting what has become the majority position among the circuits, that a district court does not abuse its discretion in denying a good faith instruction where the instructions given already contain a specific statement of the government's burden to prove the elements of a "knowledge" crime. *Id.* at 1102-03. In this matter, the District Court's instructions, taken as a whole, adequately defined the elements of the crime, including the intent requirement, thereby making a good faith instruction unnecessary and redundant. If the jury found that the Defendants had acted in good faith, it necessarily could not have found that the Defendants had acted with the requisite scienter. Accordingly, any good faith instruction would have been unnecessary and duplicative.

*See also United States v. Jimenez*, 513 F.3d 62 (3d Cir. 2008) (holding that instructions adequately covered the defendants' defense to the charge of bank fraud, which included a claim of good faith); *United States v. Cocchiola*, 358 F. App'x. 376, 380-81 (3d Cir. 2009) (non-precedential) (holding trial court properly denied good faith instruction where other instructions adequately covered requisite intent); *United States v. Diamond*, 322 F. App'x. 255 (3d Cir. 2009) (non-precedential) (holding trial court properly denied good faith instruction where other instructions adequately covered requisite intent).

*See* Comment to Instruction 5.07 (Good Faith Defense).

(revised 11/10)

**6.18.1341-5 Mail Fraud – "Use of the Mails" Defined**

**The third element that the government must prove beyond a reasonable doubt is that in advancing, furthering, or carrying out the scheme,** *(name)* **used the mails** *(a private or commercial interstate carrier)***, or caused the mails** *(a private or commercial interstate carrier)* **to be used.**

**The government is not required to prove that** *(name) (himself)(herself)* **actually mailed anything or that** *(name)* **even intended that the mails would be used to further, or to advance, or to carry out the scheme.**

**However, the government must prove beyond a reasonable doubt, that the mails** *(a private or commercial interstate carrier)* **were, in fact, used in some manner to further, or to advance, or to carry out the scheme to defraud. The government must also prove either that** *(name)* **used the mails, or that** *(name)* **knew the use of the mails** *(private or commercial interstate carrier)* **would follow in the ordinary course of business or events, or that** (name) **should reasonably have anticipated that the mails would be used.**

**It is not necessary that the item mailed** *(sent by carrier)* **was itself false or fraudulent or contained any false or fraudulent statement, representation, or promise, or contained any request for money or thing of value.**

**However, the government must prove beyond a reasonable doubt that the use of the mails** *(private or commercial interstate carrier)* **in some way furthered, or advanced, or carried out the scheme.**

**Comment**

O'Malley et al., supra, § 47.04.

In *Pereira v. United States*, 347 U.S. 1 (1954), the Court explained that the scheme need not "contemplate the use of the mails as an essential element:"

> Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used.

*Pereira*, 347 U.S. at 8-9. *See also United States v. Bentz*, 21 F.3d 37, 40-42 (3d Cir. 1994) (dismissing wire fraud indictment where defendant did not know that use of wires would follow in the ordinary course of business and where such use was not objectively reasonably foreseeable). However, the mailing must be for the purpose of executing or attempting to execute the scheme to defraud. *United States v. Maze*, 414 U.S. 395, 400 (1974). The Third Circuit has held that "the mailings must be sufficiently closely related to the scheme to bring the conduct within the ambit of the mail fraud statute, and the 'scheme's completion [must] depend [ ] in some way on the charged mailings.'" *United States v. Coyle*, 63 F.3d 1239, 1244-45 (3d Cir. 1995) (citations omitted)

The mailing may be routine or innocent and need not contain false information. *Schmuck v. United States*, 489 U.S. 705, 715 (1989). The mailings may even, in hindsight, be counterproductive. *Schmuck*, 489 U.S. at 715. *See also United States v. Diamond*, 322 F. App'x. 255 (3d Cir. 2009) (non-precedential) (citing Model Instruction and comment).

In *Coyle*, 63 F.3d at 1244-45 (citations omitted), the Third Circuit explained:

> Even mailings made after the fruits of the scheme have been received may come within the statute when they are "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place."

In an appropriate case, the court may give the following instruction regarding a "lulling letter:"

> A mailing intended to lull the victims into a false sense of security, or to conceal the fraud or postpone its detection, or to make detection less likely, constitutes a mailing for the purpose of executing the scheme to defraud.

*See United States v. Lane*, 474 U.S. 438, 451-53 (1986); *United States v. Sampson*, 371 U.S. 75, 80-81 (1962); *United States v. Lebovitz*, 669 F.2d 894, 896 (3d Cir. 1982). (revised 12/09)

### 6.18.1341-6 Mail Fraud – Each Use of the Mails a Separate Offense

**Each use of the mails to advance, or to further, or to carry out the scheme or plan may be a separate violation of the mail fraud statute.**

**Comment**

O'Malley et al., supra, § 47.15.

Each separate mailing constitutes a separate violation of the mail fraud statute. *See United States v. McClelland*, 868 F.2d 704, 706 (5th Cir. 1989); *United States v. Tiche*, 424 F. Supp. 996, 1003 (W.D. Pa.), *aff'd.*, 564 F.2d 90 (3d Cir. 1977).

## 6.18.1343 Wire Fraud – Elements of the Offense (18 U.S.C. § 1343)

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with wire fraud, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **devised a scheme to defraud or to obtain money or property** *(or the intangible right of honest services)* **by materially false or fraudulent pretenses, representations or promises** *(or wilfully participated in such a scheme with knowledge of its fraudulent nature)***;**

**Second: That** *(name)* **acted with the intent to defraud; and**

**Third: That in advancing, furthering, or carrying out the scheme,** *(name)* **transmitted any writing, signal, or sound by means of a wire, radio, or television communication in interstate commerce or caused the transmission of any writing, signal, or sound of some kind by means of a wire, radio, or television communication in interstate commerce.**

### Comment

O'Malley et al., supra, § 47.07.

18 U.S.C. § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such

> scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

The court should also give Instruction 6.18.1343-1 (Wire Fraud – "Transmits by means of wire, radio, or television communication in interstate commerce" - Defined). The cases construing the mail fraud statute apply equally to wire fraud. *See United States v. Giovengo*, 637 F.2d 941 (3d Cir. 1980). As a result, the court may also give the following instructions as appropriate: 6.18.1341-1 (Mail, Wire, or Bank Fraud – "Scheme to Defraud or to Obtain Money or Property" Defined), 6.18.1341-2 (Mail, Wire, or Bank Fraud - Unanimity Required), 6.18.1341-3 (Mail or Wire Fraud – Protected Interests: Honest Services), and 6.18.1341-4 (Mail or Wire Fraud – "Intent to Defraud" Defined). In appropriate cases, the court should also give Instruction 6.18.1343-2 (Wire Fraud – Each Transmission by Wire Communication a Separate Offense).

> 18 U.S.C. § 2326 provides enhanced penalties for certain violations of § 1343:
>
> A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing--
> (1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and
> (2) in the case of an offense under any of those sections that--
> (A) victimized ten or more persons over the age of 55; or
> (B) targeted persons over the age of 55,
> shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

If the indictment alleges any of these circumstances, the instruction should be modified to add the aggravating factor as an element essential for conviction. The court may then also wish to give Instruction 3.11 (Lesser Included Offenses).

### 6.18.1343-1 Wire Fraud – "Transmits by means of wire, radio, or television communication in interstate commerce"– Defined

**The third element that the government must prove beyond a reasonable doubt is that in advancing, furthering, or carrying out the scheme,** *(name)* **transmitted a writing, signal, or sound by means of a wire, radio, or television communication in interstate commerce or caused the transmission of a writing, signal, or sound of some kind by means of a wire, radio, or television communication in interstate commerce.**

**The phrase "transmits by means of wire, radio, or television communication in interstate commerce" means to send from one state to another by means of telephone or telegraph lines or by means of radio or television. The phrase includes a telephone conversation by a person in one state with a person in another state, or electronic signals sent from one state to another, such as by fax or financial wire.** *[The use of the Internet to send a message, such as an e-mail, or to communicate with a web site may constitute a wire transmission in interstate commerce.]*

**The government is not required to prove that** *(name)* **actually used a wire communication in interstate commerce or that** *(name)* **even intended that anything be transmitted in interstate commerce by means of a wire, radio, or television communication to further, or to advance, or to carry out the** *(scheme or plan to defraud) (scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises)***.**

**However, the government must prove beyond a reasonable doubt that a transmission by a wire, radio, or television communication facility in interstate commerce was, in fact, used in some manner to further, or to advance, or to carry out the scheme to defraud. The government must also prove either that** *(name)* **used wire, radio, or television communication in interstate commerce, or that** *(name)* **knew the use of the wire, radio, or television communication in interstate commerce would follow in the ordinary course of business or events, or that** *(name)* **should reasonably have anticipated that wire, radio, or television communication in interstate commerce would be used.**

**It is not necessary that the information transmitted by means of wire, radio, or television communication in interstate commerce itself was false or fraudulent or contained any false or fraudulent pretense, representation, or promise, or contained any request for money or thing of value.**

**However, the government must prove beyond a reasonable doubt that the use of the wire, radio, or television communication in interstate commerce furthered, or advanced, or carried out, in some way, the scheme.**

**Comment**

O'Malley et al., supra, § 47.08.

Transmission by means of wire, radio, or television communication in interstate commerce is not narrowly construed. *See United States v. King*, 590 F.2d 253 (8th Cir. 1978), *cert. denied*, 440 U.S. 973 (1979) (rejecting defendant's challenge to wire fraud conviction where conviction rested in part on microwave communications in order to further a fraud).

In *Pereira v. United States*, 347 U.S. 1 (1954), a mail fraud case, the Court explained that the scheme need not "contemplate the use of the mails as an essential element:"

> Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used.

*Pereira*, 347 U.S. at 8-9. *See also United States v. Keller*, 2010 WL 3733872 (3d Cir. 2010) (non-precedential) (noting that use of the wires need not be an essential element of the scheme); *United States v. Bentz*, 21 F.3d 37, 40-42 (3d Cir. 1994) (dismissing wire fraud indictment where defendant did not know that use of wires would follow in the ordinary course of business and where such use was not objectively reasonably foreseeable). If the government proves that the wire communication occurred and was reasonably foreseeable, it is not necessary that the government prove it was foreseeable that the wire communication would be interstate. *See United States v. Blackmon*, 839 F.2d 900, 907 (2d Cir. 1988). In *Keller*, the Third Circuit held that the trial court had properly refused to give the defendant's requested instruction that the scheme to defraud must have "depended in some way" on the use of the wires. The court noted that the trial court gave Model Criminal Jury Instruction 6.18.1343-1 for wire fraud. *Keller,* 2010 WL 3733872 at *3.

If the government relies on use of the Internet, the court should add the optional language addressing Internet use. Although the Third Circuit has not directly addressed this issue, use of the Internet to send a message or communicate with a web site may constitute the requisite transmission in interstate commerce. *Cf. United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006).

(Revised 11/10)

## 18.1343-2 Wire Fraud – Each Transmission by Wire Communication a Separate Offense

**Each transmission by wire communication in interstate commerce to advance, or to further, or to carry out the scheme or plan may be a separate violation of the wire fraud statute.**

### Comment

O'Malley et al., supra, § 47.15.

Each use of the wires constitutes a separate violation of the wire fraud statute. *See United States v. Luongo*, 11 F.3d 7, 9 (1st Cir. 1993).

### 6.18.1344 Bank Fraud - Elements of the Offense (18 U.S.C. § 1344)

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with bank fraud, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name) [(knowingly executed a scheme or artifice to defraud (name of financial institution))(knowingly executed a scheme to obtain the money, funds or other property owned by or under the control of (name of financial institution))]* **by means of material false or fraudulent pretenses, representations or promises as detailed in Count** *(No.)* **of the indictment;**

**Second: That** *(name)* **did so with the intent to defraud** *(name of financial institution)***; and**

**Third: That** *(name of financial institution)* **was** *[(then insured by the Federal Deposit Insurance Corporation) (chartered by the United States)]***.**

**Comment**

18 U.S.C. § 1344 provides that:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice--
> (1) to defraud a financial institution; or
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

The court should also give Instructions 6.18.1341-1 (Mail, Wire, or Bank Fraud – "Scheme to Defraud or to Obtain Money or Property" Defined) and 6.18.1344-1 (Bank Fraud – "Intent to

Defraud" Defined).

The Third Circuit looks to the interpretation of the mail fraud statute, 18 U.S.C. § 1341, to construe the bank fraud statute. *United States v. Thomas*, 315 F.3d 190, 198 (3d Cir. 2002). In appropriate cases, the court should instruct concerning the requirement of unanimity. *Thomas*, 315 F.3d at 198. *See* Instruction 6.18.1341-2 (Mail, Wire, or Bank Fraud - Unanimity Required).

In *Thomas*, the Third Circuit addressed the requirements for conviction under section 1344. The court noted that:

> The meaning of the first line of the statute is not disputed. "The terms 'scheme' and 'artifice' are defined to include any plan, pattern or cause of action, including false and fraudulent pretenses and misrepresentations, intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived."

315 F.3d at 195 (citation omitted). In *Thomas*, the court resolved the question of whether 1344(1) and (2) should be read disjunctively or conjunctively, stating that "to convict at all under the bank fraud statute, there must be an intent to defraud the bank" and holding that "conduct, reprehensible as it may be, does not fall within the ambit of the bank fraud statute when the intention of the wrongdoer is not to defraud or expose the bank to any loss but solely to defraud the bank's customer." 315 F.3d at 196-99.

It is not necessary that the defendant actually cause harm to the bank to be guilty of bank fraud. *See United States v. Khorozian*, 333 F.3d 498, 505 n.6 (3d Cir. 2003).

18 U.S.C. § 2326 provides enhanced penalties for certain violations of § 1344:

> A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing--
> (1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and
> (2) in the case of an offense under any of those sections that--
> (A) victimized ten or more persons over the age of 55; or
> (B) targeted persons over the age of 55,
> shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

If the indictment alleges any of these circumstances, the instruction should be modified to add the aggravating factor as an element essential for conviction. The court may then also wish to give Instruction 3.11 (Lesser Included Offenses).

(revised 12/09)

**6.18.1344-1 Bank Fraud – "Intent to Defraud" Defined**

**The second element that the government must prove beyond a reasonable doubt is that** *(name)* **acted with the intent to defraud** *(name of financial institution)***.**

**To act with an "intent to defraud" means to act knowingly and with the intention or the purpose to deceive or to cheat.**

**In considering whether** *(name)* **acted with an intent to defraud, you may consider, among other things, whether** *(name)* **acted with a desire or purpose to bring about some gain or benefit to** *(himself)(herself)* **or someone else at the expense of** *(name of financial institution)* **or with a desire or purpose to cause some loss to** *(name of financial institution)***.**

**Comment**

O'Malley et al., supra, § 47.14.

The government must prove specific intent to defraud the bank. *United States v. Thomas*, 315 F.3d 190, 197 (3d Cir. 2002). In *Thomas*, the Third Circuit held that "harm or loss to the bank must be contemplated by the wrongdoer to make out a crime of bank fraud." 315 F.3d at 200. *See also United States v. Repella*, 359 F. App'x. 294 (3d Cir. 2009) (non-precedential) (holding that bank fraud conviction was not supported by sufficient evidence of intent to defraud banks in indictment, plea colloquy or pre-sentence report). In *United States v. Leahy*, 445 F.3d 634, 646 (3d Cir. 2006), the court pointed out that its decision in *United States v. Khorozian*, 333 F.3d 498 (3d Cir. 2003), "clarified *Thomas*' s holding regarding the mens rea element of § 1344." The court explained:

> [*Khorozian* made] clear that intent to cause a loss or liability, or an intent to harm the bank, is not required. Rather, loss, or risk of loss, goes to the consequences of the fraudulent scheme, and it need not be intended to satisfy § 1344's mens rea requirement of a specific intent to defraud a bank. * * * Accordingly, *Khorozian* limited *Thomas*' s requirement of an intent to cause loss or liability to the bank to those situations where the bank was merely an "unwitting instrumentality" of the fraud; however, where the bank is a direct target of the deceptive conduct or

> scheme, § 1344 is satisfied by proof of a specific intent to defraud the bank plus fraudulent conduct (e.g., misrepresentations) which creates an actual loss or a risk of loss. In other words, where the fraudulent scheme targets the bank, there is no requirement that the defendant intended to harm the bank or otherwise intended to cause loss.

In *Leahy*, the court noted that the following instruction was consistent with its holding in *Thomas*:

> The second element of bank fraud, which the government must prove beyond a reasonable doubt, is that the defendants participated in the scheme to defraud with the intent to defraud. To act with an intent to defraud means to act knowingly and with the purpose to deceive or to cheat. An intent to defraud is ordinarily accompanied by a desire or a purpose to bring about gain or benefit to oneself or some other person, or by a desire or a purpose to cause some loss to some person. The intent element of bank fraud is an intent to deceive the bank in order to obtain from it money or other property.

445 F.3d at 644.

Specific intent may be inferred from "a material misstatement of fact made with reckless disregard for the truth." *United States v. Hannigan*, 27 F.3d 890, 892 n.1 (3d Cir. 1994). In some cases, the court may also consider instructing on willful blindness. *United States v. Stewart*, 185 F.3d 112 (3d Cir. 1999). *See* Instruction 5.06 (Willful Blindness).

If the government proves such intent, it is irrelevant that the defendant also intended to harm another person or entity or was motivated by a desire to harm another person or entity. However, an intent to harm a third party alone is not sufficient to establish liability for bank fraud.

A good faith defense instruction is generally unnecessary in bank fraud cases and therefore has not been included. In *Gross v. United States*, 961 F.2d 1097 (3d Cir. 1992), the Third Circuit stated:

> We are persuaded by the majority view, and agree that a jury finding of good faith is inconsistent with a finding that the defendant acted knowingly and willfully. Therefore, in this case, we conclude that failure to give the instruction on the good faith defense did not constitute an abuse of discretion. By giving a detailed instruction on the elements of the crime with which Gross was charged, the court ensured that a jury finding of good faith would lead to an acquittal. Consistent with our well-established practice of evaluating the jury charge as a whole, we find that the district court's charge was within the bounds of its discretion.
>
> While it is not reversible error for the district court to refuse to give the good faith

> instruction in this case, we commend the district judges in the exercise in the discretion of its use as a supplement to the 'knowing and wilful' charge in future cases.

*Gross*, 961 F.2d at 1103 (citation omitted). In *Leahy*, 445 F.3d at 651, the Third Circuit also rejected the defendant's argument that the trial court's refusal to instruct on good faith constituted error. The court stated:

> In *United States v. Gross*, 961 F.2d 1097 (3d Cir.1992), we held, adopting what has become the majority position among the circuits, that a district court does not abuse its discretion in denying a good faith instruction where the instructions given already contain a specific statement of the government's burden to prove the elements of a "knowledge" crime. *Id.* at 1102-03. In this matter, the District Court's instructions, taken as a whole, adequately defined the elements of the crime, including the intent requirement, thereby making a good faith instruction unnecessary and redundant. If the jury found that the Defendants had acted in good faith, it necessarily could not have found that the Defendants had acted with the requisite scienter. Accordingly, any good faith instruction would have been unnecessary and duplicative.

In *United States v. Jimenez*, 513 F.3d 62 (3d Cir. 2008), the Third Circuit held that the district court's instructions had adequately covered the defendants' defense to the charge of bank fraud, which included a claim of good faith. The court described the contents of the jury instructions as follows:

> The district court explicitly told the jury that good faith was a complete defense to bank fraud because good faith negated the element of intent to defraud required for a bank fraud conviction, and that the Government bore the burden of proving beyond a reasonable doubt that the defendants acted with the requisite intent to defraud, negating a good faith defense. The court further instructed the jury that "even if a bank officer or employee may have known the true nature of the questioned transaction, that is not a defense to bank fraud. Rather, the question is whether the financial institution itself, not its officers or agents, was defrauded." . . . . Taken together with the instruction that "[i]n determining whether or not the prosecution has proven that a defendant acted with the specific intent required by the mail and bank fraud counts, the jury must consider all of the evidence received in the case bearing on a defendant's state of mind", the instructions allowed the jury to consider the bank officials' knowledge and acquiescence in determining whether the defendants intended to defraud [the bank], while properly instructing the jury that the defendants' intent to defraud must target the bank, not the individual bank officers.
>
> The court also properly instructed the jury that repayment of the overdrafted balances could be considered in determining whether the defendants acted with an intent to defraud or whether they acted in good faith, focusing on the intent of the

> defendants at the time of the actions alleged to be fraudulent. The court's instruction that "[a]ctual repayment to the bank may negate an intent to defraud the bank only if coupled with other evidence that likewise negates an intent to defraud" correctly states the law and appropriately focuses the jurors' attention on the defendants' intent at the time of the charged conduct.
>
> Likewise, the court properly instructed the jury that fees and interest charged by the bank on the overdrafts do not negate a defendant's intent to defraud, which is the focus of a bank fraud charge. This instruction, coupled with the instructions on knowledge and intent to defraud, allowed the defendants to argue that they believed their actions were authorized from the fact that they paid the overdraft fees and therefore lacked the requisite intent to defraud. The fact that the jury did not buy into their argument does not make the instructions erroneous.

*United States v. Jimenez*, 513 F.3d at 74-75 (citations omitted).

*See* Comment to Instruction 5.07 (Good Faith Defense).

(revised 12/09)

## 6.18.1347 Health Care Fraud - Elements of the Offense (18 U.S.C. § 1347)

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with health care fraud, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **knowingly devised or participated in a scheme to** *(defraud (victim entity or person)) (obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of (victim entity or person))* **in connection with the delivery of or payment for health care benefits, items, or services;**

**Second: That** *(name)* **acted with the intent to defraud; and**

**Third: That** *(victim entity or person)* **was**

*[a (public)(private) plan or contract, affecting commerce, under which medical benefits, items, or services were provided to any individual.]*

*[an (individual)(entity) who was providing a medical benefit, item, or service for which payment may be made under a (public)(private) plan or contract, affecting commerce, under which medical benefits, items, or services were provided to any individual.]*

**Comment**

18 U.S.C. § 1347 provides:

> Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice--
>
> (1) to defraud any health care benefit program; or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,
>
> in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.
>
> 18 U.S.C. § 24(b) defines "health care benefit program" to mean:
>
> any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

In addition to instructing the jury on the elements of the offense, the court should also give Instruction 6.18.1341-1 (Mail, Wire, or Bank Fraud - "Scheme to Defraud or to Obtain Money or Property" Defined), Instruction 6.18.1347-1 ("Intent to Defraud" - Defined), and Instruction 6.18.1347-2 (Health Care Fraud - Affecting Interstate Commerce). If the indictment charges multiple schemes or plans to defraud, the court should give Instruction 6.18.1341-2 (Mail, Wire, or Bank Fraud - Unanimity Required).

In *United States v. Hickman*, 331 F.3d 439, 445-46 (5th Cir. 2003), the Fifth Circuit considered the requirements of the statute.

> . . . § 1347 punishes one who "knowingly and willfully executes, or attempts to execute, a scheme or artifice . . . to defraud any health care benefit program . . . or . . . to obtain, by means of false or fraudulent pretenses . . . any of the money or property . . . of . . . any health care benefit program . . . ." Although there is a paucity of case law interpreting this provision, its language and structure are almost identical to the bank fraud statute, 18 U.S.C. § 1344. In *United States v. Lemons*, 941 F.2d 309 (5th Cir.1991), we interpreted § 1344 to punish "each execution of the scheme." Id. at 318. We contrasted this with the mail and wire fraud statutes, which punish "each act in furtherance, or execution, of the scheme." Id. . . . . We hold, by analogy, that the health care fraud statute, § 1347, punishes executions or attempted executions of schemes to defraud, and not

> simply acts in furtherance of the scheme. Of course, although the crime of health care fraud is complete upon the execution of a scheme, any scheme can be executed a number of times, and each execution may be charged as a separate count.
> * * *
> Ultimately, the decision of whether a particular transaction is an "execution" of the scheme or merely a component of the scheme will depend on several factors including the ultimate goal of the scheme, the nature of the scheme, the benefits intended, the interdependence of the acts, and the number of parties involved. This test highlights the fact that the definition of an execution is inextricably intertwined with the way the fraudulent scheme is defined. (Citations omitted.)

The court concluded that each claim constituted a separate execution of the defendant's scheme. *Hickman*, 331 F.3d at 447. *See also United States v. Bell*, 2010 WL 1854113 (W.D. Pa. 2010) (discussing scienter requirement).

In *United States v. Jones*, 471 F.3d 478 (3d Cir.2006), the Third Circuit differentiated between health care fraud and theft. The defendant, a worker at a Methadone clinic, was convicted of health care fraud under 18 U.S.C. § 1347(2). The defendant, who was responsible for depositing the clinic's daily earnings in a bank account, repeatedly embezzled the clinic's money to her own funds. The Court of Appeals reversed on the grounds that the theft of the money occurred after the health care benefit was conferred; the theft was unrelated to the conferral of any health care benefit:

> The plain language of the statute clearly prohibits health care fraud by knowingly or willfully using "false or fraudulent pretenses, representations, or promises" to obtain the money or property of a health care benefit program in connection with the delivery of, or payment for, health care benefits, items, or services. See 18 U.S.C. § 1347(2). . . . [F]raud is differentiated from theft. Under the common law and the Model Penal Code, theft is synonymous to larceny--the taking of another's property by trespass with intent to deprive permanently the owner of the property. Fraud, which did not exist at common law, "means to cheat or wrongfully deprive another of his property by deception or artifice," and "implies deceit, deception, artifice, trickery."
>
> Here, the Government did not establish health care fraud. Rather, the Government established only that: (1) from February 2000 to March 2004, the amount deposited into Progressive's bank account was $451,000 less than the amount received from clients; (2) the discrepancies between the amount received and the amount deposited occurred on the majority of the days on which Jones worked alone and did not occur when Jones was absent from work; (3) Jones was one of the employees that made bank deposits; and (4) Jones had made cash deposits to her bank account and cash expenditures exceeding her wages. The Government has not established, nor did it seek to establish, any type of misrepresentation by

> Jones in connection with the delivery of, or payment for, health care benefits, items, or services.

*Id.* at 481 (internal citation and footnote omitted).

The court went on to explain:

> There was simply no type of misrepresentation made in connection with the delivery of, or payment for, health care benefits, items or services. There is no allegation that Jones said or did anything that affected the delivery of, or payment for, health care benefits, items, or services. The services were already properly paid for when Jones failed to deposit all of the money collected, and instead kept it.

*Id.* at 482.

In *United States v. Lucien*, 347 F.3d 45, 52 (2d Cir. 2003), the Second Circuit held that a state no-fault automobile insurance program qualified as "health care benefit program" and upheld the health care fraud convictions of defendants who posed as injured passengers in staged automobile collisions in a scheme to obtain payments from insurers, which included payments to the defendants' medical providers.

(Revised 11/10)

**6.18.1347-1 Health Care Fraud – "Intent to Defraud" Defined**

**The second element that the government must prove beyond a reasonable doubt is that** *(name)* **acted with the intent to defraud** *(victim entity or person)***.**

**To act with an "intent to defraud" means to act knowingly and with the intention or the purpose to deceive or to cheat.**

**In considering whether** *(name)* **acted with an intent to defraud, you may consider, among other things, whether** *(name)* **acted with a desire or purpose to bring about some gain or benefit to** *(himself)(herself)* **or someone else at the expense of** *(victim entity or person)* **or with a desire or purpose to cause some loss to** *(victim entity or person)*.

**Comment**

O'Malley et al., supra, § 47.14.

*See* Instructions 5.02 (Knowingly) and 5.03 (Intentionally).

### 6.18.1347-2 Health Care Fraud - Affecting Interstate Commerce

**The government must prove beyond a reasonable doubt that the** *(public)(private)* **plan or contract affected or could have affected interstate commerce. Affecting interstate commerce means any action, which in any way, interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in commerce between or among the states. The effect can be minimal.**

### Comment

Sand et al., supra, 50-7 and 50-15.

In *United States v. Hickman*, 331 F.3d 439, 443 (5th Cir. 2003), the Fifth Circuit recognized that "affecting commerce" is probably an essential element of the offense but held that the trial court's failure to instruct on this element was not plain error where the victims of the fraud were Medicare and Medicaid.

# Obstruction of Justice: Witness Tampering *(18 U.S.C. §§ 1512, 1503)*

| | |
|---|---|
| 6.18.1512A2 | Obstruction of Justice - Witness Tampering Through Physical Force or Threat of Physical Force (18 U.S.C. § 1512(a)(2)(A) or (B)) |
| 6.18.1512A2-1 | Obstruction of Justice - Hindering Communication Through Physical Force or Threat of Physical Force (18 U.S.C. § 1512(a)(2)(C)) |
| 6.18.1512B | Obstruction of Justice - Witness Tampering Through Intimidation, Threats, or Corrupt Persuasion (18 U.S.C. § 1512(b)(1) and (2)) |
| 6.18.1512B-1 | Obstruction of Justice - Hindering Communication Through Intimidation, Threats, or Corrupt Persuasion (18 U.S.C. § 1512(b)(3)) |
| 6.18.1512E | Affirmative Defense - Truth-Seeking Lawful Conduct |
| 6.18.1513B | Retaliating Against a Witness, Victim, or Informant (18 U.S.C. § 1513(b)) |

**6.18.1512A2 Obstruction of Justice - Witness Tampering Through Physical Force or Threat of Physical Force (18 U.S.C. § 1512(a)(2)(A) or (B))**

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with** *(briefly state offense; e.g., tampering with a witness)***, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:**

**First: That** *(name)* **knowingly used** *(attempted to use)* **physical force or the threat of physical force against** *(name of person)***,**

**Second: That** *(name)* **acted with intent to**

*[Include language that applies:*

*(influence)(delay)(prevent) the testimony of (name of person) in (specify proceeding), an official proceeding,*

*or*

*cause or induce (name of person) to (withhold testimony) (withhold a (record) (document) (specify object)) from (specify proceeding), an official proceeding,*

*or*

*cause or induce (name of person) to alter, destroy, mutilate or conceal an object with intent to impair the object's integrity or availability for use in (specify proceeding), an official proceeding,*

*or*

*cause or induce (name of person) to evade legal process summoning (name of person)*

*(to appear as a witness) (to produce a (record) (document) (specify object)) in (specify proceeding), an official proceeding,*

*or*

*cause or induce (name of person) to be absent from (specify proceeding), an official proceeding to which (name of person) had been summoned by legal process]***,**

**Third: That** *(name)* **knew or should have known that** *(specify proceeding)* **was pending or was likely to be instituted.** *[However, the government does not need to prove that an official proceeding was actually pending or about to be instituted at the time of the alleged offense.]*

**Fourth: That** *(specify proceeding)***, the official proceeding, was a federal proceeding**. *[However, the government does not need to prove that the defendant knew that the proceeding was a federal proceeding.]*

**Comment**

18 U.S.C. § 1512(a)(2)(A) and (B) provide:

> Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to--
>
> (A) influence, delay, or prevent the testimony of any person in an official proceeding;
>
> (B) cause or induce any person to--
>
> (I) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
>
> (ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;
>
> (iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; * * *

commits a crime.

This instruction should be used only if the defendant is charged under 18 U.S.C. § 1512(a)(2)(A) or (B). If the defendant is charged with a violation of 18 U.S.C. § 1512(a)(2)(C), the court should give Instruction 6.18.1512A2-1 (Obstruction of Justice - Hindering Communication Through Physical Force or Threat of Physical Force (18 U.S.C. § 1512(a)(2)(C))). If the defendant is charged with a violation of 18 U.S.C. § 1512(b)(1) or (2), the court should give Instruction 6.18.1512B (Obstruction of Justice - Witness Tampering Through Intimidation, Threats, or Corrupt Persuasion (18 U.S.C. § 1512(b)(1) and (2))). If the defendant is charged with a violation of 18 U.S.C. § 1512(b)(3), the court should give Instruction 6.18.1512B-1 (Obstruction of Justice - Hindering Communication Through Intimidation, Threats, or Corrupt Persuasion (18 U.S.C. § 1512(b)(3))). These instructions do not cover all the subsections of § 1512. Section 1512(a)(1) addresses killing or attempting to kill another to prevent him or her from attending or testifying at an official proceeding, from producing evidence in an official proceeding, or from communicating certain information to a law enforcement officer or judge. Section 1512(c) addresses corrupt tampering with records, documents or other objects. Section 1512(d) creates a misdemeanor offense for harassing witnesses. If the indictment charges the defendant under one of these other provisions of section 1512, the instructions should be modified accordingly.

Under this statute, the force or threat of force does not have to be against the person testifying; that is, the defendant need not have direct contact with the witness. All that is required is that the defendant use physical force or the threat of physical force to tamper with a witness. *United States v. Davis,* 183 F.3d 231, 250 (3d Cir. 1999). The statute encompasses cases in which the defendant used force against, for example, a family member in order to silence a witness. *See United States v. Bell*, 113 F.3d 1345, 1349 n.3 (3d Cir. 1997). Alternatively, the use of force or threat of force may be directed at a number of potential victims, as, for example, a case where the defendant blew up a courtroom. If the government alleges a violation of the statute by using physical force or the threat of physical force against a third person and without direct contact with the witness, the court may want to instruct the jury that direct contact is not required.

In addition, the government is not required to prove that the defendant succeeded in the effort to tamper with the witness; the government need not prove that the witness changed or withheld his or her testimony. *United States v. Davis,* 183 F.3d 231, 250 (3d Cir. 1999). If there is a question as to whether the defendant's effort to tamper with the witness was successful, the court may want to instruct the jury that success is not a prerequisite to conviction and that what the government must prove beyond a reasonable doubt is that the defendant acted with intent to influence a witness' testimony.

18 U.S.C. § 1515(a)(2) defines the term "physical force" as "physical action against another, and includes confinement."

18 U.S.C. § 1512(f) provides:

> For the purposes of this section–
>
> (1) an official proceeding need not be pending or about to be instituted at the time of the offense; and
>
> (2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

18 U.S.C. § 1512(g) provides:

> In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance--
>
> (1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or
>
> (2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

Despite the language of § 1512(g), in *Arthur Andersen L.L.P. v. United States*, 544 U.S. 696 (2005), a prosecution under § 1512(b)(2), the Court held that the government must establish a nexus between the defendant's acts and a particular proceeding. The instruction directs the court to specify the particular proceeding. In *Arthur Andersen*, the Court stated:

> The instructions also were infirm for another reason. They led the jury to believe that it did not have to find any nexus between the "persua [sion]" to destroy documents and any particular proceeding. In resisting any type of nexus element, the Government relies heavily on § 1512(e)(1)[ now § 1512(f)(1)], which states that an official proceeding "need not be pending or about to be instituted at the time of the offense." It is, however, one thing to say that a proceeding "need not be pending or about to be instituted at the time of the offense," and quite another to say a proceeding need not even be foreseen. A "knowingly ... corrup[t] persuade[r]" cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.

544 U.S. at 707-08. Like § 1512(b)(2), subsections 1512(a)(2)(A) and (B) address conduct that affects an official proceeding. As a result, it appears that the nexus requirement applies equally to these provisions of the statute.

In *United States v. Vampire Nation*, 451 F.3d 189, 205-06 (3d Cir. 2006), discussing the

nexus requirement under 1512(b)(2)(A), the Third Circuit quoted the Second Circuit's assessment of *Arthur Andersen*:

> "[T]he touchstone for the nexus requirement, therefore, is an act taken that would have the natural and probable effect of interfering with a judicial or grand jury proceeding that constitutes the administration of justice; that is, the act must have a relationship in time, causation, or logic with the judicial proceedings." *United States v. Quattrone*, 441 F.3d 153, 171 (2d Cir. 2006).

The Third Circuit held that the trial court had not committed plain error when it instructed the jury that the defendant could not be convicted unless he intended to persuade his target to impede an official proceeding given that the evidence established that the target had informed the defendant that he had received a subpoena to appear before the grand jury. *See also United States v. Aguilar*, 515 U.S. 593, 599-600 (1995) (holding under the omnibus obstruction of justice provision of 18 U.S.C. § 1503 that the government must prove not only that the defendant made false statements to the federal agents but also that the defendant "knew his actions [were] likely to affect" the proceeding).

*Arthur Anderson* does not settle the question of whether the defendant must also know that the proceeding was federal. In *United States v. Bell*, 113 F.3d 1345, 1351 (3d Cir. 1997), decided before *Arthur Andersen*, the Third Circuit considered that question. Bell was prosecuted for murder of a witness in violation of 18 U.S.C. § 1512(a)(1)(A) and (C) and use of physical force and threats against a witness, in violation of 18 U.S.C. § 1512(b)(1), (2), and (3). He complained of the following supplemental instruction:

> [Y]ou would have to find beyond a reasonable doubt that the defendant intended to frustrate a future judicial proceeding. You would also have to conclude that that proceeding would be a federal proceeding, but you don't have to find that the defendant knew that it would be a federal proceeding.

The Third Circuit rejected the challenge, stating:

> The quoted instruction did nothing more than explain 18 U.S.C. § 1512(f)(1) and (2)'s express provision that the government need not prove any state of mind on the part of the defendant with respect to the federal character of the proceeding or law-enforcement-officer communication that it alleges she intended to interfere with or prevent.

*Bell*, 113 F.3d at 1351.

Section 1515(a)(1) provides that, as used in section 1512 the term "official proceeding" means:

> (A) a proceeding before a judge or court of the United States, a United States

> magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;
> (B) a proceeding before the Congress;
> (C) a proceeding before a Federal Government agency which is authorized by law; or
> (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce.

The question of whether the proceeding alleged and proved by the government is an official proceeding is for the judge.

> 18 U.S.C. § 1512(j) provides:
>
> (j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

If the maximum sentence for an offense charged in the criminal trial exceeds the maximum set forth in § 1512(a)(3), the higher sentence can be imposed only if the jury finds that the tampering offense occurred in connection with a criminal trial. In such cases, the court should instruct the jury to determine whether the offense occurred in connection with the trial of the criminal case.

## 6.18.1512A2-1 Obstruction of Justice - Hindering Communication Through Physical Force or Threat of Physical Force (18 U.S.C. § 1512(a)(2)(C))

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with** *(briefly state offense; e.g., tampering with a witness)*, **which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:**

**First: That** *(name)* **knowingly used** *(attempted to use)* **physical force or the threat of physical force against** *(name of person against whom defendant used or threatened force)*;

**Second: That** *(name)* **acted with intent to hinder, delay or prevent** *(name of person whose communication was targeted)* **from communicating to** *(law enforcement authorities) (a judge*) **information relating to the commission or possible commission of an offense;**

**Third: That the offense was a federal offense; and**

**Fourth: That** *(name)* **believed that** *(name of person whose communication was targeted)* **might communicate with federal authorities**. *[However, the government does not need to prove that an official proceeding was actually pending or about to be instituted at the time of the alleged offense.]*

**Comment**

18 U.S.C. § 1512(a)(2)(C) provides:

> Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to--
>
> * * *
>
> (C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings

commits a crime. If the defendant is prosecuted for attempt, the court may want to give Instruction 7.01 (Attempt).

18 U.S.C. § 1512(f) provides:

> For the purposes of this section--
>
> (1) an official proceeding need not be pending or about to be instituted at the time of the offense; and
>
> (2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

18 U.S.C. § 1512(g) provides:

> In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance--
>
> (1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or
>
> (2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

18 U.S.C. § 1515(a)(4) defines "law enforcement officer" to mean

> an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant--
>
> (A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or
>
> (B) serving as a probation or pretrial services officer under this title.

18 U.S.C. § 1515(a)(2) defines "physical force" as “physical action against another, and

includes confinement."

The Third Circuit has not specifically resolved how to charge the jury on this offense and has not addressed the specific requirements for conviction under this section. However, in *United States v. Guadalupe*, 402 F.3d 409 (3d Cir. 2005), the Third Circuit listed the elements necessary for a conviction under 18 U.S.C. § 1512(b)(3), which addresses the use of corrupt persuasion, intimidation, or threats to accomplish the same goal:

> To obtain a conviction pursuant to 18 U.S.C. § 1512(b)(3), the government must prove that: (1) the defendant attempted to corruptly persuade a person; (2) the defendant was motivated by a desire to prevent the communication between that person and law enforcement authorities concerning the commission or possible commission of an offense; (3) the offense was actually a federal offense; and (4) the defendant believed that the person he attempted to corruptly persuade might communicate with federal authorities.

402 F.3d at 412. The statute does not require proof that the defendant addressed the force or threatened force to a witness or potential witness. It encompasses cases in which the defendant used force against, for example, a family member in order to silence a witness. In such cases, the court may modify the language of the second element accordingly. *See United States v. Bell*, 113 F.3d 1345, 1349 n.3 (3d Cir. 1997).

The instruction includes as the fourth element the requirement that the defendant believed that the person influenced would communicate with a federal official. In *Guadalupe*, the Third Circuit wrestled with the question whether the defendant who interferes with communication to a law enforcement officer must know that the law enforcement officer is a *federal* officer. 402 F.3d at 413-14. The court recognized that, despite the language of § 1512(g), *United States v. Stansfield*, 101 F.3d 909 (3d Cir. 1996), requires some level of awareness that the communication interfered with would otherwise reach federal authorities. In *Stansfield,* the court explained:

> Were we to require only that the government prove that the underlying offense is federal and that the defendant intended to prevent the witness from communicating with law enforcement officials in general, without also proving the defendant's knowledge of or belief in the possibility that the witness would communicate with federal authorities, we would essentially vitiate an important facet of the intent requirement of the statute.

101 F.3d at 918. The court held that in order to obtain a conviction for tampering with a witness by killing or attempting to kill another pursuant to 18 U.S.C. § 1512(a)(1)(C),

> the government must prove: (1) the defendant killed or attempted to kill a person; (2) the defendant was motivated by a desire to prevent the communication between any person and law enforcement authorities concerning the commission or possible commission of an offense; (3) that offense was actually a federal offense; and (4) the

> defendant believed that the person in (2) above might communicate with the federal authorities. This last element may be inferred by the jury from the fact that the offense was federal in nature, plus additional appropriate evidence. For example, it is sufficient (but not necessary) that the government prove that the defendant had actual knowledge of the federal nature of the offense in order for the jury to infer the last element.

101 F.3d at 918. The court further stated:

> [T]his framework is an appropriate reconciliation between the constraint that the government must prove the defendant's specific intent to hinder a federal investigation and the fact that, by virtue of [§1512(g)] , it need not prove that the defendant knew the federal status of any particular law enforcement officer involved in an investigation.

101 F.3d at 919.

In *Guadalupe*, the court also discussed *Bell*. In *Bell*, the court stated:

> In view of the statute's clear command that the government need not prove any "state of mind" on the part of the defendant with respect to the federal character of the proceeding or officer, 18 U.S.C. [§1512(g)], we do not read the italicized passage as requiring proof that the defendant believed the victim might communicate with law enforcement officers whom the defendant knew or believed to be federal officers. Rather, we read this sentence as recognizing that what the statute mandates is proof that the officers with *whom the defendant believed the victim might communicate would in fact be federal officers*.

*Bell*, 113 F.3d at 1349 (emphasis in original).

The court then explained:

> [W]e believe that the law of this circuit after *Stansfield* is that the government must prove that at least one of the law-enforcement-officer communications which the defendant sought to prevent would have been with a federal officer, but that the government is not obligated to prove that the defendant knew or intended anything with respect to this federal involvement. As *Stansfield* explained, the government may carry this burden by showing that the conduct which the defendant believed would be discussed in these communications constitutes a federal offense, so long as the government also presents "additional appropriate evidence."

*Bell*, 113 F.3d at 1349.

The *Bell* court further explained:

> [This conclusion] respects fully the statute's requirement that the defendant intend to prevent a communication to a law enforcement officer, as well as its requirement that such officer be, in fact, a federal officer. What our analysis renders irrelevant is the defendant's "mental state" regarding the fact that the officer is a federal officer-a fact which [§1512(g)(2)] by its terms declares irrelevant.

*Bell*, 113 F.3d at 1350-51. In *Guadalupe*, the court noted that "[a]n example of this 'additional appropriate evidence' is that the defendant had actual knowledge of the federal nature of the offense." 402 F.3d at 412.

Finally, the court rejected Bell's complaint about the following supplemental instruction:

> [Y]ou would have to find beyond a reasonable doubt that the defendant intended to frustrate a future judicial proceeding. You would also have to conclude that that proceeding would be a federal proceeding, but you don't have to find that the defendant knew that it would be a federal proceeding.

The Third Circuit stated:

> The quoted instruction did nothing more than explain 18 U.S.C. [§1512(g)(1) and (2)'s] express provision that the government need not prove any state of mind on the part of the defendant with respect to the federal character of the proceeding or law-enforcement-officer communication that it alleges she intended to interfere with or prevent.

*Bell*, 113 F.3d at 1351. Thus, *Bell* defined a less exacting standard and held it was consistent with *Stansfield*.

In *Guadalupe*, the court also recognized that *United States v. Applewhaite*, 195 F.3d 679, 687 (3d Cir. 1999), suggests that the government does *not* need to prove that the defendant knew or should have known that the officer was a federal officer. 195 F.3d at 687. The court in *Guadalupe* further noted:

> The teachings of *Applewhaite* lessened the government's burden of proof in federal obstruction of justice cases because we did not require any "additional appropriate evidence" that the defendant believed the person he attempted to corruptly persuade might communicate with federal officials.

402 F.3d at 413.

The court in *Guadalupe* stated:

> We conclude that proving a violation of 18 U.S.C. § 1512(b)(3) does not depend on the existence or imminency of a federal investigation but rather on the possible

> existence of a federal crime and a defendant's intention to thwart an inquiry into that crime by officials who happen to be federal.

402 F.3d at 411.

Ultimately, the court held that the evidence in *Guadalupe* was sufficient to satisfy either standard but did not reconcile the cases:

> Here, the government met its burden of proof as most recently articulated in *Applewhaite* because Guadalupe intended to influence an investigation which later became federal. We also stay faithful to the teachings of *Stansfield* and *Bell* because there is "additional appropriate evidence" that Guadalupe knew or should have known that Burnette might communicate with federal officials based on his position and experience as a prison administrator.

402 F.3d at 413-14. Some question therefore exists as to the requirement that the defendant know the communication would extend to a federal official.

> 18 U.S.C. § 1512(j) provides:
>
> (j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

If the maximum sentence for a offense charged in the criminal trial exceeds the maximum set forth in § 1512(a)(3), the higher sentence can be imposed only if the jury finds that the tampering offense occurred in connection with a criminal trial. In such cases, the court should instruct the jury to determine whether the offense occurred in connection with the trial of the criminal case.

## 6.18.1512B Obstruction of Justice - Witness Tampering Through Intimidation, Threats, or Corrupt Persuasion (18 U.S.C. § 1512(b)(1) and (2))

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with** *(briefly state offense; e.g., tampering with a witness)***, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:**

**First: That** *(name)* **knowingly** *[(used intimidation) (threatened) (corruptly persuaded)] (name of person)*, *(or attempted to do so)*, *(or engaged in misleading conduct toward (name of person))***;**

**Second: That** *(name)* **acted with intent to**

*[Include language that applies:*

*(influence)(delay)(prevent) the testimony of (name of person) in (specify proceeding), an official proceeding,*

*or*

*cause or induce (name of person) to [(withhold testimony) (withhold a (record) (document) (specify object))] from (specify proceeding), an official proceeding,*

*or*

*cause or induce (name of person) to alter, destroy, mutilate or conceal an object with intent to impair the object's integrity or availability for use in (specify proceeding), an official proceeding,*

*or*

*cause or induce (name of person) to evade legal process summoning (name of person) [(to appear as a witness) (to produce a (record) (document) (specify object))] in (specify proceeding), an official proceeding,*

*or*

*cause or induce (name of person) to be absent from (specify proceeding), an official proceeding, to which (name of person) had been summoned by legal process]***;**

**Third: That** *(name)* **knew or should have known that** *(specify proceeding)* **was pending or was likely to be instituted.** *[However, the government does not need to prove that an official proceeding was actually pending or about to be instituted at the time of the alleged offense.]***;**

**Fourth: That** *(specify proceeding)***, the official proceeding, was a federal proceeding**. *[However, the government does not need to prove that the defendant knew that the proceeding was a federal proceeding.]*

*[To "corruptly persuade" means to corrupt another person by persuading (him)(her) to violate a legal duty, to accomplish an unlawful end or unlawful result, or to accomplish some otherwise lawful end or lawful result in an unlawful manner.]*

**Comment**

18 U.S.C. § 1512(b)(1) and (2) provide:

> (b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--
>
> (1) influence, delay, or prevent the testimony of any person in an official proceeding;
>
> (2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
(D) be absent from an official proceeding to which such person has been summoned by legal process; or

* * *

shall be fined under this title or imprisoned not more than ten years, or both.

*See United States v. Wolfe*, 301 F.App'x. 134, 2008 WL 5146618 (3d Cir. 2008) (non-precedential) (noting that government had to establish that defendant intentionally injured the person and that he did so intending to retaliate against the person for cooperating with the government in the criminal case).

Under this statute, the force or threat of force does not have to be against the person testifying; that is, the defendant need not have direct contact with the witness. All that is required is that the defendant use physical force or the threat of physical force to tamper with a witness. *United States v. Davis,* 183 F.3d 231, 250 (3d Cir. 1999). The statute encompasses cases in which the defendant used force against, for example, a family member in order to silence a witness. *See United States v. Bell*, 113 F.3d 1345, 1349 n.3 (3d Cir. 1997). Alternatively, the use of force or threat of force may be directed at a number of potential victims, as, for example, a case where the defendant blew up a courtroom. If the government alleges a violation of the statute by using physical force or the threat of physical force against a third person and without direct contact with the witness, the court may want to instruct the jury that direct contact is not required.

In addition, the government is not required to prove that the defendant succeeded in the effort to tamper with the witness; the government need not prove that the witness changed or withheld his or her testimony. *Davis,* 183 F.3d at 250. If there is a question as to whether the defendant's effort to tamper with the witness was successful, the court may want to instruct the jury that success is not a prerequisite to conviction and that what the government must prove beyond a reasonable doubt is that the defendant acted with intent to influence a witness' testimony.

18 U.S.C. § 1512(f) provides:

For the purposes of this section--
(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and
(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

18 U.S.C. § 1512(g) provides:

> In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance --
>
> > (1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or
> > (2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

Despite the language of § 1512(g), in *Arthur Andersen L.L.P. v. United States*, 544 U.S. 696 (2005), a prosecution under § 1512(b)(2), the Court held that the government must establish a nexus between the defendant's acts and a particular proceeding. The instruction directs the court to specify the particular proceeding. In *Arthur Andersen*, the Court stated:

> The instructions also were infirm for another reason. They led the jury to believe that it did not have to find any nexus between the "persua [sion]" to destroy documents and any particular proceeding. In resisting any type of nexus element, the Government relies heavily on § 1512(e)(1)[ now § 1512(f)(1)], which states that an official proceeding "need not be pending or about to be instituted at the time of the offense." It is, however, one thing to say that a proceeding "need not be pending or about to be instituted at the time of the offense," and quite another to say a proceeding need not even be foreseen. A "knowingly . . . corrup[t] persuade[r]" cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.

544 U.S. at 707-08. Like § 1512(b)(2), § 1512(b)(1) addresses conduct that affects an official proceeding. As a result, it appears that the nexus requirement applies equally to both provisions of the statute.

In *United States v. Vampire Nation*, 451 F.3d 189, 205-06 (3d Cir. 2006), discussing the nexus requirement under § 1512(b)(2)(A), the Third Circuit quoted the Second Circuit's assessment of *Arthur Andersen*:

> "[T]he touchstone for the nexus requirement, therefore, is an act taken that would have the natural and probable effect of interfering with a judicial or grand jury proceeding that constitutes the administration of justice; that is, the act must have a relationship in time, causation, or logic with the judicial proceedings." *United States v. Quattrone*, 441 F.3d 153, 171 (2d Cir. 2006).

The Third Circuit held that the trial court had not committed plain error when it instructed the jury

that the defendant could not be convicted unless he intended to persuade his target to impede an official proceeding given that the evidence established that the target had informed the defendant that he had received a subpoena to appear before the grand jury. In *United States v. Kaplan*, 490 F.3d 110 (2d Cir. 2007), the Second Circuit concluded that the nexus requirement applies to § 1512(b)(1) and commented that it "would have been more prudent for the district judge to identify the 'particular' federal proceeding that the defendant intended to obstruct." *See also United States v. Aguilar*, 515 U.S. 593, 599-600 (1995) (holding under the omnibus obstruction of justice provision of 18 U.S.C. § 1503 that the government must prove not only that the defendant made false statements to the federal agents but also that the defendant "knew his actions [were] likely to affect" the proceeding).

*Arthur Andersen* does not settle the question of whether the defendant must also know that the proceeding is federal. In *United States v. Bell*, 113 F.3d 1345, 1351 (3d Cir. 1997), decided before *Arthur Andersen*, the Third Circuit considered that question. Bell was prosecuted for murder of a witness in violation of 18 U.S.C. § 1512(a)(1)(A) and (C) and use of physical force and threats against a witness, in violation of 18 U.S.C. § 1512(b)(1), (2), and (3). She complained of the following supplemental instruction:

> [Y]ou would have to find beyond a reasonable doubt that the defendant intended to frustrate a future judicial proceeding. You would also have to conclude that that proceeding would be a federal proceeding, but you don't have to find that the defendant knew that it would be a federal proceeding.

The Third Circuit rejected the challenge, stating:

> The quoted instruction did nothing more than explain 18 U.S.C.[§1512(g)(1) and (2)'s] express provision that the government need not prove any state of mind on the part of the defendant with respect to the federal character of the proceeding or law-enforcement-officer communication that it alleges she intended to interfere with or prevent.

*Bell*, 113 F.3d at 1351.

If the defendant is charged with corrupt persuasion, the jury must be told that it must find that the defendant acted knowingly, dishonestly, and with intent to hinder, delay, or prevent the communication. This language is intended to respond to the Supreme Court's decision in *Arthur Andersen* and the Third Circuit's decision in *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997).

In *Arthur Andersen*, the defendant was prosecuted under § 1512(b)(2). The Supreme Court reversed the convictions because the jury instructions did not properly convey the statutory requirement of corrupt persuasion. The Court emphasized that non-corrupt persuasion could be perfectly lawful. *Arthur Andersen*, 544 U.S. at 703-04. The Court read the statute as requiring proof that the defendant "knowingly corruptly persuades," stating "[o]nly persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e].'" 544 U.S. at 704-06. In *Arthur Andersen*, the

trial court had modified the pattern instruction from the Fifth Circuit for corruptly obstructing the administration of justice in violation of 18 U.S.C. § 1503. The instruction "defined 'corruptly' as 'knowingly and dishonestly, with the specific intent to subvert or undermine the integrity' of a proceeding." 544 U.S. at 706-07. At the urging of the government, the trial court eliminated the word "dishonestly" and added "impede," instructing the jury that "it could convict if it found petitioner intended to 'subvert, undermine, or impede' governmental factfinding." 544 U.S. at 706-07. The result was an erroneous instruction that did not convey to the jury the "requisite consciousness of wrongdoing." 544 U.S. at 706.

Before *Arthur Andersen* was decided, the Third Circuit interpreted the phrase "corruptly persuades" in *Farrell*. Like *Arthur Andersen*, *Farrell* signaled that proof of "corrupt persuasion" requires a high level of culpability, but did not articulate a specific standard. In *Farrell*, the court stated:

> [W]e are confident that both attempting to bribe someone to withhold information and attempting to persuade someone to provide false information to federal investigators constitute "corrupt persuasion" punishable under § 1512(b). Nonetheless, we are hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous "corruptly persuades" clause. However, we do not think it necessary to provide such a definition here because we are similarly confident that the "culpable conduct" that violates § 1512(b)(3)'s "corruptly persuades" clause does not include a coercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators.

126 F.3d at 488.

The court further elaborated:

> We read the inclusion of "corruptly" in § 1512(b) as necessarily implying that an individual can "persuade" another not to disclose information to a law enforcement official with the intent of hindering an investigation without violating the statute, i.e., without doing so "corruptly." Thus, more culpability is required for a statutory violation than that involved in the act of attempting to discourage disclosure in order to hinder an investigation.

*Farrell*, 126 F.3d at 489. In *United States v. Davis*, 183 F.3d 231, 250 n.6 (3d Cir. 1999), the Third Circuit noted:

> [T]he District Court's instruction on corrupt persuasion does not track *Farrell*. The Court instructed the jury that "[t]he word 'corruptly' means having improper motive or purpose of obstructing justice." *Farrell* and *Poindexter* suggest that this instruction provides insufficient guidance to the jury, as anyone with the intent to interfere with

an investigation has “improper” motives. On remand, the Court should clarify that “corrupt persuasion” involves more than an improper motive, and includes inducements to violence.

*See also United States v. Vega*, 184 F. App’x. 236, 234 (3d Cir. 2006) (non-precedential) ("[N]oncoercive statements may constitute corrupt persuasion if they advocate illegal behavior.").

18 U.S.C. § 1515(a)(3) provides that "misleading conduct" means:

(A) knowingly making a false statement;
(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;
(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;
(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or
(E) knowingly using a trick, scheme, or device with intent to mislead.

Section 1515(a)(1) provides that, as used in section 1512 the term “official proceeding” means:

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;
(B) a proceeding before the Congress;
(C) a proceeding before a Federal Government agency which is authorized by law; or
(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce.

The question of whether the proceeding alleged and proved by the government is an official proceeding is for the judge.

18 U.S.C. § 1512(j) provides:

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

If the maximum sentence for an offense charged in the criminal trial exceeds the maximum set forth in § 1512(a)(3), the higher sentence can be imposed only if the jury finds that the tampering offense occurred in connection with a criminal trial. In such cases, the court should instruct the jury to determine whether the offense occurred in connection with the trial of the criminal case.

(revised 12/09)

## 6.18.1512B-1 Obstruction of Justice - Hindering Communication Through Intimidation, Threats, or Corrupt Persuasion (18 U.S.C. § 1512(b)(3))

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with** *(briefly state offense; e.g., tampering with a witness)*, **which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:**

**First: That** *(name)* **knowingly** *[(used intimidation) (threatened) (corruptly persuaded)] (name of person)*, **or attempted to do so** *(or engaged in misleading conduct toward (name of person))*;

**Second: That** *(name)* **acted with intent to hinder, delay or prevent** *(name of person whose communication was targeted)* **from communicating to** *(law enforcement authorities) (a judge*) **information relating to the commission or possible commission of an offense;**

**Third: That the offense was a federal offense.**

**Fourth: That** *(name)* **believed that** *(name of person whose communication was targeted)* **might communicate with federal authorities.** *[However, the government does not need to prove that an official proceeding was actually pending or about to be instituted at the time of the alleged offense.]*

*[To "corruptly persuade" means to corrupt another person by persuading (him)(her) to violate a legal duty, to accomplish an unlawful end or unlawful result, or to accomplish some*

*otherwise lawful end or lawful result in an unlawful manner.]*

**Comment**

18 U.S.C. § 1512(b)(3) provides:

> (b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to–
>
> * * *
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;
>
> shall be fined under this title or imprisoned not more than ten years, or both.

The government is not required to prove that the defendant succeeded in the effort to tamper with the witness; the government need not prove that the witness changed or withheld his or her testimony. *United States v. Davis,* 183 F.3d 231, 250 (3d Cir. 1999). If there is a question as to whether the defendant's effort to tamper with the witness was successful, the court may want to instruct the jury that success is not a prerequisite to conviction and that what the government must prove beyond a reasonable doubt is that the defendant acted with intent to influence a witness' testimony. If the defendant is prosecuted for attempt, the court may want to give Instruction 7.01 (Attempt).

18 U.S.C. § 1512(f) provides:

> For the purposes of this section--
> (1) an official proceeding need not be pending or about to be instituted at the time of the offense; and
> (2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

18 U.S.C. § 1512(g) provides:

> In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance--
>
> (1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a

> United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or
>
> (2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

18 U.S.C. § 1515(a)(4) provides that "law enforcement officer" means:

> [A]n officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant--
> (A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or
> (B) serving as a probation or pretrial services officer under this title.

In *United States v. Guadalupe*, 402 F.3d 409 (3d Cir. 2005), the Third Circuit explained:

> To obtain a conviction pursuant to 18 U.S.C. § 1512(b)(3), the government must prove that: (1) the defendant attempted to corruptly persuade a person; (2) the defendant was motivated by a desire to prevent the communication between that person and law enforcement authorities concerning the commission or possible commission of an offense; (3) the offense was actually a federal offense; and (4) the defendant believed that the person he attempted to corruptly persuade might communicate with federal authorities.

402 F.3d at 412. *See also United States v. Cooper*, 121 F.3d 130, 133 (3d Cir. 1997) (discussing elements). The statute does not require proof that the defendant addressed the force or threatened force to a witness or potential witness. It encompasses cases in which the defendant used force against, for example, a family member in order to silence a witness. In such cases, the court may modify the language of the second element accordingly. *See United States v. Bell*, 113 F.3d 1345, 1349 n.3 (3d Cir. 1997).

If the defendant is charged with corrupt persuasion, the jury must be told that it must find that the defendant acted knowingly, dishonestly, and with intent to hinder, delay or prevent the communication. This language is intended to respond to the Supreme Court's decision in *Arthur Andersen L.L.P. v. United States*, 544 U.S. 696 (2005), and the Third Circuit's decision in *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997).

In *Arthur Andersen*, the defendant was prosecuted under § 1512(b)(2). The Supreme Court reversed the convictions because the jury instructions did not properly convey the statutory requirement of corrupt persuasion. The Court emphasized that non-corrupt persuasion could be perfectly lawful. *Arthur Andersen*, 544 U.S. at 703-04. The Court read the statute as requiring proof

that the defendant "knowingly corruptly persuades," stating "[o]nly persons conscious of wrongdoing can be said to 'knowingly ... corruptly persuad[e].'" 544 U.S. at 704-06. In *Arthur Andersen*, the trial court had modified the pattern instruction from the Fifth Circuit for corruptly obstructing the administration of justice in violation of 18 U.S.C. § 1503. The instruction "defined 'corruptly' as 'knowingly and dishonestly, with the specific intent to subvert or undermine the integrity' of a proceeding." 544 U.S. at 706-07. At the urging of the government, the trial court eliminated the word "dishonestly" and added "impede," instructing the jury that "it could convict if it found petitioner intended to 'subvert, undermine, or impede' governmental factfinding." 544 U.S. at 706-07. The result was an erroneous instruction that did not convey to the jury the "requisite consciousness of wrongdoing." 544 U.S. at 706.

Before *Arthur Andersen* was decided, the Third Circuit interpreted the phrase "corruptly persuades" in *Farrell*. Like *Arthur Andersen*, *Farrell* signaled that proof of "corrupt persuasion" requires a high level of culpability, but did not articulate a specific standard. In *Farrell*, the court stated:

> [W]e are confident that both attempting to bribe someone to withhold information and attempting to persuade someone to provide false information to federal investigators constitute "corrupt persuasion" punishable under § 1512(b). Nonetheless, we are hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous "corruptly persuades" clause. However, we do not think it necessary to provide such a definition here because we are similarly confident that the "culpable conduct" that violates § 1512(b)(3)'s "corruptly persuades" clause does not include a coercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators.

126 F.3d at 488.

The court further elaborated:

> We read the inclusion of "corruptly" in § 1512(b) as necessarily implying that an individual can "persuade" another not to disclose information to a law enforcement official with the intent of hindering an investigation without violating the statute, i.e., without doing so "corruptly." Thus, more culpability is required for a statutory violation than that involved in the act of attempting to discourage disclosure in order to hinder an investigation.

*Farrell*, 126 F.3d at 489. In *United States v. Davis*, 183 F.3d 231, 250 n.6 (3d Cir. 1999), the Third Circuit noted:

> [T]he District Court's instruction on corrupt persuasion does not track *Farrell*. The Court instructed the jury that "[t]he word 'corruptly' means having improper motive

> or purpose of obstructing justice." *Farrell* and *Poindexter* suggest that this instruction provides insufficient guidance to the jury, as anyone with the intent to interfere with an investigation has "improper" motives. On remand, the Court should clarify that "corrupt persuasion" involves more than an improper motive, and includes inducements to violence.

*See also United States v. Vega*, 184 F. App'x. 236, 234 (3d Cir. 2006) (non-precedential) ("[N]oncoercive statements may constitute corrupt persuasion if they advocate illegal behavior.").

The government need not prove that a federal investigation was either underway or imminent. In *United States v. Guadalupe*, 402 F.3d 409, 411 (3d Cir. 2005), the Third Circuit stated:

> [P]roving a violation of 18 U.S.C. § 1512(b)(3) does not depend on the existence or imminency of a federal investigation but rather on the possible existence of a federal crime and a defendant's intention to thwart an inquiry into that crime by officials who happen to be federal.

The instruction includes as the fourth element the requirement that the defendant believed that the person influenced would communicate with a federal official. In *Guadalupe*, the Third Circuit wrestled with the question whether the defendant who interferes with communication to a law enforcement officer must know that the law enforcement officer is a *federal* officer. 402 F.3d at 413-14. The court recognized that, despite the language of § 1512(g), *United States v. Stansfield*, 101 F.3d 909 (3d Cir. 1996), requires some level of awareness that the communication interfered with would otherwise reach federal authorities. In *Stansfield,* the court explained:

> Were we to require only that the government prove that the underlying offense is federal and that the defendant intended to prevent the witness from communicating with law enforcement officials in general, without also proving the defendant's knowledge of or belief in the possibility that the witness would communicate with federal authorities, we would essentially vitiate an important facet of the intent requirement of the statute.

101 F.3d at 918. The court held that in order to obtain a conviction for tampering with a witness by killing or attempting to kill another pursuant to 18 U.S.C. § 1512(a)(1)(C),

> the government must prove: (1) the defendant killed or attempted to kill a person; (2) the defendant was motivated by a desire to prevent the communication between any person and law enforcement authorities concerning the commission or possible commission of an offense; (3) that offense was actually a federal offense; and (4) the defendant believed that the person in (2) above might communicate with the federal authorities. This last element may be inferred by the jury from the fact that the offense was federal in nature, plus additional appropriate evidence. For example, it is sufficient (but not necessary) that the government prove that the defendant had actual knowledge of the federal nature of the offense in order for the jury to infer the last

element.

101 F.3d at 918. The court further stated:

> [T]his framework is an appropriate reconciliation between the constraint that the government must prove the defendant's specific intent to hinder a federal investigation and the fact that, by virtue of [§1512(g)] , it need not prove that the defendant knew the federal status of any particular law enforcement officer involved in an investigation.

101 F.3d at 919.

In *United States v. Bell*, 113 F.3d 1345 (3d Cir. 1997), also discussed in *Guadalupe*, the court stated:

> In view of the statute's clear command that the government need not prove any "state of mind" on the part of the defendant with respect to the federal character of the proceeding or officer, 18 U.S.C. [§1512(g)] , we do not read the italicized passage as requiring proof that the defendant believed the victim might communicate with law enforcement officers whom the defendant knew or believed to be federal officers. Rather, we read this sentence as recognizing that what the statute mandates is proof that the officers with *whom the defendant believed the victim might communicate would in fact be federal officers*.

*Bell*, 113 F.3d at 1349 (emphasis in original).

The court then explained:

> [W]e believe that the law of this circuit after *Stansfield* is that the government must prove that at least one of the law-enforcement-officer communications which the defendant sought to prevent would have been with a federal officer, but that the government is not obligated to prove that the defendant knew or intended anything with respect to this federal involvement. As *Stansfield* explained, the government may carry this burden by showing that the conduct which the defendant believed would be discussed in these communications constitutes a federal offense, so long as the government also presents "additional appropriate evidence."

*Bell*, 113 F.3d at 1349.

The court further explained:

> [This conclusion] respects fully the statute's requirement that the defendant intend to prevent a communication to a law enforcement officer, as well as its requirement that such officer be, in fact, a federal officer. What our analysis renders irrelevant is the

> defendant's "mental state" regarding the fact that the officer is a federal officer-a fact which [§1512(g)(2)] by its terms declares irrelevant.

*Bell*, 113 F.3d at 1350-51. In *Guadalupe*, the court noted that "[a]n example of this 'additional appropriate evidence' is that the defendant had actual knowledge of the federal nature of the offense." 402 F.3d at 412.

Finally, the court rejected Bell's complaint about the following supplemental instruction:

> [Y]ou would have to find beyond a reasonable doubt that the defendant intended to frustrate a future judicial proceeding. You would also have to conclude that that proceeding would be a federal proceeding, but you don't have to find that the defendant knew that it would be a federal proceeding.

The Third Circuit stated:

> The quoted instruction did nothing more than explain 18 U.S.C. [§1512(g)(1) and (2)'s] express provision that the government need not prove any state of mind on the part of the defendant with respect to the federal character of the proceeding or law-enforcement-officer communication that it alleges she intended to interfere with or prevent.

*Bell*, 113 F.3d at 1351. Thus, *Bell* defined a less exacting standard and held it was consistent with *Stansfield*.

In *Guadalupe*, the court also recognized that *United States v. Applewhaite*, 195 F.3d 679, 687 (3d Cir. 1999), suggests that the government does *not* need to prove that the defendant knew or should have known that the officer was a federal officer. 195 F.3d at 687. The court in *Guadalupe* further noted:

> The teachings of *Applewhaite* lessened the government's burden of proof in federal obstruction of justice cases because we did not require any "additional appropriate evidence" that the defendant believed the person he attempted to corruptly persuade might communicate with federal officials.

402 F.3d at 413.

The court in *Guadalupe* stated:

> We conclude that proving a violation of 18 U.S.C. § 1512(b)(3) does not depend on the existence or imminency of a federal investigation but rather on the possible existence of a federal crime and a defendant's intention to thwart an inquiry into that crime by officials who happen to be federal.

402 F.3d at 411.

Ultimately, the court held that the evidence in *Guadalupe* was sufficient to satisfy either standard but did not reconcile the cases:

> Here, the government met its burden of proof as most recently articulated in *Applewhaite* because Guadalupe intended to influence an investigation which later became federal. We also stay faithful to the teachings of *Stansfield* and *Bell* because there is "additional appropriate evidence" that Guadalupe knew or should have known that Burnette might communicate with federal officials based on his position and experience as a prison administrator.

402 F.3d at 413-14. Some question therefore exists as to the requirement that the defendant know the communication would extend to a federal official.

> 18 U.S.C. § 1515(a)(3) provides that "misleading conduct" means:
>
> (A) knowingly making a false statement;
> (B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;
> (C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;
> (D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or
> (E) knowingly using a trick, scheme, or device with intent to mislead.
>
> 18 U.S.C. § 1512(j) provides:
>
> (j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

If the maximum sentence for an offense charged in the criminal trial exceeds the maximum set forth in § 1512(a)(3), the higher sentence can be imposed only if the jury finds that the tampering offense occurred in connection with a criminal trial. In such cases, the court should instruct the jury to determine whether the offense occurred in connection with the trial of the criminal case.

**6.18.1512E Affirmative Defense - Truth-Seeking Lawful Conduct**

**It is a defense to Count** (*No.)* **if** *(name)***'s sole intention was to encourage, induce, or cause** *(name of person)* **to testify truthfully and if** *(name)***'s conduct toward** *(name of person)* **consisted solely of lawful conduct; that is, that** *(name)* **did not engage in any unlawful acts in** *(his)(her)* **efforts to encourage, induce or cause** *(name of person)* **to testify truthfully.**

*[The court may clarify the positions of the parties; e.g., The government contends that by his words, tone and gestures, the defendant threatened physical force and that such threats of physical force constitute unlawful conduct. A threat of physical force is unlawful if (describe applicable law)]***.**

**This defense does not relieve the government of its burden of proving all of the elements of the crime as I have defined them. The government must prove all the elements of the offense beyond a reasonable doubt in order for you to convict** *(name)***. The Government must also prove beyond a reasonable doubt either that** *(name)***'s intention was not solely to encourage, induce, or cause** *(name of person)* **to testify truthfully, or that** *(name)***'s conduct toward** *(name of person)* **was not solely lawful conduct.**

**Comment**

18 U.S.C. § 1512(e) provides:

> In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention

was to encourage, induce, or cause the other person to testify truthfully.

This instruction should be given only if the defendant requests it and there is evidence to support it. Although the statute defines an affirmative defense, the Third Circuit has expressed concern about the constitutionality of an instruction that places the burden of proof for this defense on the defendant. Because of this uncertainty, the recommended instruction explains the defense but does not place the burden on the defendant.

In *United States v. Clemons*, 843 F.2d 741, 752-53 (3d Cir. 1988), the Third Circuit expressed its doubt about this defense, stating, "[m]erely labeling something an affirmative defense does not mean the statute is constitutional." In *Clemons*, the Third Circuit rejected the defendant's challenge to the trial court's instruction on the defense, concluding it was harmless error.[1] The court was satisfied both that the government's evidence established the defendant's guilt beyond a reasonable doubt and that the instructions to the jury required the jury to find beyond a reasonable doubt that the defendant's conduct was not lawful. 843 F.2d at 754.

In *United States v. Johnson*, 968 F.2d 208 (2d Cir. 1992), the Second Circuit upheld an instruction that placed the burden on the defendant to establish the truth-seeking defense and rejected the defendant's argument that it was unconstitutional. A sample instruction based on *Johnson* may be found in Sand, et al., supra, 46-32.1.

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[1] The trial court had given the following instruction:

> [I]t is a defense to that count if Oscar Clemons' conduct toward Greg Dennis consisted solely of lawful conduct, and that Oscar Clemons' sole intention was to encourage, induce, or cause Greg Dennis to testify truthfully rather than to testify falsely or not at all.
>
> Now, the defendant-I want to emphasize this-the defendant has no duty or burden to advance this defense. His failure to advance or prove such a defense shall not be held against him under any circumstances because, as I said earlier, and I will repeat again for the third, fourth, or fifth or however many times, the defendant has no burden to prove anything. The defendant has no burden to advance any evidence at all. He has no duty to testify.
>
> But, however, if you're of the belief from all the evidence you heard in this case that Oscar Clemons' conduct towards Greg Dennis was lawful conduct, that his intention was to encourage, induce or cause Greg Dennis to testify truthfully, you will find the defendant not guilty on that charge. . . .
>
> . . . So the government always has the burden. Mr. Clemons has no burden of proving anything of any kind. However, if it is proved that his conduct consisted solely of lawful conduct and that his sole intention was to encourage, induce or cause Greg Dennis to testify truthfully, then he would be found not guilty of that charge.
>
> But again I repeat that the defendant has no burden or duty to advance any defenses. He has no duty or burden to testify. He has no duty or burden to put forth witnesses or evidence. He has no duty to testify on his own behalf . . . .

*Clemons*, 843 F.2d at 750 n.10.

## 6.18.1513B Retaliating Against a Witness, Victim, or Informant (18 U.S.C. § 1513(b))

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with** *(briefly state offense; e.g., retaliating against a witness)***, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **knowingly engaged in conduct;**

**Second: That** *(name)***'s conduct caused** *(bodily injury to (name of person)) (damage to the property of (name of person))*, *(or threatened to do so)***;**

**Third: That** *(name)* **acted with specific intent to retaliate against** *(name of person)* **for** *(include appropriate language; e.g., their attendance as a witness at an official proceeding)***.**

**Fourth: That** *(specify proceeding)***, the official proceeding, was a federal proceeding.**

**Comment**

18 U.S.C. § 1513(b) provides:

> Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for--
>
> (1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or
>
> (2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer;

> or attempts to do so, shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1513 further provides:

> (c) If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.
>
> * * * *
>
> (e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

In *United States v. Cummiskey*, 728 F.2d 200, 206-07 (3d Cir. 1984), the court stated that 18 U.S.C. § 1513(a)(1) "defines an offense with three elements: (1) knowing engagement in conduct (2) either causing, or threatening to cause, bodily injury to another person (3) with the intent to retaliate for, inter alia, the attendance or testimony of a witness at an official proceeding" and further noted that an attempt to commit these acts is also a violation of the statute. In *Cummiskey*, the court also held that the trial court's instruction "that the jury must find whether 'these defendants actually engaged in conduct which threatened to cause bodily injury'" was correct.

Under this statute, the force or threat of force does not have to be against the person testifying; that is, the defendant need not have direct contact with the witness. All that is required is that the defendant use physical force or the threat of physical force to tamper with a witness. *United States v. Davis,* 183 F.3d 231, 250 (3d Cir. 1999). The statute encompasses cases in which the defendant used force against, for example, a family member in order to silence a witness. *See United States v. Bell*, 113 F.3d 1345, 1349 n.3 (3d Cir. 1997). Alternatively, the use of force or threat of force may be directed at a number of potential victims, as, for example, a case where the defendant blew up a courtroom. If the government alleges a violation of the statute by using physical force or the threat of physical force against a third person and without direct contact with the witness, the court may want to instruct the jury that direct contact is not required.

Section 1515(a)(1) provides that, as used in section 1512 the term "official proceeding" means:

> (A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) a proceeding before the Congress;
(C) a proceeding before a Federal Government agency which is authorized by law; or
(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce.

The question of whether the proceeding alleged and proved by the government is an official proceeding is for the judge.

Section 1515(a)(5) defines the term "bodily injury" to mean any of the following:

(A) a cut, abrasion, bruise, burn, or disfigurement;
(B) physical pain;
(C) illness;
(D) impairment of the function of a bodily member, organ, or mental faculty; or
(E) any other injury to the body, no matter how temporary.

18 U.S.C. § 1512(j) provides:

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

If the maximum sentence for a offense charged in the criminal trial exceeds the maximum set forth in § 1512(a)(3), the higher sentence can be imposed only if the jury finds that the tampering offense occurred in connection with a criminal trial. In such cases, the court should instruct the jury to determine whether the offense occurred in connection with the trial of the criminal case.

If the defendant is charged with retaliating against another person through use of a proxy, the court should also give Instruction 7.02 (Accomplice Liability; Aiding and Abetting).

# Hobbs Act Extortion and Robbery *(18 U.S.C. § 1951)*

**6.18.1951 Hobbs Act - Elements of the Offense (18 U.S.C. § 1951)**

**In order to sustain its burden of proof for the crime of interfering with interstate commerce by** *(robbery)(extortion)* **as charged in Count** *(No.)* **of the indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:**

**First: That Defendant** *(name)* **took from** *(the victim alleged in the indictment)* **the property described in Count** *(No.)* **of the indictment;**

**Second: That** *(name)* **did so knowingly and willfully by** *(robbery) (extortion)***; and**

**Third: That as a result of** *(name)***'s actions, interstate commerce** *(an item moving in interstate commerce)* **was obstructed, delayed, or affected.**

**Comment**

Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions § 53.03 [hereinafter O'Malley et al., supra].

18 U.S.C. § 1951(a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

If the defendant is charged with attempt the court should adapt this instruction and should also give Instruction 7.01 (Attempt).

Likewise, if the defendant is charged with conspiracy to violate this statute, the appropriate instructions on conspiracy should be given. *See* Instruction 6.18.371A et seq.

It should be noted that a Hobbs Act conspiracy does not require proof of an overt act. *See Ladner v. United States*, 168 F.2d 771, 773 (5th Cir. 1948); *United States v. Facciolo*, 753 F. Supp. 449 (S.D.N.Y. 1990). The Third Circuit has not addressed this question, but has held that drug conspiracies and RICO conspiracies do not require proof of an overt act. *See* Comment to Instruction 6.18.1962D (discussing RICO conspiracies) and Instruction 6.21.846B (discussing drug conspiracies).

In *United States v. Traitz*, 871 F.2d 368, 380-81 (3d Cir. 1989), the trial court gave the following instruction:

> In order to meet its burden of proving that the defendants committed extortion under the Hobbs Act, the Government must prove each of the following elements:
>
> First, that the defendants induced or attempted to induce others to part with their property;
>
> Second, that the defendants did so with the victims' consent, but that this consent was compelled by the wrongful use or threat of force, violence or fear;
>
> Third, that interstate commerce or an item moving in interstate commerce was delayed, obstructed or affected in any way or degree; and
>
> Fourth, that the defendants acted knowingly and willfully.

The Third Circuit quoted the instructions but remarked only that the defendants did not challenge the trial court's "general recitation of the essential elements of the Hobbs Act." *Traitz*, 871 F.2d at 381. *See also United States v. Driggs*, 823 F.2d 52 (3d Cir. 1987). In *Driggs*, the court noted:

> The essential elements that the government must prove are that the defendant obstructed, delayed or affected commerce or attempted to do so; by extortion ("the obtaining of property from another, with his consent, . . . under color of official right"); and that the defendant acted knowingly and willfully.

823 F.2d at 54.

**6.18.1951-1 Hobbs Act - Robbery Defined**

**Robbery is the unlawful taking or obtaining of personal property from the person or in the presence of another, against** *(his)(her)* **will, by means of actual or threatened force, or violence, or fear of injury, whether immediately or in the future, to** *(his)(her)* **person or property, or property in** *(his)(her)* **custody or possession, or the person or property of a relative or member of** *(his)(her)* **family or of anyone in** *(his)(her)* **company at the time of the taking or obtaining.**

**Comment**

O'Malley et al., supra, § 53-05.

18 U.S.C. § 1951(b)(1) provides:

As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

**6.18.1951-2 Hobbs Act - Extortion by Force, Violence, or Fear**

**Extortion is the obtaining of another person's property or money, with *(his)(her)* consent when this consent is induced or brought about through the use of actual or threatened force, violence or fear.**

*[In order for (name) to have obtained the property of another there must have been a transfer of possession of, or a legal interest in, that property from that other person to (name) or a designee of (name).]*

**Comment**

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 50-9 (Matthew Bender 2003) [hereinafter, Sand et al., supra]; O'Malley et al., supra, § 53.09.

> 18 U.S.C. § 1951(b)(2) provides:
> As used in this section–
> * * *
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The court should use this instruction when the defendant is charged with extortion through force, violence, or fear. The court should also give Instructions 6.18.1951-3 (Hobbs Act - "Unlawful Taking by Force, Violence or Fear" Defined), 6.18.1951-4 (Hobbs Act - "Fear of Injury" Defined), and 6.18.1951-5 (Hobbs Act - Property Defined). If the defendant is charged with extortion under color of official right, the court should give Instruction 6.18.1951-6 (Hobbs Act - Extortion Under Color of Official Right).

The bracketed language should be included if there is a question concerning whether the defendant acquired property rather than simply depriving the victim of property. Mere deprivation of property or interference with the use of property is not sufficient under the statute. In *Scheidler v. National Organization for Women*, *Inc.*, 537 U.S. 393 (2003), the Court addressed the definition of "extortion" under § 1951. The Court stated, "we have construed the extortion provision of the Hobbs Act at issue in these cases to require not only the deprivation of but also the acquisition of property." *Id.* at 404.

**6.18.1951-3 Hobbs Act - "Unlawful Taking by Force, Violence or Fear" Defined**

**The government must prove beyond a reasonable doubt that** *(name)* **unlawfully took** *(the alleged victim)***'s property against** *(his)(her)* **will by actual or threatened force, violence, or fear of injury, whether immediately or in the future. You must determine whether** *(name)* **obtained the property by using any of these unlawful means, as set forth in the indictment. The government does not need to prove that force, violence, and fear were all used or threatened. The government satisfies its burden of proving an unlawful taking if you unanimously agree that** *(name)* **employed any of these methods; that is, the government satisfies its burden only if you all agree concerning the particular method used by** *(name)***.**

**In considering whether** *(name)* **used, or threatened to use force, violence or fear, you should give those words their common and ordinary meaning, and understand them as you normally would. A threat may be made verbally or by physical gesture. Whether a statement or physical gesture by** *(name)* **actually was a threat depends upon the surrounding facts.**

**Comment**

Sand et al., supra, 50-5.

If the defendant is charged with attempt the court should modify this instruction accordingly. *See United States v. Parkin*, 319 F. App'x. 101 (3d Cir. 2009) (non-precedential) (holding that where defendant was charged with attempted extortion, the government did not need to establish that the defendant actually caused fear). (revised 12/09)

**6.18.1951-4 Hobbs Act - "Fear of Injury" Defined**

**Fear exists if a victim experiences anxiety, concern, or worry over expected personal** *(physical)(economic)* **harm. The fear must be reasonable under the circumstances existing at the time of the defendant's actions.**

**Your decision whether** *(name)* **used or threatened fear of injury involves a decision about** *(the alleged victim)***'s state of mind at the time of** *(name)***'s actions. It is obviously impossible to prove directly a person's subjective feeling. You cannot look into a person's mind to see what** *(his)(her)* **state of mind is or was. But a careful consideration of the circumstances and evidence should enable you to decide whether** *(the alleged victim)* **was in fear and whether this fear was reasonable.**

**Looking at the overall situation and the actions of the person in question may help you determine what** *(his)(her)* **state of mind was. You can consider this kind of evidence – which is called "circumstantial evidence" – in deciding whether** *(name)* **obtained property through the use of threat or fear.**

**You have also heard the testimony of** *(the alleged victim)* **describing** *(his)(her)* **state of mind – that is, how** *(he)(she)* **felt about giving up the property. This testimony was allowed to help you decide whether the property was obtained by fear. You should consider this testimony for that purpose only.**

**You may also consider the relationship between** *(name)* **and** *(the alleged*

*victim)* **in deciding whether the element of fear exists. However, even a friendly relationship between the parties does not preclude you from finding that fear exists.**

**Comment**

Sand et al., supra, 50-6. *See also United States v. Provenzano*, 334 F.2d 678, 687 (3d Cir. 1964) (citing *United States v. Tolub*, 309 F.2d 286 (2d Cir. 1962) (fear experienced by the victim must be reasonable)); *United States v. Addonizio*, 451 F.2d 49, 72 (3d Cir. 1972) (fear may be of economic or physical harm).

## 6.18.1951-5 Hobbs Act - Property Defined

**The term "property" includes money and other tangible and intangible things of value.**

### Comment

Sand et al., supra, 50-4.

In many cases, there will be no need to instruct the jury on the meaning of the term "property." When intangible property is involved, the court should include this instruction. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 402 (2003), the Supreme Court recognized that the term property includes intangible as well as tangible things of value.

**6.18.1951-6 Hobbs Act - Extortion Under Color of Official Right**

**The government alleges that** *(name)* **committed extortion under color of official right. A public** *(official)(employee)* **commits "extortion under color of official right" if** *(he)(she)* **uses the power and authority of** *(his)(her)* **office in order to obtain money, property, or something of value from another to which neither that public** *(official)(employee)* **nor that government office has an official right.**

**Extortion under color of official right means that a public official induced, obtained, accepted, or agreed to accept a payment to which he or she was not entitled, knowing that the payment was made in return for taking, withholding, or influencing official acts**. *[The government may show that the benefit was meant to be given to the public official directly, or to a third party who is not a public official but who was acting in concert with the public official.]*

**The government is not required to prove an explicit promise to perform the official acts in return for the payment. Passive acceptance of a benefit by a public official is a sufficient basis for this type of extortion, if the official knows that** *(he)(she)* **is being offered payment in exchange for** *(his)(her)* **ability to do official acts.**

**The government is not required to prove that** *(name)* **made any specific threat or used force or fear to cause** *(the victim alleged in the indictment)* **to part with the property that the indictment alleges** *(name)* **obtained by**

**extortion under color of right. However, the government must prove beyond a reasonable doubt that** *(name)* **knowingly and deliberately used** *(his)(her)* **official position in order to obtain something of value, to which** *(name)* **had no right.**

*[The government is not required to prove that (name) actually possessed the official power to guarantee, deny, or influence any actions. It is enough to show that (victim alleged in indictment) reasonably believed that (name) had the actual, residual, or anticipated official power to help (him)(her) with respect to matters pending before a government agency.]*

*[In order for (name) to have obtained the property of another there must have been a transfer of possession of, or a legal interest in, that property from that other person to (name) or a designee of (name).]*

**Comment**

Sand et al., supra, 50-9; O'Malley et al., supra, § 53.09.

18 U.S.C. § 1951(b)(2) provides:

> As used in this section–
> * * *
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

This instruction and the one that follows address extortion by color of official right, which is distinct from extortion through force, violence, or fear, and may only be committed by a public official (although a non-public official may be guilty of aiding and abetting extortion by color of official right).

In *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir. 1972), the Third Circuit held that the following instruction properly defined extortion under the statute:

> The term 'extortion' means the obtaining of property from another with his consent induced either by wrongful use of fear or under color of official right. The term 'fear', as used in the statute, has the commonly accepted meaning. It is a state of anxious concern, alarm, apprehension of anticipated harm to a business or of a threatened loss.
>
> * * *
>
> Extortion under color of official right is the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats or use of fear. You will note that extortion as defined by Federal Law is committed when property is obtained by consent of the victim by wrongful use of fear, or when it is obtained under color of official right, and in either instance the offense of extortion is committed.

The defendant complained that the instruction defined extortion disjunctively, allowing the jury to find extortion if the defendant obtained money or property either by use of fear or under color of official right. The Third Circuit rejected the defendant's argument and explained:

> [W]hile private persons may violate the statute only by use of fear and public officials may violate the act by use of fear, persons holding public office may also violate the statute by a wrongful taking under color of official right. The term "extortion" is defined in § 1951(b)(2): "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." The "under color of official right" language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress. The disjunctive charge on § 1951 extortion was correct.

*Id.* at 1229 (citations omitted). In *United States v. Urban*, 404 F.3d 754, 768 (3d Cir. 2005), the Third Circuit explained that, "[i]n order to prove Hobbs Act extortion 'under color of official right,' 'the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.'"

There need not be one benefit for one official act. Instead, a conviction may be based on proof that the official accepted a "stream of benefits" in exchange for one or more official acts. *See United States v. Donna*, 366 F. App'x. 441 (3d Cir. 2010) (non-precedential) (citing *United States v. Kemp*, 500 F.3d 257, 282 (3d Cir.2007)).

The government may show that the benefit was meant to be given to the public official directly, or to a third party who is not a public official but who was acting in concert with the public official. *See generally United States v. Antico*, 275 F.3d 245, 255-56 (3d Cir. 2001); *United States v. Bradley*, 173 F.3d 225, 231-32 (3d Cir. 1999); *United States v. Margiotta*, 688 F.2d 108, 133 (2d Cir. 1982) ("A Hobbs Act prosecution may lie where the extorted payments are transferred to third parties, including political allies and political parties, rather than to the public official who has acted under color of official right.").

The offense of extortion under color of official right does not have to involve force or threat on the part of the public official. The coercive element is provided by the existence of the public office itself. *Evans v. United States*, 504 U.S. 255, 265 (1992); *Antico*, 275 F.3d at 255 n.14; *United States v. Jannotti*, 673 F.2d 578, 594 (3d Cir. 1982).

The government need not prove that the defendant acted exclusively with corrupt intent. *See United States v. Donna*, 366 F. App'x. 441 (3d Cir. 2010) (non-precedential) (remarking that trial court's "dual motive" instruction stating that a person commits extortion under color of official right when that person has "a partly corrupt intent and a partly neutral intent" constituted a correct statement of the law).

An explicit promise to perform the official acts in return for the payment is not required. *Evans,* 504 U.S. at 268; *Antico*, 275 F.3d at 255-56; *Bradley*, 173 F.3d at 231. Passive acceptance of a benefit by a public official is a sufficient basis for this type of extortion, if the official knows that he or she is being offered payment in exchange for his ability to do official acts. The government need not prove that the public official first suggested or solicited the giving of money or property. *Evans*, 504 U.S. at 259; *United States v. Blandford*, 33 F.3d 685, 698-99 n.15 (6th Cir. 1994). Extortion occurs if the official knows that the payment or benefit is motivated by a hope that it will influence the official in the exercise of his or her office, or influence any action that the official takes because of the official position, and if, knowing this, the official accepts or agrees to accept the payment or benefit or have it accepted by another person. *United States v. Holzer*, 816 F.2d 304, 311 (7th Cir. 1987); *United States v. Butler*, 618 F.2d 411, 417-19 (6th Cir. 1980); *United States v. Trotta*, 525 F.2d 1096, 1101 (2d Cir. 1975) ("To repeat, it is the use of the power of public office itself to procure the payments of money not owed to the public official or his office that constitutes the offense."); *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974).

It is not necessary for the government to prove that the defendant actually misused or attempted to misuse the power of his/her office insofar as the defendant granted some benefit or favor to the payors. Though the payors may not have gotten any more than their due in the defendant's performance of his office, the defendant's acceptance of money or a benefit, in return for the use of, or the attempted use of, his/her office is extortion. *See Antico,* 275 F.3d at 255-58; *United States v. Evans*, 30 F.3d 1015, 1019 (8th Cir. 1994); *United States v. Loftus*, 992 F.2d 793, 797 (8th Cir. 1993); *Holzer*, 816 F.2d at 308; *United States v. Paschall*, 772 F.2d 68, 71, 74 (4th Cir. 1985) (citing

*United States v. Manton*, 107 F.2d 834 (2d Cir. 1939)); *United States v. Bibby*, 752 F.2d 1116, 1128 (6th Cir. 1985) ("[I]t is not essential that a [public] official be able to guarantee a certain result before his acceptance of money to bring about that result will run afoul of the law."); *United States v. Butler,* 618 F.2d 411, 420 (6th Cir. 1980).

The public official's agreement to take or refrain from taking an action on behalf of the payor need not be express. *Antico,* 275 F.3d at 255-57; *United States v. Donna*, 366 F. App'x. 441 (3d Cir. 2010) (non-precedential).

The official need not actually possess the power to provide or deny the particular action. *United States v. Mazzei*, 521 F.2d 639, 645 (3d Cir. 1975); *United States v. Nedza*, 880 F.2d 896, 902 (7th Cir. 1989); *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974). It is the payor's reasonable belief in such power which is relevant. *Mazzei*, 521 F.2d at 643; *United States v. McDonough,* 56 F.3d 381, 388 (2d Cir. 1995); *Nedza*, 880 F.2d at 902; *see United States v. Brown*, 540 F.2d 364, 372 (8th Cir. 1976); *United States v. Freedman*, 562 F. Supp. 1378, 1385 (N.D. Ill. 1983).

The bracketed language in the last paragraph should be included if there is a question concerning whether the defendant acquired property rather than simply depriving the victim of property. Mere deprivation of property or interference with the use of property is not sufficient under the statute. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), the Court addressed the definition of "extortion" under § 1951. The Court stated, "we have construed the extortion provision of the Hobbs Act at issue in these cases to require not only the deprivation of but also the acquisition of property." *Id.* at 404.

If the public official plays a role in more than one aspect of government, the court may want to specify the particular office that the extortion threatened to corrupt. *See, e.g., United States v. Mister*, 2010 WL 1006693 (3d Cir. 2010) (non-precedential) (rejecting defendant's variance argument in part because jury instructions clearly stated the corruption at issue in the case).

(Revised 11/10)

**6.18.1951-7 Hobbs Act - Affecting Interstate Commerce**

**The third element that the government must prove beyond a reasonable doubt is that *(name)*'s conduct affected or could have affected interstate commerce. Conduct affects interstate commerce if it in any way interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in commerce between or among the states. The effect can be minimal.**

**It is not necessary to prove that *(name)* intended to obstruct, delay or interfere with interstate commerce or that the purpose of the alleged crime was to affect interstate commerce. Further, you do not have to decide whether the effect on interstate commerce was to be harmful or beneficial to a particular business or to commerce in general. You do not even have to find that there was an actual effect on commerce. All that is necessary to prove this element is that the natural consequences of the offense potentially caused an effect on interstate commerce to any degree, however minimal or slight.**

**Comment**

Sand et al., supra, 50-7 and 50-15.

18 U.S.C. § 1951(b) provides:

As used in this section--

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the

> District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

The government need not prove that the defendant intended to affect interstate commerce but only that it was one natural effect of the defendant's conduct. *See United States v. Addonizio*, 451 F.2d 49, 77 (3d Cir.1972); *United States v. Reyes*, 363 F. App'x. 192 (3d Cir. 2010) (non-precedential).

In *United States v. Haywood*, 363 F.3d 200, 209-10 (3d Cir. 2004), the Third Circuit addressed the interstate commerce element:

> To sustain a conviction for interference with commerce by robbery under § 1951, the government must prove the element of interference with interstate or foreign commerce by robbery. "The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." However, "[i]f the defendants' conduct produces any interference with or effect upon interstate commerce, whether slight, subtle or even potential, it is sufficient to uphold a prosecution under [§ 1951]." Moreover, "[a] jury may infer that interstate commerce was affected to some minimal degree from a showing that the business assets were depleted." (citations omitted).

The court held that the following instruction was proper:

> if the government proves beyond a reasonable doubt that this business purchased goods or services that came from outside St. Thomas, Virgin Islands, and that, therefore, all or part of the personal property obtained from this business, because of the alleged robbery, came from outside St. Thomas, Virgin Islands, then you are instructed that you may find that the defendants obtained, delayed or affected commerce as this term is used in these instructions.

The court held further that the government satisfied its burden on this element by introducing the testimony of a police officer that the victim business sold some beers that were not manufactured in the Virgin Islands, but came instead from the mainland United States. *Haywood,* 363 F.3d at 210. *See also United States v. Clausen*, 328 F.3d 708, 710-11 (3d Cir.2003) (stating that effect on commerce may be minimal); *United States v. Berroa*, 2010 WL 827617 (3d Cir. 2010) (non-precedential) (affirming conviction where robbery targeted store with inventory purchased in interstate commerce and store closed for part of day as a result of robbery); *United States v. McNeill*, 360 F. App'x. 363, 365 (3d Cir. 2010) (non-precedential) (concluding that evidence defendant robbed business that purchases goods in interstate commerce and had customers who traveled in interstate commerce is sufficient).

In *United States v. Urban*, 404 F.3d 754, 762 (3d Cir. 2005), the Third Circuit held that the following instruction properly conveyed the way in which the government could establish effect on commerce through a depletion of assets theory:

> You do not even have to find that there was an actual effect on commerce. All that is necessary to prove this element is that the natural consequences of the extortion--of the money payment, potentially caused an effect on interstate commerce to any degree, however minimal or slight. Payment from a business engaged in interstate commerce satisfies the requirement of an effect on interstate commerce. If the resources of a business are expended or diminished as a result of the payment of money, then interstate commerce is affected by such payment and may reduce the assets available for purchase of goods, services or other things originating in other states.

In *United States v. Reyes*, 363 F. App'x. 192 (3d Cir. 2010) (non-precedential), the court noted that the government need not show actual effect on interstate commerce and held that the following instruction was correct:

> The defendant need not have intended or anticipated an effect on interstate commerce. You may find the effect as a natural consequence of his actions. If you find that the defendant intended to take certain actions, that is, he did the acts charged in the indictment in order to obtain property, and you find those actions have either caused or would probably cause an effect on interstate commerce no matter how minimal, then you may find the requirements of this element satisfied.

(Revised 11/2010)

# Money Laundering *(18 U.S.C. §1956)*

**6.18.1956A Money Laundering - Elements of the Offense (18 U.S.C. §1956(a)(1))**

**Count** *(No.)* **of the indictment charges defendant,** *(name)***, with money laundering, which is a federal crime.**

**In order to find** *(name)* **guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:**

**First: That on or about the dates alleged in the indictment,** *(name)* **conducted** *(or attempted to conduct)* **a financial transaction, which affected interstate commerce;**

**Second: That** *(name)* **conducted the financial transaction with the proceeds of a specified unlawful activity, that is,** *(describe unlawful activity alleged in the indictment)***;**

**Third: That** *(name)* **knew the transaction involved the proceeds of some form of unlawful activity; and**

**Fourth: That** *(name) [include appropriate language to describe charges:*

*intended to promote the carrying on of the specified unlawful activity, that is (describe unlawful activity alleged in the indictment)*;

*conducted the financial transaction with knowledge that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of (describe unlawful activity alleged in the indictment)*;

*conducted the financial transaction with knowledge that the transaction was designed in whole or in part to avoid a transaction reporting requirement under (State)(Federal) law.]*

**Comment**

Fifth Circuit § 2.76.

18 U.S.C. § 1956(a)(1) provides that:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
> (A)(I) with the intent to promote the carrying on of specified unlawful activity;* * *; or
>
> (B) knowing that the transaction is designed in whole or in part--
> (I) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
> (ii) to avoid a transaction reporting requirement under State or Federal law
> commits a crime.

The court should also give Instruction 5.02 (Knowingly).

In *United States v. Morelli*, 169 F.3d 798, 804 (3d Cir. 1999), the Third Circuit enumerated the elements of money laundering under section 1956(a)(1):

> (1) an actual or attempted financial transaction (2) involving the proceeds of specified unlawful activity; (3) knowledge that the transaction involves the proceeds of some unlawful activity; and (4) either (a) an intent to promote the carrying on of specified unlawful activity, or (b) knowledge that the transaction is designed to promote the underlying specified unlawful activity or "to conceal or disguise the nature [or] the source . . . of the proceeds of specified unlawful activity."

*See also United States v. Gray*, 2010 WL 3735782 (3d Cir. 2010) (non-precedential) (noting that offense does not require proof of deceptive conduct). In *Morelli*, the court noted that the government may properly charge both promotion and concealment in the same count. 169 F.3d at 804.

In *United States v. Grasso*, 381 F.3d 160, 168 (3d Cir. 2004), the Third Circuit explained the breadth of the money laundering statute:

> To be sure, 18 U.S.C. § 1956 criminalizes financial transactions that satisfy the conventional understanding of money laundering-namely, transactions intended "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(I). But it is equally unlawful under the statute to engage in a financial transaction, knowing that the property involved represents the proceeds of unlawful activity, "with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(I). In other words, the money laundering statute prohibits not only the concealment of proceeds, but also the promotion of illegal activity.

In *United States v. Paramo*, 998 F.2d 1212, 1218 (3d Cir. 1993), the court held that the law does not require that the defendant "plow back" the proceeds into the unlawful activity. The court concluded that "a defendant can engage in financial transactions that promote not only ongoing or future unlawful activity, but also prior unlawful activity" and rejected the defendant's "claim that the district court erred by instructing the jury that they could convict [the defendant] if he promoted the carrying on of a 'past mail fraud.'"

(Revised 11/2010)

**6.18.1956-1 Money Laundering - Conducting a Financial Transaction Defined**

**The first element the government must prove beyond a reasonable doubt is that** *(name)* **conducted** *(or attempted to conduct)* **a financial transaction.**

**The term "conducts" includes initiating, concluding, or participating in initiating or concluding a transaction.**

**The term "transaction" means** *(a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition of property)(with respect to a financial institution, the deposit, withdrawal, transfer between accounts, or any other payment, transfer, or delivery by, through, or to a financial institution by whatever means effected)***.**

**The term "financial transaction" means any "transaction," as I just explained that term** *[include language that applies:*

*which in any way or degree affects interstate (or foreign) commerce and (involves the movement of funds by wire or other means) (involves one or more monetary instruments)*

*(involves the transfer of title to any real property, vehicle, vessel or aircraft)*,

or

*involves the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree]***.**

**Comment**

Sand et al., supra, 50A-3.

18 U.S.C. § 1956(c) provides that, as used in this section:

> (2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;
>
> (3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;
>
> (4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;
>
> (6) the term "financial institution" includes--
>
> > (A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and
> >
> > (B) any foreign bank, as defined in section 1 of the International Banking Act of 1978 (12 U.S.C. § 3101);

31 U.S.C. § 5312(a)(2) and 31 C.F.R. § 103.11 define the term “financial institution.”

The Third Circuit has held that the term “transaction” includes the writing of a check. *See United States v. Chartock*, 283 F. App’x. 948 (3d Cir. 2008) (non-precedential).

(revised 12/09)

## 6.18.1956-2 Money Laundering - Interstate Commerce Defined

**The term "interstate commerce," as used in these instructions, means commerce between any combination of states, territories or possessions of the United States** *(including the District of Columbia)***.**

*[The government is not required to prove that (name)'s transactions with a financial institution, that is, with (specify financial institution), themselves affected interstate (or foreign) commerce. The government is required to prove only that the financial institutions or banks through which the financial transactions were conducted were engaged in or had other activities which affected interstate (or foreign) commerce in any way or degree.]*

*[Further, the government is not required to prove that the defendant knew of or intended the effect on interstate commerce, merely that such an effect occurred.]*

**Comment**

Sand et al., supra, 50A-3.

The money laundering statute requires that the government plead and prove effect on interstate commerce. In *United States v. Goodwin*, 141 F.3d 394, 401 (2d Cir. 1997), the Second Circuit explained the nature of the interstate commerce requirement:

> [T]he government must allege in the indictment that the financial transactions in question had some de minimis effect on interstate commerce. Such a conclusion is required by the plain language of the money laundering statute. Section 1956(a)(1) prohibits persons from conducting certain "financial transactions." The statute provides that "the term 'financial transaction' means (A) a transaction which in any way or degree affects interstate or foreign commerce . . . or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree." 18 U.S.C. § 1956(c)(4). Thus, proof of a nexus with interstate commerce is

necessary to establish the existence of a financial transaction, and proof of a financial transaction is needed to establish a violation of the statute.

*See also United States v. Ables*, 167 F.3d 1021, 1029-31 (6th Cir. 1999) (holding government need only establish de minimis effect on interstate commerce).

The court may include the second paragraph of the instruction if the alleged money laundering transaction involves a financial institution.

**6.18.1956-3 Money Laundering - Proceeds of a Specified Unlawful Activity Defined**

**The term "proceeds," as used in these instructions, means any property, or any interest in property, that someone acquires or retains as a result of criminal activity. Proceeds may be derived from an already completed offense or from a completed phase of an ongoing offense** *(include appropriate example; e.g., such as a mail fraud scheme)***.**

**The government is not required to prove that all of the funds involved in the charged transactions were the proceeds of the specified unlawful activity.** *(A financial transaction involves "proceeds" of a specified unlawful activity even when proceeds of a specified unlawful activity are commingled in an account with funds obtained from legitimate sources.)* **It is sufficient if the government proves beyond a reasonable doubt that at least part of the funds involved in a transaction represents such proceeds of specified unlawful activity.**

**I instruct you, as a matter of law, that the term "specified unlawful activity" includes a violation of** *(specify relevant statute; e.g., the mail fraud statute)* **as charged in this case. I have explained** *(will explain)* **the elements of** *(specify alleged unlawful activity)***.**

**Comment**

18 U.S.C. § 1956(c)(7) provides a list of specified unlawful activities.

Section 1956(c)(9), enacted in May 2009, provides that "the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." This amendment appears to

represent a legislative response to and rejection of the decision of the Supreme Court in *United States v. Santos*, 128 S. Ct. 2020 (2008).[1]

Consistent with the recently-enacted statutory definition of proceeds, the Third Circuit has held that "proceeds" meant "receipts" rather than "profits." *See United States v. Grasso*, 381 F.3d 160, 167 (3d Cir. 2004) ( holding that proceeds "means gross receipts rather than profits"); *United States v. Omoruyi*, 260 F.3d 291, 294-96 (3d Cir. 2001) (holding that money became proceeds once it was credited to an account over which defendant had control); *United States v. Morelli*, 169 F.3d 798, 805 (3d Cir. 1999).

The government does not need to trace all the property involved in the money laundering transactions to a particular criminal transaction or specified unlawful activity. *See United States v. Yusuf*, 536 F.3d 178, 185 (3d Cir. 2008) ("we reject the suggestion that to qualify as 'proceeds' under the federal money laundering statute, funds must have been directly produced by or through a specified unlawful activity, and we agree that funds retained as a result of the unlawful activity can be treated as the 'proceeds' of such crime"); *United States v. Carr*, 25 F.3d 1194, 1205 (3d Cir. 1994). It is sufficient if the government proves that some of the funds in a commingled account derived from the unlawful activity. *See United States v. Sokolow*, 91 F.3d 396, 409 (3d Cir. 1996) (discussing conviction under § 1957 and concluding that government is not required to "trace the funds constituting criminal proceeds when they are commingled with funds obtained from legitimate sources"); *see also United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991) (transactions drawn on account containing commingled funds "involve" proceeds of specified unlawful activity).

The Third Circuit has held that money is not the proceeds of wire fraud if it comes into the defendant's hands before the wiring takes place. *Morelli*, 169 F.3d at 805-06. The court expressly disagreed with the Seventh Circuit's view that a defendant could accrue proceeds from a mail or wire fraud before the mailing or wiring occurred. *Morelli*, 169 F.3d at 806 n.9. *See*

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[1]In *Santos*, the Supreme Court considered the meaning of the term "proceeds" as it is used in the money laundering statute and rendered a divided opinion. Four justices concluded that the term must be interpreted to mean profits rather than receipts, concluding that the term is ambiguous as used in the statute and therefore applying the rule of lenity. *Santos*, 128 S. Ct. at 2024-25. Four justices dissented, concluding that "proceeds" means "receipts." *Santos*, 128 S. Ct. at 2035-45. Justice Stevens, concurring in the judgment only, cast the deciding vote and took the position that the meaning of the term "proceeds" should vary with the predicate crime, but that when the unlawful activity is an illicit gambling business, as in *Santos*, it meant profits. *Santos*, 128 S. Ct. at 2031-34. *Santos* represented a change from Third Circuit precedent. *See generally United States v. Yusuf*, 536 F.3d 178, 186 (3d Cir. 2008) (discussing *Santos*). In *United States v. Yusuf*, 536 F.3d 178, 189 (3d Cir. 2008), decided before the statute was amended, the Third Circuit considered the impact of *Santos* and held that "unpaid taxes, which are unlawfully disguised and retained by means of the filing of false tax returns through the U.S. mail, constitute 'proceeds' of mail fraud for purposes of supporting a charge of federal money laundering." Further, the court concluded that the unpaid taxes were also profits of the scheme. *Yusuf*, 536 F.3d at 189.

*also United States v. Conley*, 37 F.3d 970, 980 (3d Cir. 1994) ("[P]roceeds are derived from an already completed offense, or a completed phase of an ongoing offense, before they can be laundered."). However, the court went on to conclude that "the money was the proceeds of the entire ongoing fraudulent venture" and that "this venture was a wire fraud scheme." The court explained that "[a]lthough each series [of transactions] may have included discrete acts of wire fraud that followed the creation of the proceeds related to that series, the fact is that the entire program, encompassing all of the acts charged in the indictment, constituted one large, ongoing wire fraud scheme. Each wiring in each series furthered the execution of each and every individual act of tax fraud, and helped to create the proceeds involved in each succeeding series of transactions. This is primarily because each wiring, whether it occurred before or after a given act of tax fraud, served to promote and conceal each individual embezzlement of taxes, either ex ante or ex post. More precisely, each wiring, including those that occurred before a particular transaction, made it more difficult for the government to detect the entire fraudulent scheme or any particular fraudulent transaction or series of transactions. In sum, the money gained in each series of transactions (save the initial one) was the proceeds of wire fraud because the money was the proceeds of a fraud that was furthered by the prior wirings." *Morelli*, 169 F.3d at 806-07. *See also United States v. Chartock*, 283 F. App'x. 948 (3d Cir. 2008) (non-precedential) (holding that money laundering was properly charged based on proceeds obtained before the mailing in a mail fraud because "the scheme to defraud was at a 'completed phase of an ongoing offense'").

(revised 12/09)

## 6.18.1956-4 Money Laundering - Knowledge that Property Represents Proceeds of Some Form of Unlawful Activity Defined

**The third element that the government must prove beyond a reasonable doubt is that in conducting a financial transaction** *(name)* **knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity. To satisfy this element, the government must prove that** *(name)* **knew the property involved in the transaction represented proceeds from some form of unlawful activity that is a felony offense under state, federal, or foreign law. The government is not required to prove that** *(name)* **knew what the unlawful activity was.**

**In this case, the government claims that** *(name)* **knew that the proceeds were derived from unlawful activity which constitutes** *(describe criminal activity alleged; e.g., mail fraud)* **which is a felony under** *(federal)(state)(foreign)* **law.**

**Comment**

Sand et al., supra, 50A-18.

18 U.S.C. § 1956(c)(1) provides that, as used in this section

> the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7).

In *United States v. Wert-Ruiz*, 228 F.3d 250, 253 n.2 (3d Cir. 2000), the Third Circuit noted that "[t]hough knowledge that the funds have been obtained illegally is required, knowledge of what the specified unlawful activity is not." *See also United States v. Carr*, 25 F.3d 1194, 1205 (3d Cir. 1994) (holding government could establish defendant's knowledge of the criminal nature of the proceeds through circumstantial evidence).

In *Wert-Ruiz*, 228 F.3d at 254-55, the trial court gave the following "willful blindness" instruction:

> When knowledge of the existence of a particular fact is an essential part of an offense, such knowledge may be established if a defendant is aware of a high probability of its existence, unless she actually believes that it does not exist.
>
> So with respect to the issue of a defendant's knowledge in this case, if you find from all the evidence beyond a reasonable doubt that the defendant deliberately and consciously tried to avoid learning that certain currency was the proceeds of some form of illegal activity, and that the defendants deliberately and consciously tried to avoid learning that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of the unlawful activity, you may treat such deliberate avoidance of positive knowledge as the equivalent of knowledge.
>
> I must emphasize, however, that the requisite proof of knowledge on the part of a defendant cannot be established by demonstrating she was negligent, careless or foolish.

The Third Circuit concluded that the instruction was proper even though the government also contended that the defendant had actual knowledge. 228 F.3d at 256-57. *See also* 5.06 (Willful Blindness).

## 6.18.1956-5 Money Laundering - Intent to Promote, Intent to Conceal or Disguise, Intent to Avoid Reporting Requirement Defined

**The final element that the government must prove beyond a reasonable doubt is that** *(name)***, in conducting the financial transactions,** *[insert appropriate language:*

*intended to promote the carrying on of the specified unlawful activity, that is (describe unlawful activity alleged in the indictment; e.g., mail fraud)*;

*intended to conceal or disguise the nature, the source, the ownership, or the control of the proceeds of the specified unlawful activity, that is, (describe criminal activity alleged; e.g., mail fraud);*

*conducted the financial transaction with knowledge that the transaction was designed in whole or in part to avoid a transaction reporting requirement under (state)(federal) law.]*

**Whether** *(name) [insert appropriate language:*

*intended to promote the carrying on of (describe specified unlawful activity alleged in the indictment)*;

*knew that the purpose of the financial transaction (attempted financial transaction) was to conceal or disguise the nature, location, source, ownership or control of the proceeds of (the specified criminal activity)*;

*knew that the transaction was designed in whole or in part to avoid a transaction reporting requirement under (State)(Federal) law]*

**may be established by proof of** *(name)***'s actual knowledge; by circumstantial evidence; or by the defendant's willful blindness** *(or purposeful ignorance)***. In other words, you are entitled to find from the circumstances surrounding the financial transactions or attempted financial transactions the purpose of that activity and** *(name)***'s knowledge.**

**Comment**

Sand et al., supra, 50A-5.

The court should also give Instruction 5.03 (Intentionally). In appropriate cases, the court should also give Instruction 5.06 (Willful Blindness).

In *United States v. Navarro*, 145 F.3d 580, 585 (3d Cir. 1998), the Third Circuit explained:

> to constitute a violation of [1956(a)(1)] the defendant must undertake a financial transaction involving proceeds known to be from a specified unlawful activity:
>
> 1) With the intent to promote the carrying on of a specified unlawful activity (the promotion prong); or
>
> 2) Knowing that the transaction was designed in whole or in part to conceal the nature, location, ownership, etc. of the proceeds (the conceal or disguise prong); or
>
> 3) Knowing that the transaction was designed to avoid a transaction reporting requirement under state or federal law (the reporting requirement prong).

In *United States v. Paramo*, 998 F.2d 1212 (3d Cir. 1993), the court concluded that the evidence established the defendant's intent. The court summarized the evidence as follows:

> In the present case, Paramo understood that the embezzled checks would have been worthless unless cashed at a bank or otherwise exchanged for negotiable currency. Given this fact, the jury rationally could have found that the cashing of each check contributed to the growth and prosperity of each preceding mail fraud by creating value out of an otherwise unremunerative enterprise. Accordingly, the jury rationally could have concluded that cashing the checks promoted each antecedent fraud, and was specifically intended by Paramo to do so.

998 F.2d at 1218. *See also United States v. Omoruyi*, 260 F.3d 291, 295-96 (3d Cir. 2001) (holding that evidence established defendant's intent to conceal nature, source, location, ownership, and control of proceeds of mail fraud where he deposited the money in bank accounts under false names and used false identification to withdraw it); *United States v. Carr*, 25 F.3d 1194, 1202-03 (3d Cir. 1994) (concluding evidence including trips to travel agency and large amount of currency in small bills was sufficient to establish money laundering through intent to conceal nature, source, location, ownership, and control of proceeds of unlawful activity).

**6.18.1956-6 Money Laundering - Unanimity Required**

**Count** *(No.)* **of the indictment, charging** *(name)* **with money laundering, alleges more than one purpose for the money laundering offense***(s)*, **that is, that the transaction***(s) (was)(were) [include appropriate language: intended to promote the carrying on of (specify the unlawful activity), or (was)(were) designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of (specify the unlawful activity) or (was)(were) designed in whole or in part to avoid a transaction reporting requirement].*

**The government is not required to prove each of the purposes alleged. It is sufficient for the government to prove, beyond a reasonable doubt, that** *(name)* **committed each transaction for one of those purposes.**

**However, each of you must agree with each of the other jurors as to which purpose or purposes** *(name)* **intended to serve by engaging in the transaction. In other words, if you unanimously agree that** *(name)* **committed the alleged transaction to promote the carrying on of** *(specify unlawful activity alleged)* **or if you unanimously agree that** *(name)* **committed the alleged transaction to conceal or disguise the nature, location, source, ownership or control of the proceeds of that unlawful activity, or both, you may find the defendant guilty. You need not unanimously agree on each purpose, but, in order to convict, must unanimously agree upon at least one such purpose.**

**Unless each of you agrees that the government has proven the same purpose for an alleged transaction beyond a reasonable doubt, you must find the defendant not guilty of that money laundering transaction.**

**Comment**

If the indictment charges multiple purposes for a money laundering transaction, the jurors should be instructed that they cannot convict unless they unanimously agree on the particular purpose for the money laundering transaction. *See United States v. Navarro*, 145 F.3d 580 (3d Cir. 1998).

# Racketeer Influenced and Corrupt Organizations (RICO)

6.18.1962C RICO – Conducting or Participating in the Conduct of the Affairs of an Enterprise Through A Pattern Of Racketeering Activity; Elements of the Offense (18 U.S.C. §1962(c))

6.18.1962C-1 RICO – "Enterprise" Defined Generally

6.18.1962C-2 RICO – "Enterprise;" Association in Fact Defined

6.18.1962C-3 RICO – "Engaged in, or the Activities of Which Affect, Interstate or Foreign Commerce" Defined

6.18.1962C-4 RICO – "Employed by or Associated with Any Enterprise" Defined

6.18.1962C-5 RICO – "Conduct or Participate, Directly or Indirectly, in the Conduct of Such Enterprise's Affairs" Defined

6.18.1962C-6 RICO – "Pattern Of Racketeering Activity" Defined

6.18.1962C-7 RICO – "Racketeering Activity" Defined

6.18.1962C-8 RICO – Unanimity as to Acts of Racketeering Activity

6.18.1962C-9 RICO – "Unlawful Debt" Defined

6.18.1962C-10 RICO – Verdict Form and Special Interrogatories

6.18.1962D RICO – Conspiracy; Elements of the Offense (18 U.S.C. §1962(d))

6.18.1963 RICO – Criminal Forfeiture of Property (18 U.S.C.§ 1963)

**6.18.1962C RICO – Conducting or Participating in the Conduct of the Affairs of an Enterprise Through a Pattern of Racketeering Activity; Elements of the Offense (18 U.S.C. § 1962(c))**

**Count** *(no.)* **of the indictment charges defendant** *(name)* **with violating the Racketeer Influenced and Corrupt Organizations Act, also known as RICO. Under this statute, it is a federal crime for any person who is employed by or associated with an enterprise that is engaged in or affects interstate or foreign commerce, to conduct or to participate in the conduct of the affairs of that enterprise through a pattern of racketeering activity.**

**In order to find** *(name)* **guilty of this offense, you must find that the government proved each of the following five elements beyond a reasonable doubt:**

**First: The existence of an enterprise;**

**Second: That the enterprise was engaged in or its activities affected interstate or foreign commerce;**

**Third: That** *(name)* **was employed by or associated with that enterprise;**

**Fourth: That** *(name)* **knowingly conducted that enterprise's affairs or that** *(name)* **knowingly participated, directly or indirectly, in the conduct of that enterprise's affairs; and**

**Fifth: That** *(name)* **knowingly** *(conducted) (participated, directly or indirectly, in the conduct of)* **that enterprise's affairs through** *(a pattern of racketeering activity) (the collection of an unlawful debt)***, as alleged in the indictment.**

**I will now explain the law that applies to these elements.**

**Comment**

*See* Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A *Federal Jury Practice and Instructions* (5th ed. 2000) [hereinafter O'Malley et al] § 56.03; Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal* (2003) [hereinafter, Sand et al.] 52-19. For variations in other Circuits, *see* Fifth Circuit § 2.78; Seventh Circuit § 1962(c); Eighth Circuit § 6.18.1962A; Ninth Circuit §§ 8.129-30; Eleventh Circuit § 71.1.

18 U.S.C. § 1962(c) provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

In *United States v. Irizarry*, the Third Circuit quoted its precedent in stating, "[t]o establish a §1962(c) RICO violation, the government must prove the following four elements: '(1) existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity.'" *United States v. Irizarry*, 341 F.3d 273, 285 (3d Cir. 2003), quoting *United States v. Console*, 13 F.3d 641, 652-53 (3d Cir. 1993), and *United States v. Riccobene*, 709 F.2d 214, 222 (3d Cir. 1983), *overruled on other grounds by Griffin v. United States*, 502 U.S. 46, 112 (1991). *Also see*, *e.g., United States v. Parise*, 159 F.3d 790, 794 (3d Cir. 1998). Although the Third Circuit cases do not discuss a "knowingly" state of mind as to the fourth and fifth elements, other model instructions include it. *See, e.g.,* O'Malley § 56.03. For the definition of knowingly, *see* Instruction 5.02 (Knowingly).

**Pattern of Racketeering Activity; Collection of Unlawful Debt.** This instruction charges participation in the conduct of an enterprise's affairs "through a pattern of racketeering activity." An offense under section 1962(c) may also rest on participation in an enterprise's affairs "through the collection of unlawful debt." If that is the nature of the offense charged, the instructions should be modified accordingly.

**Definitions of Elements.** Instructions 1962C-1 through 1962C-9 define the elements of a section 1962(c) offense. Even when a section 1962(c) substantive offense is not charged, the court may need to give the definitional instructions when the defendant is charged with a section 1962(d) conspiracy whose objective is a section 1962( c) offense. *See* Instruction 6.18.1962D (RICO Conspiracy; Elements of Offense).

The trial judge may consider it advisable, in some cases, to admonish the jury that the word "racketeering" is simply a term used by Congress in the statute and its use in the trial should not influence the jury.

**Other RICO Offenses.** In addition to the offense covered by this instruction, 18 U.S.C. § 1962 defines three other RICO offenses. Section 1962(d) (RICO conspiracy) is covered by Instruction 6.18.1962D. The other two subsections of 18 U.S.C. §1962 provide in pertinent part:

> (a) It shall be unlawful for any person [1] who has received any income derived, directly or indirectly, from [2] a pattern of racketeering activity or through collection of an unlawful debt [3] in which such person has participated as a principal, . . . [4] to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, [5] any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .
>
> (b) It shall be unlawful for any person [1] through a pattern of racketeering activity or through collection of an unlawful debt [2] to acquire or maintain, directly or indirectly, any interest in or control of [3] any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a) & (b) (numbers added in brackets to indicate the elements of the offenses). If the defendant is charged with violating section 1962(a) or (b), the trial judge should modify this section 1962(c) instruction, by describing the appropriate violation in the first paragraph and then instructing on the elements of section 1962(a) or (b).

**Guilt of RICO Offense by Aiding and Abetting.** A defendant may be guilty of a substantive RICO offense by aiding and abetting under 18 U.S.C. § 2. If that basis of responsibility is charged, the court should also give Instruction 7.02 (Accomplice Liability; Aiding and Abetting). Also, where there is an alleged conspiracy to commit the RICO offense, a defendant need not personally commit all the elements of the offense; some or all of the elements may be committed by a co-conspirator. These instructions only refer to the defendant *(name)* in discussing the person who is alleged to have committed the elements, but in some cases it may be the defendant or another person for whom the defendant is responsible through aiding and abetting or conspiracy. Therefore, trial judge may need to be careful to modify the instructions as appropriate in view of the government's theory and the allegations of the indictment.

**RICO Criminal Forfeiture of Property.** If the indictment contains notice that the government will seek forfeiture of property as part of sentencing in accordance with 18 U.S.C. § 1963, and if a party requests a jury determination that the property is subject to forfeiture under Fed. R. Crim. P. 32.2(b)(4), the trial court will need to give Instruction 6.18.1963 (RICO – Criminal Forfeiture of Property (18 U.S.C. § 1963)).

**6.18.1962C-1 RICO – "Enterprise" Defined Generally**

**The first element that the government must prove beyond a reasonable doubt for the offense charged in Count** *(no.)* **is the existence of an "enterprise," as alleged in the indictment. An enterprise may be: (1) a legal entity, such as a corporation or partnership** *(or sole proprietorship) (or association)***; or (2) a** *(union or)* **group of individuals associated in fact although not a legal entity. In this case, the enterprise alleged in the indictment is** *(describe the type of enterprise and the specific enterprise alleged in the indictment)***.**

**The term enterprise includes both legitimate enterprises and also illegitimate or completely illegal enterprises. Thus, the enterprise need not have a purpose other than the commission of or facilitating the commission of the racketeering activity alleged in the indictment.**

*[Although the government must prove that (name) was employed by or associated with the enterprise, the enterprise must itself be an entity separate and distinct from the defendant.]*

**Comment**

*See* 2B O'Malley et al, supra, § 56.04; Sand et al, supra, 52-20, 52-29. For variations in other Circuits, *see* Eighth Circuit § 6.18.1962D.

The **RICO Act defines** an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4). Although the government is not required to prove the existence of an enterprise engaged in or affecting interstate or foreign commerce for a section 1962(d) RICO conspiracy to violate section 1962(c), in most cases the government will do so. *See* Comment to Instruction 6.18.1962C. Therefore, ordinarily the trial judge should

give this and the other relevant enterprise instructions when the defendant is charged with a substantive section 1962(c) offense, or with a section 1962(d) conspiracy, or both. *See* Instructions 6.18.1962-2; 6.18.1962-3.

**Legal Entity Enterprise.** A "legal entity" type of enterprise is generally self-explanatory and may include, besides corporations and partnerships, sole proprietorships, labor unions and their benefit plans, and governmental entities. *See, e.g., United States v. Parise*, 159 F.3d 790, 795 (3d Cir. 1998); *United States v. McDade*, 28 F.3d 283, 295-96 (3d Cir. 1994). *See* Sand, Comment to Instruction 52-20. When the enterprise alleged in the indictment is a "union or group of individuals associated in fact although not a legal entity" (an "association in fact enterprise"), Instruction 6.18.1962-2 (RICO – "Enterprise;" Association in Fact Defined) should be given.

With respect to the second paragraph of this instruction, *see United States v. Turkette*, 452 U.S. 576 (1981) (holding that an enterprise may be a legitimate organization or a completely illegal organization) and the Comment to Instruction 6.18.1962-2.

**Distinctness Principle.** The requirement that the enterprise and the defendant (the RICO "person") must be separate and distinct (the "distinctness" principle) was accepted by the Supreme Court in *Cedric Kushner Promotion Ltd. v. King*, 533 U.S. 158, 161, 166 (2001), where the Court held that "the need for two distinct entities is satisfied . . . when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner. . . ." In most cases this will not be an issue, but if it is, the bracketed final paragraph should be given.

**6.18.1962C-2 RICO – "Enterprise;" Association in Fact Defined**

**The indictment alleges that the enterprise in this case was a** *(union or)* **group of individuals** *[a group of separate legal entities] [a group of individuals and legal entities]* **associated together in fact although not** *[itself]* **a legal entity. As I already told you, an enterprise need not be a formal business entity such as a corporation, but may be merely an informal association of individuals** *[or of separate legal entities] [or of individuals and legal entities]***. A group or association of individuals** *[legal entities] [individuals and legal entities]* **can be an enterprise if they have associated together for a common purpose of engaging in a course of conduct. This is referred to as an "association in fact enterprise."**

**In order to find the existence of an "association in fact enterprise," you must find that the government proved beyond a reasonable doubt each of the following:**

**First: That the** *(union or)* **group had a purpose***(s)* **and longevity sufficient for the members of the** *(union or)* **group** *(those associated with the (union or) group)* **to pursue its purpose***(s)***;**

**Second: That the** *(union or)* **group had an ongoing organization, formal or informal, with some sort of framework for carrying out its objectives;**

**Third: That there was a relationship***(s)* **among the members of the** *(union or)* **group** *(those associated with the (union or) group)* **and that the members of the** *(union or)* **group** *(those associated with the (union or) group)* **functioned as a**

**continuing unit to achieve a common purpose*(s)*; and**

**Fourth: That the enterprise existed separate and apart from the alleged pattern of racketeering activity.**

**To find that the enterprise was an entity separate and apart from the alleged pattern of racketeering activity, you must find that the government proved that the enterprise had an existence beyond what was necessary merely to commit the charged racketeering activity. However, the government does not have to prove that the enterprise had some function wholly unrelated to the racketeering activity; the enterprise may be formed solely for the purpose of carrying out a pattern of racketeering activity. The existence of an association-in-fact enterprise is often proved by what it does*[, rather than by abstract analysis of its structure]*. Evidence that shows a pattern of racketeering activity may be considered in determining whether the government has proved the existence of an enterprise beyond a reasonable doubt, and proof of a pattern of racketeering activity may be sufficient for you to infer the existence of an association-in-fact enterprise. Also, evidence showing the oversight or coordination of the commission of several different racketeering acts and other activities on an ongoing basis may be considered in determining whether the enterprise had a separate existence.**

**To prove an association-in-fact enterprise, the government need not prove that the group had a hierarchical structure or a chain of command; decisions may**

**be made on an ad hoc basis and by any number of methods. The government also need not prove that members of the group had fixed roles; different members may perform different roles at different times. The government need not prove that the group was a business-like entity, or that it had a name, or regular meetings, or established rules and regulations, or the like. An enterprise is also not limited to groups whose crimes are sophisticated, diverse, complex, or unique.**

**Comment**

*See* 2B O'Malley et al, supra, § 56.04; Sand et al, supra, 52-20, 52-29.

**"Association in Fact Enterprise" as Defined by Supreme Court and Third Circuit.** The Supreme Court, in *United States v. Turkette*, 452 U.S. 576 (1981), explained with respect to a so-called "association-in-fact enterprise" that, "[t]he enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct." The existence of this type of enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* at 583. *See also United States v. Irizarry*, 341 F.3d 273, 285-86 (3d Cir. 2003). The Supreme Court in *Turkette* also made it clear that "[t]he 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the 'pattern of racketeering activity' in which it engages. The existence of an enterprise at all times remains a separate element. . . ." The Court also recognized, however, that "the proof used to establish these separate elements may in particular cases coalesce, [but] proof of one does not necessarily establish the other." *Turkette*, 452 U.S. at 583. *See also United States v. Console*, 13 F.3d. 641, 650 (3d Cir. 1993). The Third Circuit has acknowledged that, in the right circumstances, the existence of an enterprise may be inferred from proof of a pattern of racketeering activity. *See, e.g., United States v. Irizarry*, 341 F.3d at 286; *United States v. Console*, 13 F.3d at 650 n.5; *United States v. Pelullo*, 964 F.2d 193, 212 (3d Cir. 1992).

In *United States v. Irizarry*, the Third Circuit quoted its earlier decision in *United States v. Riccobene*, where it "construed *Turkette* to require proof of each of the three sub-elements . . ., thus requiring the Government to prove: (1) that the enterprise is an ongoing organization with some sort of framework for making or carrying out decisions; (2) that the various associates function as a continuing unit; and (3) that the enterprise is separate and apart from the pattern of activity in which it engages." 341 F.3d at 286, quoting *United States v. Riccobene,* 709 F.2d 214, 222 (3d Cir. 1983), *overruled on other grounds by Griffin v. United States*, 502 U.S. 46, 112

(1991). In *Riccobene*, the Third Circuit stated that "[e]ach of the elements enumerated by the Supreme Court describes a separate aspect of the life of the enterprise," and that these three requirements are questions of fact for the jury. 709 F.2d at 222; *see Irizarry*, 341 F.3d at 286.

In *Boyle v. United States*, __ U.S.__, 129 S.Ct.2237 (2009), the Supreme Court resolved a conflict among the Circuits by holding that, although an association in fact enterprise must have a structure, it need not have an "ascertainable structure" beyond that inherent in the pattern of racketeering activity in which it is engaged, and the trial court need not use the word "structure" in its instructions to the jury. In so doing, the Court implicitly rejected parts of the Third Circuit's definition of the elements of an association-in-fact enterprise. *See, e.g., Riccobene*, 709 F.2d at 222 (suggesting that the government must prove that there was some mechanism for controlling and directing the affairs of the group on an on-going basis, that some sort of structure existed within the group for making decisions, whether based on a hierarchy or consent of the members, that the members performed roles in the group consistent with the group's organizational structure, and that there was a shared organizational pattern and a system of authority).

The Court in *Boyle* concluded that "an association-in-fact enterprise must have a structure;" it "must have at least three structural attributes: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." __ U.S. at __, 129 S.Ct. at 2244, citing *Turkette*. However, the Court continued, "Although an association-in-fact enterprise must have these structural features, it does not follow that a district court must use the term 'structure' in its jury instructions," *id.* at __, 129 S.Ct. at 2244, and stated that telling the jury that the structure must be ascertainable would be "redundant and potentially misleading." *Id.* at __, 129 S.Ct. at 2245. The Court rejected the defense argument that the enterprise "must have at least some additional structural attributes:"

> Such a group need not have a hierarchical structure or a 'chain of command;' decisions may be made on an ad hoc basis and by any number of methods. . . . Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, . . . . While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.

*Id.* at __, 129 S.Ct. at 2245-46. Similarly, the Court rejected the assertion of the dissenting justices in *Boyle* "that the definition of a RICO enterprise is limited to 'business-like entities.'" *Id.* at __, 129 S.Ct. at 2243. Finally, the *Boyle* Court reaffirmed what it had said in *Turkette*, that it is "it is incorrect" to say "that the existence of an enterprise may never be inferred from the

evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity. . . .” *Id.* at __, 129 S.Ct. at 2245, citing *Turkette* at 583.

In *Boyle*, the Court held that the trial judge correctly instructed the jury that:

> [I]n order to establish the existence of such an enterprise, the Government had to prove that: “(1) There [was] an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose.” Over petitioner's objection, the court also told the jury that it could “find an enterprise where an association of individuals, without structural hierarchy, form[ed] solely for the purpose of carrying out a pattern of racketeering acts” and that “[c]ommon sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.”

*Id.* at __, 129 S.Ct. at 2242. The trial judge also correctly refused a defense request to instruct “that the Government was required to prove that the enterprise ‘had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts.’” *Id.* The trial court adequately instructed the jury that the enterprise needed to have the structural attributes that may be inferred from the statutory language in telling the jury that the government was required to prove that there was “an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives” and that “the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose.” . . . . Finally, the Court said the trial judge did not err in instructing the jury that “the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.” . . . . This instruction properly conveyed the point we made in *Turkette* that proof of a pattern of racketeering activity may be sufficient in a particular case to permit a jury to infer the existence of an association-in-fact enterprise.” *Id.* at __, 129 S.Ct. at 2247.

When the alleged association-in-fact enterprise consists of a group of not only individuals, but a group of legal entities or a group of legal entities and individuals, the bracketed language in the first paragraph should be used. *See, e.g., United States v. Aimone*, 715 F.2d 822, 828 (3d Cir. 1983) (a RICO enterprise may be a legal entity, or a group of individuals or a combination of legal entities and individuals associated in fact), citing *United States v. Thevis*, 665 F.2d 616, 625-26 (5th Cir. 1979), and *United States v. Huber*, 603 F.2d 387, 393-94 (2d Cir. 1979).

(revised 12/09)

**6.18.1962C-3 RICO – "Engaged In, or the Activities of Which Affect, Interstate or Foreign Commerce" Defined**

**The second element the government must prove beyond a reasonable doubt for the offense charged in Count** *(no.)* **is that the enterprise was engaged in interstate** *(or foreign)* **commerce, or that the enterprise's activities affected interstate** *(or foreign)* **commerce. This means the government must prove that the enterprise was involved in or affected in some way trade, or business, or travel between two or more states** *(between a state and a foreign country)***.**

**An enterprise is engaged in interstate** *(or foreign)* **commerce when it is itself directly engaged in the production, distribution, or acquisition of services, money, goods, or other property in interstate** *(foreign)* **commerce.**

**Alternatively, an enterprise's activities affected interstate** *(foreign)* **commerce if its activities in any way interfered with, changed, or altered the movement or transportation or flow of goods, merchandise, money, or other property between or among two or more states** *(between a state and a foreign country)***. The government must prove that the enterprise's activities had some effect on commerce, no matter how minimal or slight. The government need not prove that** *(name)* **knew that the enterprise would engage in, or that the enterprise's activities would affect, interstate** *(foreign)* **commerce. The government also need not prove that** *(name)* **intended to obstruct, delay or interfere with interstate** *(foreign)* **commerce, or that the purpose of the alleged crime generally was to affect interstate** *(foreign)* **commerce.** *[May be*

*given if relevant: Moreover, you do not have to decide whether the effect on commerce was harmful or beneficial.]*

**In addition, the government does not have to prove that the pattern or the individual acts of racketeering activity themselves affected interstate** *(or foreign)* **commerce. Rather, it is the enterprise and its activities considered as a whole that must be shown to have that effect. On the other hand, this effect on interstate** *(or foreign)* **commerce may be established through the effect caused by the pattern or the individual acts of racketeering activity.**

**Comment**

*See* 2B O'Malley et al, supra, § 56.05; Sand et al, supra, 52-21, 52-30. *See, e.g., United States v. Robertson*, 514 U.S. 669 (1995).

**6.18.1962C-4 RICO – "Employed by or Associated with Any Enterprise" Defined**

**The third element that the government must prove beyond a reasonable doubt for the offense charged in Count** *(no.)* **is that** *(name)* **was either "employed by" or "associated with" the enterprise. The government need not prove both.**

**If you find that** *(name)* **was employed by the enterprise, that is enough to satisfy this element. You should give the phrase "employed by" its common, ordinary meaning. For example, a person is employed by an enterprise when he or she is on the payroll of the enterprise, or performs services for the enterprise, or holds a position in the enterprise.**

**Alternatively, you may find that** *(name)* **was "associated with" the enterprise, if you find that the government proved that** *(he) (she)* **was aware of the general existence and nature of the enterprise, that it extended beyond** *(his) (her)* **individual role, and with that awareness participated in, aided, or furthered the enterprise's activities** *[or had an ownership interest in the enterprise]***.**

**It is not required that** *(name)* **be employed by or associated with the enterprise for the entire time the enterprise existed. The government also is not required to prove that** *(name)* **had a formal or managerial position in the enterprise, or participated in all the activities of the enterprise, or had full knowledge of all the activities of the enterprise, or knew about the participation of all the other members of the enterprise. What the government must prove beyond a reasonable doubt is**

**that at some time during the existence of the enterprise as alleged in the indictment, *(name)* was employed by or associated with the enterprise within the meaning of those terms as I have just explained.**

**To prove that *(name)* was either employed by or associated with an enterprise, the government must prove beyond a reasonable doubt that *(name)* was connected to the enterprise in some meaningful way, and that *(name)* knew of the existence of the enterprise and of the general nature of its activities.**

**Comment**

*See* Sand et al, supra, 52-22, 52-31; Seventh Circuit § 1962(c)

In *United States v. Parise*, the Third Circuit stated that "[f]or the purposes of RICO, the threshold showing of 'association' is not difficult to establish; it is satisfied by proof that the defendant was 'aware of at least the general existence of the enterprise named in the indictment.' United States v. Eufrasio, 935 F.2d 553, 577 n. 29 (3d Cir.1991) (quoting United States v. Castellano, 610 F.Supp. 1359, 1401-02 (S.D.N.Y.1985)); see also Console, 13 F.3d at 653. That is, a defendant must be aware of the general nature of the enterprise and know that the enterprise extends beyond his individual role. *See United States v. Rastelli,* 870 F.2d 822, 828 (2d Cir.1989)." 159 F.3d 790, 796 (3d Cir. 1998). With respect to whether a defendant was "employed by" the enterprise, *see United States v. Console*, 13 F.3d 641, 654 (3d Cir. 1993).

In *United States v. Urban*, 404 F.3d 754, 769-70 (3d Cir. 2005), the Third Circuit recounted:

> "one need not hold a formal position within an enterprise in order to 'participate' in its affairs." *United States v. Parise*, 159 F.3d 790, 796 (3d Cir.1998) (citing *Reves*, 507 U.S. at 179, 113 S.Ct. 1163). Moreover, "the 'operation or management' test does not limit RICO liability to upper management because 'an enterprise is operated not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management.'" *Parise*, 159 F.3d at 796 (quoting *Reves*, 507 U.S. at 184, 113 S.Ct. 1163) (internal quotation marks omitted). *Reves* thus "made clear that RICO liability may extend to those who do not hold a managerial position within an enterprise, but who do nonetheless knowingly further the illegal aims of the enterprise by carrying out the directives of those in control." *Id.*

## 6.18.1962C-5 RICO – "Conduct or Participate, Directly or Indirectly, in the Conduct of Such Enterprise's Affairs" Defined

**The fourth element that the government must prove beyond a reasonable doubt for the offense charged in Count** *(no.)* **is that** *(name)* **knowingly conducted the affairs of the enterprise or that** *(he) (she)* **knowingly participated, directly or indirectly, in the conduct of the affairs of the enterprise. In order to prove this element, the government must prove a connection between** *(name)* **and the conduct of the affairs of the enterprise. The government must prove that** *(name)* **took some part in the operation or management of the enterprise or that** *(he) (she)* **had some role in directing the enterprise's affairs.**

**Evidence that** *(name)* **held a managerial position within the enterprise or exerted control over the enterprise's operations is enough to prove this element, but is not required. You may find that** *(name)* **participated, directly or indirectly, in the conduct of the affairs of the enterprise if you find that** *(he) (she)* **was a lower level participant who acted under the direction of upper management, knowingly furthering the aims of the enterprise by implementing management decisions or carrying out the instructions of those in control, or that** *(name)* **knowingly performed acts, functions, or duties that were necessary to, or helpful in, the operation of the enterprise.**

**Comment**

*See* 2B O'Malley et al, supra, § 56.08; Sand et al, supra, 52-25. For variations in other

Circuits, *see* Seventh Circuit §1962(c); Eighth Circuit § 6.18.1962E.

**Operation or Management Test.** In *United States v. Parise*, 159 F.3d 790, 796 (3d Cir. 1998), the Third Circuit recognized that:

> Our analysis of this claim must begin with an examination of the definition of "participation" under § 1962(c) as clarified by the Supreme Court in *Reves v. Ernst & Young,* 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). In *Reves,* the Court endorsed the "operation or management" test to determine whether a defendant participated in the conduct of an enterprise's affairs. *Id.* at 184, 113 S.Ct. 1163. According to *Reves,* "[i]n order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs." *Id.* at 179, 113 S.Ct. 1163. However, one need not hold a formal position within an enterprise in order to "participate" in its affairs. *Id.* at 179, 113 S.Ct. 1163. Further, the "operation or management" test does not limit RICO liability to upper management because "an enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management." *Id.* at 184, 113 S.Ct. 1163. In so holding, the Court made clear that RICO liability may extend to those who do not hold a managerial position within an enterprise, but who do nonetheless knowingly further the illegal aims of the enterprise by carrying out the directives of those in control.

In *Parise*, the Third Circuit reasoned that the purpose of the operation or management test was to limit RICO liability under §1962(c) to those situations in which the government can demonstrate a nexus between the person and the conduct of the affairs of the enterprise. *Id.*

**Defendant Charged Not as Principal But as Aider or Abettor or with *Pinkerton* Liability.** The operation or management test addresses the liability of a principal in a section 1962(c) offense. If the government alleges that the defendant is guilty of violating section 1962(c) as an aider or abettor (accomplice) under 18 U.S.C. § 2, then the government would not need to prove that the defendant was personally involved in the operation or management of the enterprise. The government would simply need to prove that he or she aided or abetted another person who was involved in the operation or management of the enterprise. The Third Circuit has not decided a criminal case in which the defendant was charged with aiding and abetting a RICO section 1962(c) violation, but it has discussed aiding and abetting in a civil RICO case. In *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 656-57 (3d Cir. 1998), the Third Circuit held that a private, civil cause of action for aiding and abetting a RICO violation cannot be sustained. Relying on *Central Bank of Denver v. First Interstate Bank of Denver*, 522 U.S. 164 (1994) (holding that private aiding and abetting suits were not authorized by section 10(b) of the Securities Act of 1934), the Third Circuit distinguished civil from criminal RICO actions:

> Section 1964(c) establishes a civil remedy in favor of "[a]ny person injured in his business or property by reason of a violation of section 1962." Like § 10(b), the text of § 1962 itself contains no indication that Congress intended to impose private civil aiding

> and abetting liability under RICO. Criminal liability for aiding and abetting a violation of § 1962 is imposed by reference to the general aiding and abetting statute, 18 U.S.C. § 2. This provision has no application to private causes of action. *See Central Bank of Denver,* 511 U.S. at 181-82, 114 S.Ct. 1439. Thus, reference to 18 U.S.C. § 2 cannot provide the basis for the imposition of civil liability for aiding and abetting a RICO violation.

155 F.3d at 657. If the defendant is charged with aiding and abetting a section 1962(c) offense, the trial judge should give Instruction 7.02 (Accomplice Liability; Aiding and Abetting).

The "operation or management" test would also not limit liability for a section 1962(d) RICO conspiracy to commit a section 1962(c) violation, or for *Pinkerton* liability for the substantive 1962(c) offense committed by a co-conspirator of the defendant. *See* the Comment to Instruction 6.18.1962D (RICO – Conspiracy; Elements of the Offense (18 U.S.C. §1962(d)). If the defendant is charged with a section 1962(c) offense committed by a co-conspirator, the trial judge should give 7.03 (Responsibility for Substantive Offenses Committed by Co-Conspirators (*Pinkerton* Liability)).

**6.18.1962C-6 RICO – "Through a Pattern of Racketeering Activity" Defined**

**The fifth element that the government must prove beyond a reasonable doubt for the offense charged in Count** *(no.)* **is that** *(name)* **knowingly conducted the enterprise's affairs or knowingly participated, directly or indirectly, in the conduct of the enterprise's affairs "through a pattern of racketeering activity."**

**To establish this element, the government must prove each of the following beyond a reasonable doubt:**

**First: That** *(name)* **committed at least two of the acts of racketeering activity alleged in the indictment and that the last act of racketeering activity occurred within ten years** *[X years, if the time is extended by (name's) period of imprisonment]* **after the commission of a previous act of racketeering activity;**

**Second: That the acts of racketeering activity were related to each other, meaning that there was a relationship between or among the acts of racketeering activity** *[referred to as the "relatedness" requirement]***;**

**Third: That the acts of racketeering activity amounted to or posed a threat of continued criminal activity** *[referred to as the "continuity" requirement]***; and**

**Fourth: That** *(name)* **conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs "through" the pattern of racketeering activity.**

**With respect to the second requirement, acts of racketeering activity are "related" if the acts had the same or similar purposes, results, participants, victims or methods of commission, or were otherwise interrelated by distinguishing characteristics. Acts of racketeering activity are not related if they are disconnected, sporadic, or widely separated and isolated acts.**

**As to the third requirement, the government must prove that the racketeering acts themselves amounted to continuing racketeering activity or that the acts otherwise posed a threat of continuing racketeering activity. Continuing racketeering activity may be proved by evidence showing a closed period of repeated racketeering activity; that is, by evidence of a series of related racketeering acts committed over a substantial period of time.** *[Acts of racketeering activity committed over only a few weeks or months and which do not threaten future criminal conduct do not satisfy this requirement.]* **Continuing racketeering activity or a threat of continuing racketeering activity may also be proved by evidence showing past racketeering activity that by its nature projects into the future with a threat of repetition; for example, when the acts of racketeering activity are part of a long-term association that exists for criminal purposes or when the acts of racketeering activity are shown to be the regular way of conducting the affairs of the enterprise.**

*[In deciding whether the government proved a pattern of racketeering activity, you may consider evidence regarding the number of acts of racketeering activity, the length of*

*time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity.]*

*[You may find that separately performed, functionally different, or directly unrelated acts of racketeering activity form a pattern of racketeering activity if you find that the government proved beyond a reasonable doubt that they were all undertaken in furtherance of one or another of the purposes of the enterprise.]*

**To prove the fourth requirement, that** *(name)* **conducted or participated in the conduct of the enterprise's affairs *"through"* a pattern of racketeering activity, the government must prove that the acts of racketeering activity had a relationship or a meaningful connection to the enterprise. This relationship or connection may be established by evidence that** *(name)* **was enabled to commit the racketeering activity by virtue of** *(his) (her)* **position with or involvement in the affairs of the enterprise, or by evidence that** *(name's)* **position with or involvement in the enterprise facilitated** *(his) (her)* **commission of the racketeering activity, or by evidence that the racketeering activity benefitted the enterprise, was authorized by the enterprise, promoted or furthered the purposes of the enterprise, or was in some other way related to the affairs of the enterprise.**

**Comment**

*See* 2B O'Malley et al, supra, § 56.07; Sand et al, supra, 52-23. For variations in other Circuits, *see* Seventh Circuit § 1962(c); Eighth Circuit § 6.18.1962F; Ninth Circuit § 8.126.

**Statutory Requirement.** In order to satisfy the statutory requirement of 18 U.S.C. §

1962 that the defendant's participation must be "through a pattern of racketeering activity," section 1961(5) "requires at least two acts of racketeering activity, one of which occurred after the effective date of [the RICO act] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

If there is evidence that the ten year period, within which the racketeering acts must occur, should be extended because the defendant was in prison, this could raise a jury question. However, because of the sensitivity of evidence that the defendant was in prison, the extension of the time period is usually stipulated.

**Relatedness and Continuity.** Proof of two acts of racketeering activity without more does not, however, establish a pattern of racketeering activity. The Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), interpreted RICO as requiring that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related *and* that they amount to or pose a threat of continued criminal activity." *Id.* at 239. The Court noted that the "relatedness" and "continuity" requirements were flexible and fact specific, and it defined these requirements no more explicitly than what is articulated in this instruction. Also *see, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14 (1985); *United States v. Pelullo*, 964 F.2d 193, 207 (3d Cir. 1992) (holding that the trial court erred when it failed to include the continuity requirement in its jury instruction on the pattern of racketeering element)..

With respect to **"closed-ended continuity,"** the Supreme Court in *H.J.Inc.* stated merely that the evidence must prove "a series of related predicates extending over a substantial period of time" and that acts "extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." 492 U.S. at 242. In *Pelullo*, the Third Circuit concluded that evidence of racketeering activity that extended over a period of 19 months would be sufficient to support a finding of closed-ended continuity, noting that, "[w]hile declining to define with precision the meaning of a "substantial period of time," we have never found such a period to exist where the racketeering activity occurred over a period of one year or less. *See Hughes v. Consol-Pennsylvania Coal Co,* 945 F.2d 594, 610-11 (3d Cir. 1991) (12 months; collecting cases); *Hindes v. Castle,* 937 F.2d 868, 875 (3d Cir. 1991) (eight months); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1418-19 (3d Cir. 1991) (eight months); *Banks v. Wolk*, 918 F.2d 418, 423 (3d Cir. 1990)(eight months); *Marshall-Silver Constr. Co. v. Mendel,* 894 F.2d 593, 597 (3d Cir. 1990) (seven months)." *Pelullo*, 964 F.2d at 209. The court also observed that in *Swistock v. Jones,* 884 F.2d 755 (3d Cir.1989), it had indicated that 14 months might be sufficient duration, but that later cases had limited *Swistock* because that case also included allegations of open-ended continuity. 964 F.2d at 210. Also *see, e.g., Tabas v. Tabas*, 47 F.3d 1280, 1293-94 (3d Cir. 1995) (scheme lasting over three years covered substantial period for closed-ended continuity).

**"*Barticheck* Factors."** In *Pelullo*, the Third Circuit also stated that, "[a]dditionally, the factors identified in *Barticheck v. Fidelity Union Bank/First Nat'l State,* 832 F.2d 36, 39 (3d

Cir.1987), 'the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity,' remain relevant after *H.J. Inc.* 'as they bear upon the separate questions of continuity and relatedness.' *Banks v. Wolk,* 918 F.2d 418, 423 (3d Cir.1990)." 964 F.2d at 208.

Whether and to what extent the *Barticheck* factors are still relevant is unclear, however, as the result of the Third Circuit's divided *en banc* decision in *Tabas v. Tabas*, 47 F.3d 1280 (3d Cir. 1995). Accordingly, this instruction includes these factors as optional language that may be given by the trial judge in an appropriate case.

The lead opinion in *Tabas* (representing the views of three members of the court) concluded that continuity had been shown sufficiently by the substantial duration of the racketeering acts and by evidence that those acts were a regular way of doing business and, therefore, it was not necessary to use the *Barticheck* factors. However, the opinion stated that these factors might be relevant in different, less clear cases, noting, "the *Barticheck* factors are best viewed as analytical tools available to courts when the issue of continuity cannot be clearly determined under either a closed- or open-ended analysis." 47 F.3d at 1296 n. 21 (opinion by Roth, J, joined by Mansmann & Lewis, JJ).

One concurring opinion in *Tabas* (joined by three judges) noted that although "the six *Barticheck* factors. . . . have been at the heart of this court's civil RICO jurisprudence for the past seven years,"

> the *Barticheck* factors fail to provide the needed guidance, and any attempt to use all six in continuity analysis, in my view, is destined for failure, in part because these factors were not originally intended to govern the continuity inquiry. Rather, they originated as an attempt to distill our case law on the RICO pattern requirement, simpliciter, not as an explication of separate relatedness and continuity requirements. . . . Some of the *Barticheck* factors are relevant to this general notion of pattern. Once "pattern" is analytically severed into "relatedness" and "continuity," however, there is no reason to insist that all six of the factors will logically bear on both continuity and relatedness. *Barticheck* did not do so. Rather, it discussed the various factors and concluded simply that the plaintiffs had adequately alleged a RICO pattern. *See id.* at 39.

47 F.3d at 1298-99 (Becker, J, concurring, joined by Stapleton & McKee, JJ). The second concurring opinion stated simply that the *Barticheck* factors should not be considered except to the extent that they logically bear on relatedness and continuity. *Id.* at 1302 (Alito, J).

Finally, the dissenting opinion in *Tabas* (representing the views of six members of the court), noted first that, "we decided *Barticheck* before the Supreme Court's decision in *H.J. Inc.* Nevertheless, we have noted in post-*H.J. Inc.* cases that the *Barticheck* factors are still relevant and must be considered ' "as they bear upon the separate questions of continuity and relatedness." ' *Hindes,* 937 F.2d at 873 (quoting *Banks,* 918 F.2d at 423)." 47 F.3d at 1305

(Greenberg, J, joined by Sloviter, C.J., Hutchinson, Scirica, Cowen, & Nygaard, JJ). The dissent concluded that the *Barticheck* factors should be used in all cases, not only those in which continuity is unclear; "While I do not doubt that in practice the *Barticheck* factors cannot be applied with mathematical precision, at least the factors are guidelines in determining whether the plaintiff has demonstrated continuity and relatedness." 47 F.3d at 1304. The dissent then conducted a detailed analysis of the factors as applied to the facts of the case, concluding that relatedness had been proven but not continuity. *Id.* at 1305-10.

**"Through" a Pattern of Racketeering Activity.** With respect to the Fourth requirement, that the defendant conduct or participate in the conduct of the affairs of the enterprise *"through"* a pattern of racketeering activity, there can be no RICO violation where the defendant's predicate acts of racketeering activity are unrelated to the enterprise. *United States v. Provenzano*, 688 F.2d, at 200 (citing *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981). A violation of Section 1962(c) requires a connection between the defendant, the enterprise, and the pattern of racketeering activity. *Id.* The Third Circuit has approved instructions on how this can be shown. *United States v. Irizarry*, 341 F.3d 273, 304 (3d Cir. 2003).

**6.18.1962C-7 RICO – "Racketeering Activity" Defined**

**"Racketeering activity," as defined by the RICO statute** *[federal law]***, includes any acts that involve or that may be charged as any of a wide range of crimes under state or federal law. Count** *(no.)* **of the indictment alleges that** *(name)* **committed the following** *(state number of)* **acts of racketeering activity:** *(describe each act of racketeering activity alleged in the indictment)***.**

**The** *(first)* **act of racketeering activity** *(describe the first act of racketeering activity alleged)* **alleged in Count** *(No.)* **contains several elements. In order to find that** *(name)* **committed this act of racketeering activity, you must find that the government proved beyond a reasonable doubt that** *(name)***:** *(For each alleged act of racketeering activity, state the elements and any appropriate definitions or explanations of those elements.)*

**Comment**

*See* 2BO'Malley et al, supra, § 56.06; Sand et al, supra, 52-24. For variations in other Circuits, *see* Seventh Circuit § 1962(c); Ninth Circuit § 8.125.

**Statutory Definition.** 18 U.S.C. § 1961(1) defines "racketeering activity" by setting forth a wide range of predicate criminal acts under state and federal law. 18 U.S.C. §1961 (1)(A) includes "any act or threat involving a variety of crimes "chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. §1961(1)(B) includes "any act which is indictable under any of" a number of provisions of Title 18 of the United States Code. 18 U.S.C. § 1961(1)(C) - (G) include within the meaning of "racketeering activity" "any act which is indictable under" specified provisions of Titles 11 and 29 of the United States Code, and under the Currency and Foreign Transactions Reporting Act, the Immigration and Nationality Act, and 18 U.S.C. § 2332(g)(5)(B) (relating to terrorism).

**Alternative Ways of Committing Racketeering Acts.** The indictment may allege that some or all of the racketeering acts have two components or "sub-sets;" that is, two different or

alternative ways of committing the same alleged racketeering act. In such a case, to find that act of racketeering activity, the jury must agree unanimously on at least one of the alternative ways in which the racketeering act was committed. The trial judge should explain these alternatives to the jury when he or she describes the alleged acts of racketeering activity and should also tell the jury what these alternatives mean with respect to the jury's findings. If special interrogatories are provided to the jury with the verdict form (*see* Instruction 6.18.1962-9), the interrogatories should list the alternative ways of committing the acts of racketeering activity and should ask the jury to indicate whether it finds one alternative, both, or neither.

**Criminal Conspiracy as Racketeering Act.** In *United States v. Irizarry*, 341 F.3d 273, 301 (3d Cir. 2003), the Third Circuit noted that in addition to those substantive offenses listed in section 1961(5), a criminal conspiracy to commit one of those offenses may also be a predicate act of racketeering activity: "Thus, if the predicate conspiracy relates to the affairs of a RICO enterprise, it can be charged as part of that enterprise's pattern of racketeering activity in a RICO prosecution even though not all co-conspirators are actually members of the charged RICO enterprise. *See [United States v.] Pungitore,* 910 F.2d at 1134-35." *Id.* at 296. The court also noted:

> Moreover, a RICO enterprise may engage in a pattern of racketeering activity that consists of separate and distinct conspiracies. *United States v. Pungitore,* 910 F.2d 1084, 1099-1101, 1134-35 (3d Cir.1990). The government can prosecute a series of different conspiracies in a single RICO count so long as all of the different conspiracies relate to the affairs of a single enterprise. *Riccobene,* 709 F.2d at 224-25. As we have said, "Congress intended that a series of agreements that under pre RICO law would constitute multiple conspiracies could under RICO be tried as a single enterprise conspiracy if the defendants have agreed to commit a substantive RICO offense." *Id.* (citation and internal quotations omitted); *see also United States v. Ruggiero,* 726 F.2d 913, 923 (2d Cir.1984) ("[A] RICO conspiracy under 18 U.S.C. § 1962(d), supported by predicate acts of racketeering activity that in themselves are conspiracies" does not "violate the principle of *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), which prohibits conviction of multiple conspiracies under an indictment charging a single conspiracy.").

*Id.* at 293 n. 7. The Third Circuit in *Irizarry* distinguished conspiracy as predicate racketeering activity under section 1962(c) and the separate RICO conspiracy offense under section 1962(d), noting, "[h]owever, 'the RICO conspiracy and the predicate conspiracy are distinct offenses with entirely different objectives.' *Pungitore,* 910 F.2d at 1135." *Id.* For a discussion of the RICO conspiracy offense under 18 U.S.C. §1962(d), *see* Instruction 6.18.1962D (RICO Conspiracy – Elements of the Offense (18 U.S.C. § 1962(d)).

**6.18.1962C-8 RICO – Unanimity as to Acts of Racketeering Activity**

**The indictment alleges that** *(name)* **committed** *(state number of)* **acts of racketeering activity. As I have instructed, you must find that the government proved beyond a reasonable doubt that** *(name)***at least two of the alleged acts of racketeering activity within the prescribed time period.**

**You must unanimously find that the government proved beyond a reasonable doubt that** *(name)* **committed each of at least two of the same particular acts of racketeering activity alleged. It is not enough that some members of the jury find that** *(name)* **committed two of the particular racketeering acts alleged while other members of the jury find that** *(name)* **committed different racketeering acts. In order for you to find** *(name)* **guilty, there must be at least two specific racketeering acts that all of you find were committed by** *(name)***.**

**Comment**

*See* Sand et al, supra, 52-7.

The jury must unanimously agree that the defendant committed at least two of the same acts of racketeering activity. *United States v. Merlino*, 310 F.3d 137 (3d Cir. 2002). In *United States v. Brown,* 583 F.2d 659 (3d Cir.1978), *cert. denied,* 440 U.S. 909 (1979), the jury was presented with four acts set forth as predicate offenses in a RICO conspiracy; each act also formed the basis for a separate substantive offense charged against the defendant. The jury convicted on all counts. On appeal, the Third Circuit overturned the convictions on two of the substantive counts, finding that the conduct charged in those counts did not, as a matter of law, constitute mail fraud. Then, because the court had no way of ascertaining which of the substantive offenses the jury had relied upon to satisfy the requirement of two predicate racketeering acts for the RICO conspiracy, it overturned the conviction on that count as well, even though two of the potential predicate offenses could still have constituted valid bases for the verdict. To avoid this problem, the trial judge should provide special interrogatories for the jury to answer after it has agreed on a guilty verdict, to establish on which of the predicate offenses

the jury relied. *See* further discussion in the Comment to Instruction 6.18.1962-10 (RICO – Verdict Form and Special Interrogatories).

**6.18.1962C-9 RICO – "Unlawful Debt" Defined**

**The term "unlawful debt," as used in these instructions, means a debt that (1) was incurred or contracted in gambling activity in violation of federal, state or local law** *[,or which was unenforceable in whole or in part under federal or state law because of the laws relating to usury]***, or (2) was incurred in connection with the business of gambling in violation of federal, state, or local law** *[, or the business of lending money or any thing of value at a rate that was usurious under federal or state law, where the rate was at least twice the legally enforceable rate]***.**

*[Usury is the lending of money at an illegally high rate of interest. In (jurisdiction), the legally enforceable rate of interest is __ %; any higher rate of interest is illegal.]*

**Comment**

"Unlawful debt" is defined in 18 U.S.C. § 1961(6). If it is alleged that the debt was unenforceable because of the laws relating to usury, the trial judge should consider defining usury and telling the jury the usury rate that applies.

**6.18.1962C-10 RICO – Verdict Form with Special Interrogatories**

**I have now instructed you on the elements of the Racketeer Influenced and Corrupt Organizations Act *(RICO)* offense*(s)* charged in Count *(no.)* of the indictment. A verdict form has been prepared for you to use to record your verdict*(s)* on these count*(s)*.**

**As I explained to you, the indictment alleges that the pattern of racketeering activity in this case included *(state number)* acts of racketeering activity. As I also explained, to find a pattern of racketeering activity, you must unanimously agree that the government proved beyond a reasonable doubt that *(name)* committed each of at least two of the same particular acts of racketeering activity alleged.**

**The verdict form includes a series of interrogatories for you to answer to indicate which acts of racketeering activity, if any, you unanimously find. Do not answer these interrogatories until after you have reached your verdict. If you decide that the government has not proved *(name)* guilty of the Racketeering Influenced and Corrupt Organization Act *(RICO)* offense*(s)* charged in Count *(No.)*, then you do not need to answer these interrogatories. However, if you find unanimously that the government proved each of the elements of this *(these)* offense*(s)* beyond a reasonable doubt then, after you have reached and recorded that verdict on the verdict form, you should answer the interrogatories with respect to the acts of racketeering activity. You must decide whether *(name)* is guilty of this**

*(these)* **offense***(s)* **first, before answering the interrogatories.**

**VERDICT FORM with SPECIAL INTERROGATORIES**

**COUNT NO. __ ( Conducting or Participating in the Conduct of the Affairs of an Enterprise Through a Pattern of Racketeering Activity)**

**_____ Guilty**

**_____ Not Guilty**

**If you find** *(name of defendant)* **not guilty of conducting or participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity, as charged in Count No. __, please proceed to the next count; do not answer the jury interrogatories. If you find** *(name)* **guilty of conducting or participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity, as charged in Count No. __, please answer the following jury interrogatories before proceeding to the next count:**

**JURY INTERROGATORIES COUNT NO. __:**

**Do you unanimously find that the government proved beyond a reasonable doubt that the pattern of racketeering activity included the following acts of racketeering activity, as alleged in Count No. __?**

**Racketeering Act Number 1** *(state the racketeering act as alleged in the indictment)*

**_____ Yes**

**_____ No**

**Racketeering Act Number 2** *(state the racketeering act as alleged in the indictment)*

**_____ Yes**

**_____ No**

**Racketeering Act Number 3** *(state the racketeering act as alleged in the indictment)*

**_____ Yes**

**_____ No**

*[Include each of the racketeering acts alleged in the indictment.]*

**COUNT NO. __ (Conspiracy to Conduct or to Participate in the Conduct of the Affairs of an Enterprise Through a Pattern of Racketeering Activity)**

**_____ Guilty**

**_____ Not Guilty**

**If you find** *(name of defendant)* **not guilty of conspiracy to conduct or to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity, as charged in Count No. __, do not answer the jury interrogatories. If you find** *(name)* **guilty of conspiracy to conduct or to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity, as charged in Count No.**

**__, please answer the following jury interrogatories:**

**JURY INTERROGATORIES COUNT NO. __:**

**Do you unanimously find that the government proved beyond a reasonable doubt that the pattern of racketeering activity included the following acts of racketeering activity, as alleged in Count No. __?**

**Racketeering Act Number 1** *(state the racketeering act as alleged in the indictment)*

**_____ Yes**

**_____ No**

**Racketeering Act Number 2** *(state the racketeering act as alleged in the indictment)*

**_____ Yes**

**_____ No**

**Racketeering Act Number 3** *(state the racketeering act as alleged in the indictment)*

**_____ Yes**

**_____ No**

*[Include each of the racketeering acts alleged in the indictment.]*

**Comment**

*See* Eighth Circuit § 6.18.1962G.

This special verdict form should not be used if the indictment charges that the defendant conducted or participated in the conduct of the enterprise's affairs through the collection of an unlawful debt, rather than through a pattern of racketeering activity.

**Special Interrogatories Generally Disfavored; When Used, Only Answered after Jury Finds Guilt.** As explained in the Comment to Instruction 3.18 (Special Verdict Form; Special Interrogatories), special interrogatories are disfavored in criminal cases, but may be used in the discretion of the trial court. In *United States v. Console*, 13 F.3d 641, 663-64 (3d Cir. 1993), and *United States v. Riccobene*, 709 F.2d 214, 227-28 (3d Cir. 1985), the Third Circuit concluded that the district court's refusal to submit special interrogatories to the jury in RICO cases was not an abuse of discretion. The Third Circuit noted in *Riccobene*, "however, that in the present case the questions were to have been submitted *after* the verdict had been returned and the jury polled. Thus, the dangers usually involved in the use of jury interrogatories in a criminal case were not present here." 709 F.2d at 228 n. 19. *Also, see, e.g., United States v. Irizarry*, 341 F.3d 273, 301 (3d Cir. 2003) (jury returned a special verdict sheet finding defendant guilty on all counts and also finding that the government had proven twelve of the thirteen racketeering acts charged); *United States v. Console*, 13 F.3d at 664 (trial court instructed the jury to specify which of the racketeering acts it found to constitute a pattern of racketeering only if it found defendant guilty of a RICO count).

**Unanimous Agreement on Same Acts.** To find that the defendant committed a pattern of racketeering activity, the jury must unanimously agree on at least two of the same acts of racketeering activity. *See, e.g., United States v. Merlino*, 310 F.3d 137 (3d Cir. 2002), *United States v. Riccobene*, 709 F.2d at 227-28; *United States v. Brown,* 583 F.2d 659 (3d Cir.1978), *cert. denied,* 440 U.S. 909 (1979). Therefore, the trial judge is advised to submit special interrogatories to the jury to establish, after the jury agrees to a guilty verdict, which of the alleged predicate acts of racketeering activity the jury agreed on in support of its verdict. If special interrogatories are used, the trial court should give this instruction explaining the special interrogatories and making it clear that the jury should answer the special interrogatories only after it has found the defendant guilty.

**Alternative Ways of Committing a Racketeering Act.** If the indictment alleges that any of the racketeering acts have two components or "sub-sets" (that is, two different or alternative ways of committing the same alleged racketeering act (*see* the Comment to Instruction 6.18.1962-8)), the special interrogatories should list the alternatives and ask the jury to indicate whether it finds one alternative, both, or neither.

**Special Interrogatory in Light of *Apprendi* Where Penalty Increased Beyond Twenty Year Maximum.** A special interrogatory may be required in light of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), for both RICO conspiracy and substantive offenses, where the sentence is increased above the general maximum of 20 years imprisonment. *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable

doubt." RICO's penalty provision, 18 U.S.C. § 1963(a), provides in pertinent part that upon conviction a defendant "shall be. . . imprisoned not more than 20 years (or for life if the violation is based on racketeering activity for which the maximum penalty includes life imprisonment)."

The increased punishment provision would apply, for example, if a predicate charge of murder in the first degree under a particular state's law requires proof of "premeditation and deliberation" and carries a life sentence, whereas murder in the second degree requires proof of only "malice" and carries a 20 year prison sentence. In order to allow a life sentence under the RICO penalty provision, the jury would have to find beyond a reasonable doubt that the murder racketeering act at issue was committed with "premeditation and deliberation." This additional finding should be made by the jury through special interrogatories after it has found the defendant guilty of the RICO substantive or conspiracy offense, because the additional facts necessary for the life sentence would not have to be found for the RICO conviction.

**6.18.1962D RICO Conspiracy – Elements of the Offense (18 U.S.C. §1962(d))**

**Count** *(no.)* **of the indictment charges that** *(name)* **agreed or conspired with one or more other person***(s)* **to conduct or to participate in the conduct of an enterprise's affairs through a pattern of racketeering activity, as I** *(have explained) (will shortly explain)* **to you.** *[If the object of the alleged conspiracy is the violation of 18 U.S.C. § 1962(a) or (b), state the substance of that violation.]*

**It is a federal crime for two or more persons to agree or conspire to commit any offense against the United States, even if they never actually achieve their objective. A conspiracy is a kind of criminal partnership.**

**In order for you to find** *(name)* **guilty of conspiracy to conduct or to participate in the conduct of an enterprise's affairs through a pattern of racketeering activity** *[if the object of the conspiracy charged is the violation of 18 U.S.C. § 1962(a) or (b), state the substance of that violation]***, you must find that the government proved beyond a reasonable doubt each of the following three (3) elements:**

**First: That two or more persons agreed to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity** *[if the object of the conspiracy charged is the violation of 18 U.S.C. § 1962(a) or (b), state the substance of that violation]***;**

**Second: That** *(name)* **was a party to or member of that agreement; and**

**Third: That** *(name)* **joined the agreement or conspiracy knowing of its objective to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity** *(if the object of the conspiracy charged is the violation of 18 U.S.C. § 1962(a) or (b), state the substance of that violation)* **and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that** *(name)* **and at least one other alleged conspirator shared a unity of purpose and the intent to achieve the objective of conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity** *(if the object of the conspiracy charged is the violation of 18 U.S.C. § 1962(a) or (b), state the substance of that violation)***.**

**The meanings of the elements "enterprise," "employed by or associated with," "conduct or participate, directly or indirectly, in the conduct of that enterprise's affairs," and "through a pattern of racketeering activity" are the same as I have just explained to you with respect to the RICO offense charged in Count** *(no.)***. However, the RICO conspiracy charged in Count** *(no.)* **is a distinct offense from the RICO offense charged in Count** *(no.)***. There are several important differences between these offenses.**

**One important difference is that, unlike the requirements to find** *(name)* **guilty of the RICO offense charged in Count** *(No.)***, in order to find** *(name)* **guilty of the**

**RICO conspiracy charged in Count *(No.)* the government is not required to prove that the alleged enterprise actually existed, or that the enterprise actually engaged in or its activities actually affected interstate or foreign commerce. Rather, because an agreement to commit a RICO offense is the essence of a RICO conspiracy, the government need only prove that *(name)* joined the conspiracy and that if the object of the conspiracy was achieved, the enterprise would be established and the enterprise would be engaged in or its activities would affect interstate or foreign commerce.**

**Similarly, unlike the requirements to find *(name)* guilty of the RICO offense, in order to find *(name)* guilty of the RICO conspiracy charged in Count *(No.)* the government is not required to prove that *(name)* was actually employed by or associated with the enterprise, or that *(name)* agreed to be employed by or to be associated with the enterprise. Nor does the RICO conspiracy charge require the government to prove that *(name)* personally participated in the operation or management of the enterprise, or agreed to personally participate in the operation or management of the enterprise. Rather, you may find *(name)* guilty of the RICO conspiracy offense if the evidence establishes that *(name)* knowingly agreed to facilitate or further a scheme which, if completed, would constitute a RICO violation involving at least one other conspirator who would be employed by or associated with the enterprise and who would participate in the operation or management of**

**the enterprise.**

**Finally, in order to find** *(name)* **guilty of the RICO conspiracy charged in Count** *(No.)* **the government is not required to prove that** *(name)* **personally committed or agreed to personally commit any act of racketeering activity. Indeed, it is not necessary for you to find that the objective or purpose of the conspiracy were achieved at all. However, the evidence must establish that the** *(name)* **knowingly agreed to facilitate or further a scheme which, if completed, would include a pattern of racketeering activity committed by at least one other conspirator.**

**In short, to find** *(name)* **guilty of the RICO conspiracy charged in Count** *(No.)* **of the indictment, you must find that the government proved beyond a reasonable doubt that** *(name)* **joined in an agreement or conspiracy with another person or persons, knowing that the objective or purpose was to conduct or to participate, directly or indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity, and intending to join with the other person or persons to achieve that objective.**

*[If applicable: The indictment need not specify the predicate racketeering acts that (name) agreed would be committed by some member of the conspiracy in the conduct of the affairs of the enterprise. The indictment alleges that (name) agreed that multiple racketeering acts would be committed. You are not limited to considering only the*

*specific racketeering acts alleged in Count (No.) of the indictment (the RICO substantive count). Rather, you may also consider the evidence presented of other racketeering acts committed or agreed to be committed by any co-conspirator in furtherance of the enterprise's affairs, including racketeering acts for which (name) is not charged in Count (No.) (the RICO substantive count), to determine whether (name) agreed that at least one member of the conspiracy would commit two or more racketeering acts.*

*Moreover, in order to convict (name) of the RICO conspiracy offense, your verdict must be unanimous as to which type or types of racketeering activity (name) agreed would be committed; for example, at least two acts of extortion, or robbery, or drug trafficking, or one of each, or any combination thereof. (Note use examples that apply)].*

**Comment**

*See* 2B O'Malley et al, supra, § 56.11; Sand et al, supra, 52-28. For variations in other Circuits, *see* Seventh Circuit § 1962(d); Eighth Circuit § 6.18.162B; Eleventh Circuit § 71.2.

18 U.S.C. §1962(d) provides:

> [I]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section [1962].

This Instruction and Comment focus on a conspiracy to violate section 1962(c), and should be modified if a conspiracy to violate section 1962(a) or (b) is charged.

**RICO § 1962(d) Conspiracy and RICO § 1962(c) Offense.** The main element that the government must prove to establish a conspiracy to violate section 1962(c) is a voluntary agreement to participate in an enterprise through a pattern of racketeering activity. *See United States v. Riccobene,* 709 F.2d 214, 224 (3d Cir. 1983). In *Riccobene*, the Third Circuit also stated in dicta that to establish a violation of §1962(d), the government must prove "beyond a reasonable doubt that an 'enterprise [engaged in or the activities of which affect interstate or foreign commerce]' did in fact exist, and that the individual defendants knowingly agreed to participate in the 'enterprise' through a pattern of racketeering." *Id.*, at 220-21. However, later

Supreme Court and Third Circuit cases make clear that this is not always necessary.

The Supreme Court held in *Salinas v. United States*, 522 U.S. 52 (1997), that section 1962(d) does not require that a defendant must personally commit or agree to personally commit the substantive RICO offense, or any specific element of that offense including the racketeering activity. Also, *see, e.g., United States v. Pungitore*, 910 F.2d 1084, 1130 (3d Cir. 1990). Precisely, the Court in *Salinas* held that the statute and traditional conspiracy law would "not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate offenses requisite to the underlying offense," but it's reasoning was broader: "If conspirators have a plan which calls for some conspirators to provide support, the supporters are as guilty as the perpetrators." Based on *Salinas*, the Third Circuit has joined a majority of courts of appeals in holding that the defendant need not personally participate or agree to personally participate in the conduct of the affairs of the enterprise to be guilty of a section 1962(d) conspiracy or of a section 1962(c) substantive offense committed by a co-conspirator.

Thus, in *Smith v. Berg*, 247 F.3d 532, 536 (3d Cir. 2001), the Third Circuit agreed with the majority of other circuits that "*Reves* [interpreting the participate in the conduct of the enterprises' affairs element of Section 1962(c)] is not a conspiracy decision; its holding focuses solely on what is required to violate § 1962(c) . . . . *Reves* says nothing about the scope of § 1962(d). . . . *Salinas* makes 'clear that § 1962(c) liability is not a prerequisite to § 1962(d) liability.' " In view of *Salinas*, the Third Circuit in *Smith v. Berg* also rejected a distinction it had suggested earlier in *United States v. Antar*, 53 F.3d 568 (3d Cir 1995), in an attempt to resolve a perceived tension between *Reves* and the other circuits' decisions:

> [T]he Supreme Court did not confine its discussion in *Salinas* to the element of predicate acts, in which event it might be "harmonized" with *Antar*'s discussion of requirements as to levels of participation; rather, the Court expressed its analysis in broad terms, defining an interpretation of conspiracy liability directly at odds with Defendants' reading of *Antar*. We therefore hold that any reading of *Antar* suggesting a stricter standard of liability under section 1962(d) is inconsistent with the broad application of general conspiracy law set forth in *Salinas*. In accord with the general principles of criminal conspiracy law, a defendant may be held liable for conspiracy to violate section 1962(c) if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise [regardless of whether the defendant actually operates or manages the enterprise].

*Id.* at 538. The Third Circuit in *Smith v. Berg* also noted that *Salinas* stated, "A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense." 522 U.S. at 65, quoted in 247 F.3d at 537 n.

9.

In many cases, the defendant will be charged with both the section 1962(d) conspiracy to violate section 1962(c) and the substantive section 1962(c) offense itself. In those cases the trial judge will instruct on the elements of both section 1962(c) and section 1962(d), and will also give Instructions 6.18.1962C-1 through 6.18.1962C-8 defining the elements of section 1962(c). This instruction assumes such a case, and the last four paragraphs explain important differences between what the government must prove for the substantive RICO offense and what it must prove for the RICO conspiracy charge. The differences explained in these paragraphs may not all be relevant on the facts of a specific case, and the trial judge should modify these paragraphs accordingly.

Where the defendant is only charged with a RICO conspiracy to violate section 1962(c), and is not also charged with the substantive offense, the trial judge will need to give the relevant definitional instructions (as modified for the conspiracy alleged) and also to modify this instruction to explain the differences from the conspiracy offense that are relevant based on the nature of the conspiracy alleged and the defendant's alleged role in it.

**No Overt Act Requirement; Other Traditional Conspiracy Principles.** Unlike the general federal conspiracy offense under 18 U.S.C. § 371, a RICO conspiracy under section 1962(d) does not include an overt act element. *See, e.g., Salinas v. United States*, 522 U.S. 52, 63 (1997). In other respects, however, the federal courts apply traditional conspiracy principles to section 1962(d) RICO conspiracies. *See, e.g., Salinas v. United States*, 522 U.S. at 63; *United States v. Pungitore*, 910 F.2d at 1148. The Third Circuit observed, "in enacting §1962(d), Congress did not radically alter traditional conspiracy law except to the extent that it proposed a dramatically new conspiratorial objective." *Id.* citing *United States v. Riccobene*, 709 F.2d at 224. Thus, when the defendant is charged with an18 U.S.C. § 1962(d) RICO conspiracy, the trial judge should also give the applicable instructions with respect to conspiracy generally. *See* Instructions 6.18.371C - L.

Also, RICO conspiracy law includes the notion that proof of a RICO conspiracy agreement may be established through circumstantial evidence to the same extent permitted in traditional conspiracy cases. *Riccobene*, 709 F.2d at 225. Furthermore, RICO conspiracy law includes the traditional principle that "one conspirator need not know the identities of all his co-conspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it." *Id.*

**RICO § 1962(d) Conspiracy and Conspiracies as Predicate Acts.** A RICO conspiracy under 18 U.S.C. §1962(d) may be supported by predicate acts of racketeering activity that are themselves conspiracies. *See* Instruction 6.18.1962-7 Comment. This is proper under *Kotteakos v. United States*, 328 U.S. 750 (1946), where the Supreme Court prohibited a conviction of multiple conspiracies under an indictment charging a single conspiracy. *See, e.g., United States v. Irizarry*, 341 F.3d, 273, 292 n.7 (3d Cir. 2003) (citing *United States v. Rugerrio*, 726 F.2d 913,

923 (2d Cir. 1984); *United States v. Pelullo*, 964 F.2d 193, 207 (3d Cir. 1992)). The Third Circuit has allowed a conspiracy predicate to support a RICO conspiracy because "the RICO conspiracy and the predicate conspiracy are distinct offenses with entirely different objectives." *United States v. Irizarry*, 341 F.3d at 292 n.7 (citing *United States v. Pungitore*, 910 F.2d 1084, 1135 (3d Cir. 1990)).

It is not enough for the government to show that a defendant merely participated in the same enterprise as another individual. Furthermore, an agreement to merely commit the predicate racketeering offenses is not sufficient to support a conviction under §1962(d). *See United States v. Riccobene,* 709 F.2d at 224. "This is so because, under RICO, it is an agreement 'to conduct or participate . . . in the conduct of [an] enterprise's activities' through the commission of predicate offenses that is prohibited, not an agreement to commit a pattern of racketeering activity alone." *Id.* However, the Third Circuit has recognized that "a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single enterprise conspiracy if the defendants have agreed to commit a substantive RICO offense." *Id.* at 224-25.

**RICO Criminal Forfeiture of Property.** If the indictment contains notice that the government will seek forfeiture of property as part of sentencing in accordance with 18 U.S.C. § 1963, and if a party requests a jury determination that the property is subject to forfeiture under Fed. R. Crim. P. 32.2(b)(4), the trial court should give Instruction 6.18.1963 (RICO – Criminal Forfeiture of Property (18 U.S.C.§ 1963)).

### 6.18.1963 RICO – Criminal Forfeiture of Property (18 U.S.C. § 1963)

*[If the indictment contains notice that the government will seek forfeiture of property as part of sentencing in accordance with 18 U.S.C. § 1963 and, if a party requests a jury determination under Fed. R. Crim . P. 32.2(b)(4) that the property is subject to forfeiture, the trial court should instruct the jury regarding this matter at three points during the trial proceedings.*

*First, when the court instructs the jury at the end of trial with respect to its deliberations and the trial verdict, the court should alert the jury that:*

> ***Depending on the verdict you reach, there may be a brief additional proceeding after you have returned your verdict.***

*Second, if the jury has returned a guilty verdict, at the outset of the forfeiture proceeding before the jury, the trial court should explain preliminarily the nature and purpose of the forfeiture proceeding that is about to take place, as follows:*

> ***You have found** (name) **guilty of** (state the offense(s))**, as charged in Count**(s) (No.) **of the indictment. You will now need to consider a further question regarding property that the indictment alleges is subject to forfeiture by** (name) **to the government. Forfeiture means that** (name) **would lose any ownership or interest** (he) (she) **has or claims to have in the specified property, as a part of the penalty for engaging in criminal activity. After the parties have presented any additional evidence on this subject, I will instruct you further on***

***the law with respect to forfeiture. In considering whether the property is subject to forfeiture, you should consider the evidence you have already heard and any additional evidence presented by the parties. You should evaluate that evidence and its credibility as I explained to you earlier in my instructions.***

*Third, at the end of the forfeiture proceeding, the trial court should give the instruction below.]*

**You have found** *(name)* **guilty of** *(state the offense(s))*, **as charged in Count***(s) (No.)* **of the indictment. You now need to consider a special verdict concerning property that the indictment alleges is subject to forfeiture by** *(name)* **to the government. Forfeiture means that** *(name)* **would lose any ownership or interest** *(he) (she)* **has or claims to have in the specified property** *(any interest in any enterprise) (any security of any enterprise) (any claim against any enterprise) (any property or contractual right of any kind affording a source of influence over any enterprise)*, **as a part of the penalty for engaging in criminal activity. I instruct you that you are bound by your previous finding that** *(name)* **is guilty of** *(state the offense(s))*.

**Under federal law, any person convicted of** *(state the offense(s))* **shall forfeit to the government any property that is, or was derived from, any proceeds which the person obtained, directly or indirectly, from the offense** *(any interest the person has acquired or maintained as a result of the offense) ((any interest in any enterprise) (any security of any enterprise) (any claim against any enterprise) (any property or*

*contractual right of any kind affording a source of influence over any enterprise) that the person established, operated, controlled, conducted, or participated in the conduct of as part of the offense)*.

**In deciding whether property is subject to forfeiture, you should not concern yourself with or consider whether any other person may own or have an interest in the property. I will resolve any such claims. Similarly, you are not to consider whether the property is presently available. Your only concern is whether the government has proven the required connection between the property and the offense***(s)* **for which you have found** *(name)* **guilty.**

**Count** *(no.)* **allege***(s)* **that** *(describe the particular property alleged to be subject to forfeiture) (describe the interest (name) acquired or maintained that is alleged to be subject to forfeiture) (describe (name's) interest in, security of, claim against, property or contractual right affording a source of influence over an enterprise that is alleged to be subject to forfeiture)* **should be forfeited because of the connection between this property** *(interest) (security) (claim) (contractual right)* **and** *(name's)* **commission of** *(state offense(s) asserted as the basis for forfeiture)*. *[Describe as to each count for which there has been a conviction, the specific property (interest) (security) (claim) (contractual right) alleged to be subject to forfeiture]*.

**This property is subject to forfeiture if you find that the government has proved beyond a reasonable doubt that the property is, or was derived from, any**

**proceeds** *(name)* **obtained, directly or indirectly, as a result of the offense***(s)* **for which you have found** *(him) (her)* **guilty.**

*(This interest is subject to forfeiture if you find that the government has proved beyond a reasonable doubt that (name) acquired or maintained the interest as a result of the offense(s) for which you have found (him) (her) guilty.)*

*(This (interest in) (security of) (claim against) (property or contractual right affording a source of influence over) an enterprise is subject to forfeiture if you find that the government has proved beyond a reasonable doubt that name (established) (operated) (controlled) (conducted) (participated in the conduct of) the enterprise as part of the offense for which you have found (him) (her) guilty.)*

**Property is "proceeds" of an offense if the property was obtained directly or indirectly, as a result of the offense. Property "was derived" from the proceeds of an offense if the property was obtained, directly or indirectly, using money or any other source of wealth gained as a result of the commission of the offense.**

**In making this determination, you should consider all of the evidence presented on the subject during this proceeding and during the trial, regardless of who offered it. All of my previous instructions continue to apply, and you should evaluate the evidence and its credibility according to the instructions I gave you earlier.**

**A Special Verdict Form has been prepared for your use. With respect to each**

**item of property** *(interest) (security) (claim) (contractual right)***, you are asked to decide whether it is subject to forfeiture to the government, based on the reasons I have explained to you. Your decision must be unanimous. Indicate on the verdict form whether you find that the property listed is subject to forfeiture, and then the foreperson should sign and date the form.**

***SPECIAL VERDICT FORM***

**We, the Jury, return the following Special Verdict as to the defendant** ***(name's)*** **interest in each item of property alleged in Count**(s) *(insert count number(s))* **to be subject to forfeiture by** *(name)* **to the United States:**

*(Insert dollar amount in United States currency and description of real property or other tangible or intangible personal property (interest) (security) (claim) (contractual right) as alleged in the indictment.)*

**Do you unanimously find by a preponderance of the evidence that this property** *(interest) (security) (claim) (contractual right)* **is subject to forfeiture?**

**YES _____**

**NO _____**

**This _____ day of _____, 20_____.**

**_____**

**Foreperson**

**Comment**

*See* Sand et al, supra, 52.33 (RICO Forfeiture). *See, e.g., Russello v. United States*, 464 U.S. 16 (1983); *United States v. Ofchinick*, 883 F.2d 1172 (3d Cir. 1989).

This instruction addresses criminal forfeiture after a conviction for a RICO violation, under 18 U.S.C. § 1963 (Criminal penalties), which provides in pertinent part:

> (a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law–
>
> (1) any interest the person has acquired or maintained in violation of section 1962;
> (2) any–
> (A) interest in;
> (B) security of;
> (C) claim against; or
> (D) property or contractual right of any kind affording a source of influence over;
> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and
> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.
>
> The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.
>
> * * *

The alternatives in the instruction cover the different bases for forfeiture under section 1963(a). The court should include the alternatives that fit the case.

**Other Criminal Forfeiture Statutes.** Congress enacted RICO forfeiture provision in 1970, the same year it enacted the controlled substances forfeiture provision (18 U.S.C. § 1963), which is the subject of Instruction 6.21.853 (Criminal Forfeiture of Property (Controlled Substances)). Since 1970, Congress has expanded the availability of criminal forfeiture to other federal criminal offenses, as discussed in the Comment to Instruction 6.21.853.

The RICO forfeiture provision is broader than the controlled substances provision with respect to the property subject to forfeiture. The RICO provision does not provide the rebuttable

presumption set forth in the controlled substances provision. *See* 21 U.S.C. § 853(d).

**Notice and Jury Determination.** Where criminal forfeiture is authorized by statute, a judgment of forfeiture can be considered in a particular case only when "the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute." Fed. R. Crim. P. 32.2(a). A jury determination that property is subject to forfeiture is required when a party requests it under Fed. R. Crim. P. 32.2(b)(4), which provides:

> (4) Jury Determination. Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

Rule 32.2 and the relevant statutes also provide that issues with respect to third party claims of ownership of or an interest in the property subject to forfeiture are to be determined by the trial judge on the petition of the third party, in an ancillary proceeding without a jury. *See, e.g.,* Fed. R. Crim. P. 32.2(c); 21 U.S.C. § 853(n).

**Burden of Proof.** Criminal forfeiture is part of the sentence authorized after conviction; it is not an element of the offense. *See, e.g., United States v. Libretti*, 516 U.S. 29, 41, 49 (1995) (holding, because forfeiture is not an element of the offense, there is no constitutional right to a jury determination of the issues relevant to forfeiture). As a result, there is no constitutional requirement that the issues with respect to forfeiture must be proved by the government beyond a reasonable doubt, and under most criminal forfeiture provisions, the government's burden of proof is a preponderance of evidence. *See* Comment to Instruction 6.21.853 (Criminal Forfeiture of Property (Controlled Substances) ( 21 U.S.C. § 853)).

Nevertheless, the Third Circuit has interpreted the RICO forfeiture statutory provision as imposing on the government the burden of proof beyond a reasonable doubt. *See, e.g., United States v. Pelullo*, 14 F.3d 881, 902-06 (3d Cir. 1994) (distinguishing cases applying the preponderance of evidence burden of proof for other forfeiture provisions); *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996) (noting that the RICO provision was the most far reaching federal criminal forfeiture provision and, therefore, the beyond a reasonable doubt standard was appropriate to insure a greater degree of fact finding accuracy).

# Bank Robbery (18 U.S.C. § 2113)

**6.18.2113A Bank Robbery - Unarmed - Elements of the Offense (18 U.S.C. § 2113(a))**

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with bank robbery, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **took money that was in the care, custody or possession of** *(name of bank)* **from** *(name of bank employee)* **or from** *(name of bank)* **while** *((name of bank employee was)(another person was)(others were))* **present;**

**Second: That** *(name)* **used** *(force and violence)(intimidation)***; and**

**Third: The deposits of** *(name of bank)* **were then insured by the** *(Federal Deposit Insurance Corporation)(Federal Savings & Loan Insurance Corporation)(National Credit Union Administration Board)***.**

*[The term "intimidation" means actions or words used for the purpose of making someone else fear bodily harm if he or she resists. It does not matter whether the victim was actually brave or timid. The actions or words must be such that they would intimidate an ordinary, reasonable person.]*

**Comment**

Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions § 57.03 [hereinafter O'Malley et al., supra]; First Circuit § 4.18.

18 U.S.C. § 2113(a) provides:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;
> * * *
> Shall be fined under this title or imprisoned not more than twenty years, or both.

If the charge is attempted bank robbery, the court should also give Instruction 7.01 (Attempt).

In addition to banks, as defined in § 2113(f), the statute also applies to robbery of credit unions as defined in § 2113(g) and savings and loan associations as defined in § 2113(h). The instruction does not contemplate use of any of these terms. As indicated, the language of the instruction should be adapted to reflect the applicable type of federal insurance.

In *United States v. Askari*, 140 F.3d 536, 541 (3d Cir. 1998), the Third Circuit addressed the meaning of intimidation under this provision. The court stated:

> In determining whether intimidation is present, an objective standard is employed from the perspective of the victim, i.e., "whether 'an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts.'" As used in § 2113(a), the term 'intimidation' means 'to make fearful or put into fear.'
> The Government is not required to show either an 'express verbal threat or threatening display of a weapon.' Actual fear need not be proven, if the acts of the defendant would threaten an ordinary reasonable person. Thus, the government need show only that an ordinary person in the teller's position would feel a threat of bodily harm from the perpetrator's acts. (citation omitted).

A defendant can be guilty of bank robbery under § 2113(a) without actually removing it from the bank him or herself. In *United States v. Alessandro*, 637 F.2d 131 (3d Cir. 1980), the Third Circuit concluded that two defendants were properly convicted under this section even though they merely retrieved money that was removed from the bank by a bank employee following their instructions because they were holding his wife hostage. The court concluded that the defendants had taken the money from the person or presence of the bank employee. Noting that the majority of circuits addressing similar facts had reached the same conclusion, the court stated:

> On this record, the money in the suitcase and bag was taken from [the bank employee] as a person and was in the care, custody, or management of the bank when deposited in the wooded area in Fort Lee known only to [the bank employee] and the defendants.

*Alessandro*, 637 F.2d at 144-45.

**6.18.2113D Bank Robbery - Armed - Elements of the Offense (18 U.S.C. § 2113(d))**

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with armed bank robbery, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:**

**First: That** *(name)* **took money that was in the care, custody or possession of** *(name of bank)* **from** *(name of bank employee)* **or from** *(name of bank)* **while** *((name of bank employee was)(another person was)(others were))* **present;**

**Second: That** *(name)* **used** *(force and violence)(intimidation)*;

**Third: That** *(name)* **intentionally** *[assaulted (name of person)][put the life of (name of person) in jeopardy]* **by the use of a dangerous weapon or device while taking the money; and**

**Fourth: The deposits of** *(name of bank)* **were then insured by the** *(Federal Deposit Insurance Corporation)(Federal Savings & Loan Insurance Corporation)(National Credit Union Administration Board)***.**

*[The term "intimidation" means actions or words used for the purpose of making someone else fear bodily harm if he or she resists. It does not matter whether the victim was actually brave or timid. The actions or words must be such that they would intimidate an ordinary, reasonable person.]*

*[An assault occurs whenever one person intentionally attempts or threatens to*

*injure someone else, and also has an apparent, present ability to carry out the threat such as by flourishing or pointing a dangerous weapon or device at the other. An "assault" may be committed without actually striking or injuring the other person.]*

*[To "put in jeopardy the life of any person by the use of a dangerous weapon or device" means to expose someone else to a risk of death by the use of a dangerous weapon or device.]*

**A "dangerous weapon or device" includes anything capable of being readily operated or wielded by one person to inflict severe bodily harm or injury upon another person.** *[The weapon or device need not actually be capable of inflicting severe bodily harm or injury upon another. Rather, a weapon or device may be considered dangerous if it instills fear in the average person.]*

*[To use a dangerous weapon (or device) means to actively employ the weapon (or device). This does not mean that the government must prove that (name) actually used the weapon (or device) to harm someone, although that would obviously constitute use of a weapon (or device). If (name) brandished or displayed a weapon (or device), or what reasonably appeared to those present to be a weapon, so others in the bank knew that it was available if needed, that is sufficient to constitute use of a weapon (or device). Similarly, if (name) referred to a weapon (or device) during the commission of the offense and actually possessed such weapon (or device), that is also sufficient to constitute use of a weapon (or device).*

*However, if (name) referred to a weapon (or device) during the offense but did not*

*actually possess the weapon (or device), that is not sufficient to constitute use of a weapon (or device). Likewise, if (name) possessed the weapon (or device) but kept it concealed and did not brandish, display, or refer to it during the commission of the offense, that is also not sufficient to constitute use of a weapon (or device).]*

**Comment**

O'Malley et al., supra, § 57.06; First Circuit § 4.18; Eleventh Circuit § 72.3.

18 U.S.C. § 2113(d) provides:

> Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

If the charge is attempted armed bank robbery, the court should also give Instruction 7.01 (Attempt).

The phrase "by the use of a dangerous weapon or device" modifies both the "assault" and "jeopardy" provisions of subsection (d). *See Simpson v. United States*, 435 U.S. 6, 11-12 n.6 (1978).

The government must establish that the defendant actually had a dangerous weapon and that the defendant used the weapon. In *United States v. Wolfe*, 245 F.3d 257, 262 (3d Cir. 2001), the court held that the trial court committed plain error when it instructed the jury:

> The fourth essential element that the government must prove beyond a reasonable doubt is that in committing the crime, the defendant deliberately and intentionally assaulted [the teller] or put her life in jeopardy by the use of a dangerous weapon .
> . . .
> * * *
> The government must prove beyond a reasonable doubt that the defendant, during the commission of a bank robbery, committed acts or said words that would have caused an ordinary person to reasonably expect to die or face serious injury by the defendant's use of a dangerous weapon.

*Wolfe*, 245 F.3d at 260-61. The court noted that the instruction erroneously suggested that the jury "could convict based solely on the teller's reasonable belief that Wolfe was armed." 245 F.3d at 263-64. The court concluded that the error was harmless.

In *United States v. Beckett*, 208 F.3d 140 (3d Cir. 2000), the Third Circuit held that the defendant, who robbed a bank using "hoax bomb" could properly be convicted under 18 U.S.C. § 2113(d) even though the bomb was incapable of harming anyone. The court held that the following instruction properly stated the requirements for conviction under the assault prong of section 2113(d):

> In order to sustain its burden of proof for the crime of armed bank robbery as charged in Count 2 of the indictment, the Government must first prove the three elements to be proved for bank robbery, as already stated. In addition, the Government must also prove that the defendant deliberately assaulted the Home Unity Savings Bank employees by the use of a dangerous weapon or device while taking the money. . . .
> The term dangerous weapon or device means any object that can be used by one person to inflict severe bodily harm or injury upon another person. The weapon or device need not actually be capable of inflicting severe bodily harm or injury upon another to be dangerous, rather, a weapon or device may be considered to be dangerous if it instills fear in the average citizen creating an immediate danger that a violent response will follow.

208 F.3d at 152.

The court cited *McLaughlin v. United States*, 476 U.S. 16, 17 (1986), in which the Supreme Court held that an unloaded gun is a "dangerous weapon" as that term is used in Section 2113(d), stating:

> First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.

If the defendant is charged with armed bank robbery and there is a question as to whether the facts support the charge of armed robbery or the charge of unarmed robbery under § 2113(a), the court may want to give the following lesser included offense instruction, based on Sand et al., supra, 53-16:

> If, after careful consideration of all of the evidence, you have a reasonable doubt whether the defendant committed the robbery by assaulting someone with a dangerous weapon or putting someone's life in jeopardy with a dangerous weapon, then you must find the defendant not guilty of armed bank robbery. You may then consider whether the defendant is guilty of the lesser included offense of simple bank robbery. Simple bank robbery differs from armed bank robbery in that the

government need not prove that the defendant accomplished the robbery by using a dangerous weapon to assault someone or jeopardize someone's life. However, the government must prove beyond a reasonable doubt all of the other elements of bank robbery that I have described to you.

**6.18.2113 -1 Bank Robbery - Inference From Possession of Recently Stolen Money**

**You have heard evidence that** *(name)* **was in possession of money recently stolen from** *(name of bank)***. If the government proves beyond a reasonable doubt that the money in question had recently been stolen from a bank, by force and violence or intimidation, and that the defendant was in possession of that recently stolen money, then you may, although you need not, find that the defendant participated in the robbery.**

**The term "recently" has no fixed meaning. Whether the money may be considered recently stolen depends upon all the facts and circumstances shown by the evidence of the case. The longer the period of time since the robbery, the more doubtful the connection between the defendant's possession of the money and the robbery.**

**Let me emphasize that you are not required to make the connection between the defendant's unexplained possession of recently stolen bank money and participation in the robbery. The mere fact that I am telling you about this connection does not mean that I am encouraging you to make it. You have the right to reject this connection if you deem it appropriate to do so, even if you find that** *(name)* **was in possession of the money in question. Remember that, at all times, the government has the burden of proving beyond a reasonable doubt that** *(name)* **participated in the robbery, and that** *(name)* **is not required to offer any explanation**

**at all.**

**Comment**

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 53-6 (Matthew Bender 2003).

In *United States v. Rispo*, 470 F.2d 1099, 1101 (3d Cir. 1973), a case addressing the defendants' challenge to convictions for, among other charges, transporting a stolen firearm, the Third Circuit considered the inference to be drawn from possession of recently stolen goods. The court noted that "such an instruction would be improper, absent proof of actual or constructive possession of the stolen property." The court went on to conclude that "[c]onsidering the evidence of such possession in this case, the court correctly charged that possession of the recently stolen property, not satisfactorily explained, was a circumstance from which the jury could infer that the persons in possession knew the property was stolen."

## Controlled Substances (21 U.S.C. §§ 841, 844, 846, 853)

| | |
|---|---|
| 6.21.841A | Controlled Substances – Possession with Intent to *(Manufacture) (Distribute)* (21 U.S.C. § 841(a) & (b)) |
| 6.21.841-1 | Controlled Substances – Possession Defined |
| 6.21.841-2 | Controlled Substances – Distribute Defined |
| 6.21.841-3 | Controlled Substances – Controlled Substance Defined |
| 6.21.841-4 | Controlled Substances – Knowingly or Intentionally Defined |
| 6.21.841-5 | Controlled Substances – Intent to Manufacture or Distribute Defined |
| 6.21.841B | Controlled Substances – *(Manufacture) (Distribute)* a Controlled Substance (21 U.S.C. § 841(a) & (b)) |
| 6.21.841C | Controlled Substances – Special Interrogatories and Verdict Forms With Respect to Weight |
| 6.21.844 | Controlled Substances – Possession (21 U.S.C. § 844) |
| 6.21.846A | Controlled Substances – Attempt to *(Distribute) (Possess with Intent to Manufacture / Distribute) (Manufacture) (Possess)* (21 U.S.C. § 846) |
| 6.21.846B | Controlled Substances – Conspiracy to *(Distribute) (Possess with Intent to Manufacture / Distribute) (Manufacture) (Possess)* (21 U.S.C. § 846) |
| 6.21.853 | Criminal Forfeiture of Property (21 U.S.C. § 853) |

## 6.21.841A Controlled Substances – Possession with Intent to *(Manufacture) (Distribute)* (21 U.S.C. § 841(a) & (b))

**Count** *(no.)* **of the indictment charges** *(name of defendant)* **with possessing** *[X grams or more of]* **a mixture or substance containing a controlled substance, specifically** *(identity of controlled substance)*, **with the intent to** *(manufacture) (distribute)* **the controlled substance, which is a violation of federal law.**

**In order to find** *(name)* **guilty of this offense, you must find that the government proved each of the following four** *[five – see Alternative 2 below]* **elements beyond a reasonable doubt:**

**First: That** *(name)* **possessed a mixture or substance containing a controlled substance;**

**Second: That** *(name)* **possessed the controlled substance knowingly or intentionally;**

**Third: That** *(name)* **intended to** *(manufacture) (distribute)* **the controlled substance; and**

**Fourth: That the controlled substance was** *(identity of controlled substance)*.

*[When the indictment alleges one of the weight thresholds authorizing increased maximum penalties under 21 U.S.C. § 841(b) or the government otherwise seeks the increased maximum penalties based on the weight thresholds, use one of the following alternatives:*

***Alternative 1***

*Use the appropriate Verdict Form with Special Interrogatories With Respect to Substance Identity and Weight, as provided in Instruction 6.21.841C.*

***Alternative 2***

*Give the following additional instruction, and also consider giving a lesser included offense instruction on possession with intent to (distribute) (manufacture) a weight meeting a lower maximum penalty threshold:*

*Fifth: That the weight of the mixture or substance containing the controlled substance was (approximate weight) (X grams or more).]*

**Comment**

*See* Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 2B *Federal Jury Practice and Instructions* (5th ed. 2000) [hereinafter O'Malley et al] § 64.07; First Circuit § 4.22; Fifth Circuit § 2.87; Eighth Circuit § 6.21.841A & § 6.21.841A1 (*Apprendi*-Affected, Short & Long Forms); Ninth Circuit § 9.13; Eleventh Circuit § 85.

21 U.S.C. § 841(a) provides:

> (a) Unlawful acts. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

This instruction should be used when the offense charged is possession with intent to manufacture or distribute a controlled substance. Instruction 21.841B should be used when the offense charged is manufacture or distribution of a controlled substance.

**Authorized Penalties Depend on Identity and Weight of Controlled Substance.** 21 U.S.C. § 841(b) sets forth the authorized penalties for violation of (a)(1) and (2). These penalties vary depending on the identity and, in some cases, the weight of the controlled substance manufactured, distributed or possessed with the intent to manufacture or distribute. *See* the Drug Penalties Chart in the Comment to Instruction 6.21.841C. If the government does not prove a specific type of controlled substance, the

maximum authorized sentence is, by default, one year in prison. 21 U.S.C. § 841(b)(3). *See, e.g., United States v. Barbosa*, 271 F.3d 438 (3d Cir. 2001); *United States v. Vasquez*, 271 F.3d 93 (3d Cir. 2001).

Ordinarily, the government will charge and prove a specific type of controlled substance; this element is covered in the "Fourth" paragraph of the instruction. If the government proves and the jury finds that the controlled substance is, for example, heroin, cocaine, cocaine base, or methamphetamine, the maximum penalty is 20 years in prison and $1 million fine regardless of the weight of the substance.

**Alternatives With Respect to Weight Thresholds.** In cases in which the indictment alleges or the government otherwise seeks to prove a weight threshold that would authorize higher maximum penalties under 21 U.S.C. § 841(b), different practices are followed in different districts. In some districts, trial judges include, in the section 841(a) instruction, weight of the substance as an element of the offense. In other districts, a weight element is not included in the offense instruction, but instead the jury is asked to make a finding on weight by answering special interrogatories after it has found the defendant guilty of the offense. This instruction provides for flexibility in handling this issue by providing bracketed alternatives with respect to the weight of the substance. *See* discussion of *Apprendi* below. If special interrogatories are used, *see* Instruction 6.21.841C.

**Identity and Weight of Controlled Substance as Elements of the Offenses.** With respect to the offenses defined by 21 U.S.C. § 841(a), the Third Circuit has held that, if the government seeks a penalty of more than the one year default maximum, the identity of the controlled substance alleged must be treated as an element of the offense that must be found by the jury beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *United States v. Barbosa*, 271 F.3d 438 (3d Cir. 2001). In *Apprendi*, the Supreme Court held that, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. In *United States v. Vasquez*, 271 F.3d 93 (3d Cir. 2001), the Third Circuit also held that weight of the controlled substance must be treated as an element when the weight exceeds the thresholds for the different maximum penalties authorized under 21 U.S.C. § 841(b).

The Third Circuit summarized its decisions on this point in *United States v. Henry*, 282 F.3d 242, 246-47 (3d Cir 2002):

> We recently addressed the quantity and identity issues, respectively, in *United States v. Vazquez,* 271 F.3d 93 (3d Cir.2001) (en banc), and *United States v. Barbosa,* 271 F.3d 438 (3d Cir.2001). In *Vazquez* we held that "an *Apprendi* violation . . . occurs if the drug *quantity* is not found by a jury beyond a reasonable

> doubt and the defendant's sentence under § 841 exceeds [the statutory maximum]." *Vazquez,* 271 F.3d at 98 (emphasis added). Similarly, in *Barbosa* we held that drug *identity* must be found by a jury beyond a reasonable doubt when the "defendant would be exposed to greater punishment depending upon ... the identity of the controlled substance." *Barbosa,* 271 F.3d at 454. Although neither *Vazquez* nor *Barbosa* established a bright line rule that drug quantity and/or identity is *always* an element that must be found beyond a reasonable doubt by a jury, inasmuch as both identity and quantity are relevant to determining what the statutory maximum is when the sentence imposed is greater than the "catch-all" maximum of one year, we conclude that, under *Vazquez* and *Barbosa, Apprendi* has been violated in this case.

In reasoning that refers explicitly to the identity of the controlled substance, but is equally applicable to the weight, the court in *Henry* explained further (282 F.3d at 248):

> Recognizing that prior cases had concluded that drug identity was a sentencing factor, not an element of the crime that had to be submitted to the jury, we did not go so far as to decide that identity is always an element. *Cf. Vazquez,* 271 F.3d at 108 (Becker, C.J., concurring) ("[D]rug type and quantity are *always* elements of an offense under § 841, and therefore must *always* be submitted to the jury for proof beyond a reasonable doubt.") (emphasis in original). Rather, we reaffirmed that "even after *Apprendi*, drug identity will not always be an element of a § 841(a) offense.... So long as the resulting, and possibly enhanced, sentence is below *the statutory maximum authorized by the jury's factual findings*, no *Apprendi* problem exists." *Barbosa,* 271 F.3d at 456-57 (emphasis added). However, what we did conclude in *Barbosa* is that in cases where drug identity is not known or found by the jury, "drug identity would not be an element [only] in those cases where the sentence imposed is below the lowest 'catch-all' maximum of one year found in § 841(b)(3)...." *Id.* at 457. This result was driven by our observation that, without a jury determination on the particular substance, we cannot assume the identity and, thereby, the provision under which the individual should be sentenced. Thus, the rule of *Barbosa* is that when the jury's factual findings do not include a finding as to the identity of the drug beyond a reasonable doubt, *Apprendi* will be violated when the sentence exceeds the lowest "catch-all" statutory maximum of one year. *See* 21 U.S.C. § 841(b)(3).

The weight thresholds also trigger mandatory minimum penalties under 21 U.S.C. § 841(b). The Supreme Court held in *Harris v. United States*, 536 U.S. 545 (2002), that facts which create mandatory minimum penalties need not be found by the jury beyond a reasonable doubt and may be determined by the judge at sentencing, although the status of the decision may be questioned after *Booker v. United States*, 543 U.S. 220 (2005). *See, e.g., United States v. Barragan-Sanchez*, 165 Fed. Appx.758, 760 (11th Cir. 2006)

(not precedential); *United States v. Ezell*, 417 F. Supp 2d 667, 670 (E.D. Pa.2006).

**Lesser Included Offenses.** Simple possession, possession with intent to distribute (or manufacture) a weight meeting a lower maximum penalty threshold, and possession with intent to distribute (or manufacture) an unspecified amount of controlled substance are lesser included offenses of possession with intent to distribute (or manufacture) a specific amount of controlled substance. *United States v. Lacy*, 446 F.3d 448 (3d Cir. 2006); *United States v. Johnson*, 292 Fed. Appx. 178, 180-81 (3d Cir. 2008) (non-precedential) (after citing *Lacy* for the propositions stated above, the Third Circuit noted, although "there is out-of-circuit authority that distribution of powder cocaine is a lesser included offense of distribution of cocaine base," citing *United States v. Lacey*, 511 F.3d 212, 215 (D.C.Cir.2008), "[t]he question of whether possession with intent to distribute cocaine is a lesser included offense of possession with intent to distribute cocaine base" was not clearly answered by Third Circuit precedent and did not need to be resolved on the record in the case before it.). The trial judge should, therefore, consider Instruction No. 3.11 (Lesser Included Offenses). The trial judge should also consider the need to give an instruction on attempt to possess with intent to distribute (or manufacture). *See* Instructions Nos. 7.01 and 6.21.846A; Fed. R. Crim. P. 31(c) (Jury Verdict – Lesser Included Offense or Attempt).

**Resulting Death or Serious Bodily Injury.** Under 21 U.S.C. § 841(b), the maximum penalties available are also increased "if death or serious bodily injury results from the use of such substance." When the indictment alleges or the government otherwise seeks to prove resulting death or serious bodily injury, the jury must find "death or serious bodily injury" beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *See Jones v. United States,* 526 U.S. 227, 230 (1999) (predecessor to *Apprendi*; addressing the federal carjacking statute, which provides three different maximum penalties depending on the extent of harm to the victim, including 25 years if there was serious bodily injury and life in prison if death resulted, the Court "concluded that the harm to the victim was an element of the crime. . . ." *United States v. Booker*, 543 U.S. 220, 230 (2005)).

As with the weight issue, the trial judge may ask the jury to consider resulting death or serious bodily injury by way of special interrogatories answered after it finds the defendant guilty of the offense. *See* Instruction 6.21.841C. Alternatively, the trial judge may include in the offense instruction a "death or serious bodily injury" element, as follows: "*[(Fifth) (Sixth), that death or serious bodily injury resulted from the use of the controlled substance.]*" Under this alternative, the judge should also consider instructing on the lesser included offense of possession with intent not resulting in death or serious injury.

**Additional Controlled Substances Offenses.** Congress has supplemented the

core offenses under 21 U.S.C. § 841 with several additional offenses carrying increased maximum penalties, when the core section 841 crimes are committed under certain specified circumstances. For example, 21 U.S.C. § 860 provides that the penalties for manufacturing, distributing, and possessing with intent to distribute are doubled or tripled when the offense is committed within a specified distance of a school or other facility regularly used by children. Specifically, 21 U.S.C. § 860(a) provides:

> Any person who violates section 841(a)(1) of this title . . . by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is (except as provided in subsection (b) of this section) subject to (1) twice the maximum punishment authorized by section 841(b) of this title; and (2) at least twice any term of supervised release authorized by section 841(b) of this title for a first offense. A fine up to twice that authorized by section 841(b) of this title may be imposed in addition to any term of imprisonment authorized by this subsection. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a person shall be sentenced under this subsection to a term of imprisonment of not less than one year. The mandatory minimum sentencing provisions of this paragraph shall not apply to offenses involving 5 grams or less of marihuana.

Also *see, e.g.,* 21 U.S.C. § 860(c) (Employing children to distribute drugs near schools and playgrounds); 21 U.S.C. § 859 (Distribution to persons under age of twenty-one); 21 U.S.C. § 861 (Employment or use of persons under 18 years of age in drug operations).

The Third Circuit has held that these statutes create separate substantive offenses in addition to the core section 841 offenses, and are not merely sentence enhancement provisions. *See, e.g., United States v. McQuilkin*, 78 F.3d 105, 108 (3d Cir. 1996) ("21 U.S.C. § 860 is a separate substantive offense, not a sentence enhancement provision."). However, the Third Circuit has joined other circuits in holding that the mental state element for the 21 U.S.C. § 860 prohibition of possession with intent to distribute controlled substances within a specified distance of a school or other facility regularly used by children is found in the underlying 841(a)(1) possession with intent to distribute offense (*i.e.*, knowing possession of narcotics with intent to distribute). The government does not have to prove that the defendant either had knowledge that he was possessing narcotics within the specified distance or intended to distribute the narcotics within that area. *United States v. Jackson*, 443 F.3d 293, 299 (3d Cir. 2006).

If the defendant is charged with one of these separate offenses, the trial judge must

give a separate instruction on that offense. For example, if the indictment includes a charge of possession with intent to distribute a controlled substance within the prescribed distance of a school or other specified, youth related facility, the trial judge should give the following additional instruction:

> Count *(no.)* of the indictment charges *(name)* with possessing with intent to distribute) a controlled substance in or near a *(school) (playground) (public housing facility) (youth center, or [specify the other type of facility charged])*. This is a separate violation of federal law in addition to the offense of possession with intent to distribute) a controlled substance generally, which is charged in Count *(no.)*.
>
> In order to find *(name)* guilty of this offense, in addition to the elements that I have already explained to you, you must also find that the government proved beyond a reasonable doubt that *(name)* possessed with intent to distribute a controlled substance *[in or on, or within 1000 feet of the property comprising a (public or private elementary, vocational, or secondary school) (public or private college, junior college, or university) (playground) (housing facility owned by a public housing authority)] [within 100 feet of a (public or private youth center) (public swimming pool) (video arcade facility)]*.
>
> The government need not prove that, when (*name*) possessed the controlled substance, he knew that he was *[in or on, or within 1000 feet of the property comprising a (public or private elementary, vocational, or secondary school) (public or private college, junior college, or university) (playground) (housing facility owned by a public housing authority)] [within 100 feet of a (public or private youth center) (public swimming pool) (video arcade facility)]*. Nor does the government have to prove that (*name*) intended to distribute the controlled substance *[in or on, or within 1000 feet of the property comprising a (public or private elementary, vocational, or secondary school) (public or private college, junior college, or university) (playground) (housing facility owned by a public housing authority)] [within 100 feet of a (public or private youth center) (public swimming pool) (video arcade facility)]*.

A similar instruction must be given if the defendant is charged with any of the other separate, increased penalty offenses. With respect to the enhanced penalties for offenses involving firearms and drug trafficking, *see* Instructions 6.18.924A, A-1, B, B-1.

The Third Circuit has also recognized that the underlying section 841 offense is a lesser included offense of the additional offenses. *See, e.g., United States v. Peterson*, – F.3d –, 2010 WL 3817087 (3d Cir. 2010) (holding that possession with intent to distribute under 21 U.S.C. § 841(a) is a lesser included offense of possession with intent to

distribute in a school zone under 21 U.S.C. § 860(a)); *United States v. Jackson*, 443 F.3d 293 (3d Cir.2006) (same); *United States v. Johnson*, 292 Fed. Appx. 178, 180 (3d Cir. 2008) (non-precedential) ("It is self-evident by the very language of § 860 that § 841(a)(1) is a lesser included offense, and every circuit to have addressed the issue has so held."). The trial judge should, therefore, consider Instruction No. 3.11 (Lesser Included Offenses).

**Accomplice Liability: Aiding and Abetting Controlled Substances Offenses.** If the defendant is charged (under 18 U.S.C § 2(a)) with aiding and abetting a controlled substance possession or distribution offense, the government must prove " 'that [the defendant] had knowledge of the [drugs], had knowledge that [the principal] intended to distribute or possess [drugs], or purposefully intended to aid others in committing the crime alleged.' " *United States v. Salmon,* 944 F.2d 1106, 1114 (3d Cir.1991) (quoting *United States v. Wexler,* 838 F.2d 88, 92 (3d Cir.1988). Also *see, e.g., United States v. Soto*, 539 F.3d 191, 194-97 (3d Cir. 2008), distinguishing *United States v. Chandler*, 359 F.3d 281 (3d Cir. 2004), in which the Third Circuit continued, "Based on this well-established precedent, the proper question before us with respect to both the conspiracy and the aiding and abetting charges is 'whether there was sufficient evidence that [the alleged accomplice] knew that the subject matter of the transaction was a controlled substance, rather than some other form of contraband, such as stolen jewels or computer chips or currency.' " 359 F.3d at 288 (quoting *United States v. Idowu,* 157 F.3d 265, 266 (3d Cir.1998)). Most recently, in *United States v. Boria*, 592 F.3d 476, (3d Cir. 2010), the Third Circuit discussed this point and reviewed its precedent in upholding the sufficiency of the evidence to sustain a conviction for conspiracy to possess controlled substances with the intent to distribute. *See* Comment to Instruction 6.21.846B (Controlled Substances – Conspiracy to (Distribute) (Possess with Intent to Manufacture / Distribute) (Manufacture) (Possess) (21 U.S.C. § 846)).

Therefore, where the evidence warrants, the trial court should include this point in its instruction with respect to accomplice liability for controlled substance offenses. *See* Instruction 7.02 (Accomplice Liability: Aiding and Abetting (18 U.S.C. § 2(a)).

(Revised 11/10)

**6.21.841-1 Controlled Substances – Possession Defined**

**To "possess" a controlled substance means to have it within a person's control. The government does not have to prove that** *(name)* **physically held the controlled substance, that is, had actual possession of it. As long as the controlled substance was within** *(name)***'s control,** *(he) (she)* **possessed it. If you find that** *(name)* **either had actual possession of the controlled substance or had the power and intention to exercise control over it, even though it was not in** *(name)***'s physical possession - that is, that** *(name)* **had the ability to take actual possession of the substance when** *(name)* **wanted to do so - you may find that the government has proved possession. Possession may be momentary or fleeting. Proof of ownership of the controlled substance is not required.**

*[The law also recognizes that possession may be sole or joint. If one person alone possesses a controlled substance, that is sole possession. However, more than one person may have the power and intention to exercise control over a controlled substance. This is called joint possession. If you find that (name) had such power and intention, then (he) (she) possessed the controlled substance even if (he) (she) possessed it jointly with another.]*

*[Mere proximity to the controlled substance or mere presence on the property where it is located or mere association with the person who does control the controlled substance or the property is not enough to support a finding of possession.]*

**Comment**

*See* Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal* (2003) [hereinafter, Sand et al.] 35-49; 2B O'Malley et al, supra, § 64.08. This instruction is the same as Instruction 6.18.922-5 with respect to possession of a firearm.

**Constructive Possession.** To convict the defendant of possession or possession with the intent to distribute a controlled substance, the government must establish that the defendant possessed the controlled substance. Possession may be actual or constructive. To establish constructive possession the government must prove that the defendant knew of the object and had control over it. In *United States v. Brown*, 3 F.3d 673 (3d Cir. 1993), the Third Circuit stated:

> Although the government need not show proof of actual possession, to show "constructive" possession of an illegal substance the government must submit sufficient evidence to support an inference that the individual "knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons. Constructive possession necessarily requires both 'dominion and control' over an object and knowledge of that object's existence."

3 F.3d at 680 (citing *United States v. Iafelice*, 978 F.2d 92 (3d Cir. 1992)). *See also United States v. Iglesias,* 535 F.3d 150, 156 (3d Cir.2008) ("Constructive possession, which can be proved by circumstantial evidence, 'requires an individual to have the power and intent to exercise both dominion and control over the object he or she is charged with possessing.' " citations omitted); *United States v. Smith*, 352 Fed.Appx. 709, 713 (3d Cir. 2009) (non-precedential) (evidence sufficient to establish defendant's constructive possession of the drugs and firearm found atop a cabinet at his residence); *United States v. Brightwell*, 104 Fed.Appx. 823 (3d Cir. 2004) (affirming conviction for possessing a firearm in relation to a drug trafficking crime on basis of constructive possession); *United States v. Garth*, 188 F.3d 99, 112 (3d Cir.1999) (holding that prosecution had failed to establish that defendant had constructive possession).

The instruction does not use the terms "constructive possession" or "dominion," which are commonly used by the courts when discussing the legal concept of possession. Jurors cannot be expected to understand these terms. However, if the attorneys have used either or both of these terms during the trial, the court may chose to modify the instruction accordingly.

**Mere Presence.** If the government's case rests heavily on the defendant's presence in combination with other circumstances, the court may wish to include the

optional language instructing the jury that mere presence or association is not sufficient to establish possession. It is clear that mere presence or association is insufficient to prove possession. *See United States v. Davis*, 461 F.2d 1026, 1036 (3d Cir. 1972) (addressing possession of drugs). In *United States v. Stewart*, 131 Fed.Appx. 350, 354 (3d Cir. 2005) (not precedential), however, the Third Circuit held that the defendant was not entitled to a "mere presence" instruction because the jury instructions given adequately conveyed the requirements for constructive possession:

> The instructions concerning actual and constructive possession were legally correct and complete. The District Court made clear that, in order to have actual possession of an object, a person must have direct physical control or authority over the object, such as the control one has when one holds an object in one's hands. And in order to have "constructive" possession over an object, the District Court explained, a person must have the ability to take actual possession of the object when the person wants to do so. Because mere proximity, mere presence, or mere association is not enough for even constructive possession, these instructions adequately conveyed to the jury that constructive possession is not established by mere proximity, mere presence, or mere association.

(Revised 11/10)

## 6.21.841-2 Controlled Substances – Distribute Defined

**Distribute** *(To distribute)***, as used in the offenses charged, means** *(deliver or transfer) (to deliver or to transfer)* **possession or control of a controlled substance from one person to another.**

**Distribute** *(To distribute)* **includes the sale of a controlled substance by one person to another, but does not require a sale. Distribute also includes a** *(delivery) (transfer)* **without any financial compensation, such as a gift or trade.**

**Comment**

The Notes to 2B O'Malley et al, supra, § 64.04 state: "This instruction is based, in part, upon 21 U.S.C.A. § 802(8) and § 802(11). Section 802(8) defines 'deliver' or 'delivery' to mean the 'actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship.' Section 802(11) defines 'distribute' to mean 'to deliver *(other than by administering or dispensing)* a controlled substance.' A 'distributor' is one 'who so delivers a controlled substance.' 21 U.S.C.A. § 802(11). Distribution simply involves an unlawful transfer--a sale or exchange of money or other 'commercial' item is not required. See United States v. Coady, 809 F.2d 119, 124 (1st Cir.1987); United States v. Workopich, 479 F.2d 1142, 1147 (5th Cir.1973); United States v. Ramirez, 608 F.2d 1261, 1264 (9th Cir.1979)."

## 6.21.841-3 Controlled Substances – Controlled Substance Defined

**You are instructed that, as a matter of law,** *(identity of controlled substance alleged in the indictment)* **is a controlled substance, that is, some kind of prohibited drug.**

**It is solely for you, however, to decide whether the government has proved beyond a reasonable doubt that** *(name) (distributed) (possessed with the intent to distribute) (manufactured) (possessed)* **a mixture or substance containing** *(identity of controlled substance alleged)***.**

**Comment**

2B O'Malley et al, supra, § 64.13.

**6.21.841-4 Controlled Substances Offenses – Knowingly or Intentionally Defined**

**To act knowingly, as used in the offense***(s)* **charged, means that** *(name)* **was conscious and aware that** *(he) (she)* **was engaged in the act***(s)* **charged and knew of the surrounding facts and circumstances that make out the offense***(s)*. **Knowingly does not require that** *(name)* **knew that the acts charged and surrounding facts amounted to a crime.**

**To act intentionally, as used in the offense***(s)* **charged, means to act deliberately and not by accident. Intentionally does not require that** *(name)* **intended to violate the law.**

**The phrase "knowingly or intentionally," as used in the offense***(s)* **charged, requires the government to prove beyond a reasonable doubt that** *(name)* **knew that what** *(he) (she) (distributed) (possessed with intent to distribute) (manufactured) (possessed)* **was a controlled substance. In addition, the government must also prove beyond a reasonable doubt that the controlled substance was in fact** *(identity of the specific controlled substance alleged) [and that the weight of the controlled substance was (X grams or more)]*. **However, as long as you find that the government proved beyond a reasonable doubt that** *(name)* **knew that what** *(he) (she) (manufactured) (distributed) (possessed)* **was a controlled substance, you need not find that** *(name)* **knew that the controlled substance was** *(identity of the specific controlled substance alleged) [or that (name) knew that the weight of the controlled substance was (X grams or more)]*.

**In deciding whether *(name)* acted "knowingly or intentionally," you may consider evidence about what *(name)* said, what *(name)* did and failed to do, how *(name)* acted, and all the other facts and circumstances shown by the evidence that may prove what was in *(name)*'s mind at that time.**

**Comment**

The language of this instruction is based on the general definitions of knowingly and intentionally, stated in Instructions 5.02 (Knowingly) and 5.03 (Intentionally), modified in accordance with the Third Circuit's opinion in *United States v. Barbosa*, 271 F.3d 438, 457-58 (3d Cir. 2001), about the meaning of these two mental states with respect to controlled substances offenses. Also *see* O'Malley § 6.15 (Knowledge of precise controlled substance need not be proven).

**No Need To Prove Awareness of Specific Type of Controlled Substance or Weight.** In *Barbosa*, the Third Circuit held that although the identity of the specific controlled substance alleged must usually be treated as an element of the offense, which must be found by a jury beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the mental state requirements knowingly, intentionally, and intent to distribute in 21 U.S.C. § 841(a) do not require the government to prove that the defendant was aware that he possessed, etc, the specific substance alleged. That is, although the government must prove the identity of the controlled substance in order to increase the available maximum sentence beyond the one year in prison default maximum, the government only needs to prove beyond a reasonable doubt that the defendant knew that he or she was possessing, etc., a controlled substance generally. Thus, in *Barbosa* the evidence was sufficient to sustain the defendant's conviction of possession with intent to distribute, even though it was essentially undisputed that the defendant honestly believed that the cocaine he possessed was in fact heroin.

In those cases in which the weight of the controlled substance affects the maximum penalty available under 21 U.S.C. § 841(b), whether the weight exceeds the thresholds for greater maximum penalties must also be treated as an element of the offense under *Apprendi*. *See* the Comment to Instruction 21.841C. *United States v. Vasquez*, 271 F.3d 93 (3d Cir.2001) (en banc). Although the Third Circuit has not addressed whether the mental state requirements for controlled substance offenses applies to this weight element, it is likely the court will also hold that the government need not prove that the defendant was aware of the weight of the mixture or substance containing the controlled substance. With respect to the controlled substance offenses, the Third Circuit has treated the identity and weight elements similarly under *Apprendi*. *See, e.g., United States v. Lacy*, 446 F.3d 448, 453 (3d Cir. 2006); *United States v. Barbosa*, 271 F.3d 438, 457-58 (3d Cir. 2001); *Vasquez v. United States*, 271 F.3d 93 (3d Cir.2001) (en banc). Identity and weight serve the same function as determinants of the various penalty ranges under 21 U.S.C. § 841(b), and Congress likely intended the same mental state analysis with respect to

both.

**Alternatives Regarding Weight Thresholds.** The bracketed language in the third paragraph should be used when the government seeks to prove the weight thresholds that would authorize the higher maximum penalties and the court follows the alternative of instructing that weight of the controlled substance is an element of the offense, rather than the alternative of asking the jury to make a finding on weight through special interrogatories after it has found the defendant guilty of the offense.

**6.21.841-5 Controlled Substances – Intent to *(Manufacture) (Distribute)* Defined**

**In order to find *(name)* guilty of possession of a controlled substance with intent to *(manufacture) (distribute)*, as charged in Count *(no.)* of the indictment, you must find that the government proved beyond a reasonable doubt that *(name)* intended to *(manufacture) (distribute)* a mixture or substance containing a controlled substance. To find that *(name)* had the intent to *(manufacture) (distribute)*, you must find that *(name)* had in mind or planned in some way *(to manufacture a controlled substance) (to deliver or transfer possession or control over a controlled substance to someone else)*.**

**In determining whether *(name)* had the intent to *(manufacture) (distribute)* you may consider all the facts and circumstances shown by the evidence presented, including *(name's)* words and actions. In determining *(name's)* intent to distribute controlled substances, you may also consider, among other things, the quantity and purity of the controlled substance, the manner in which the controlled substance was packaged, and the presence or absence of weapons, large amounts of cash, or equipment used in the processing or sale of controlled substances.**

**Comment**

*See* 2B O'Malley et al, supra, § 64.09. This is a clear example of the traditional specific intent element, meaning that the government is required to prove that it was the defendant's purpose or conscious object to commit the unlawful act.

The relevant portions of the second sentence of the second paragraph should be used when supported by the evidence. *See, e.g., United States v. Lee*, 174 Fed. Appx. 60, 62 (3d Cir. 2006) (not precedential) (evidence sufficient to prove intent to distribute where the defendant was arrested with 30, $10 packets of crack cocaine and stuffed into his waistband, as well as

$746 in United States currency, in addition to testimony that he was a seller); *United States v. Johnson*, 302 F.3d 139, 149 (3d Cir. 2002) (evidence sufficient to find intent to distribute where it showed that, when confronted by U. S. Marshals, defendant appeared to stuff fifteen bags of marijuana in a taxi's back seat cushions, his companion said the bags were his not hers; defendant had sixty-two small plastic bags of crack cocaine in his coat pocket; a bag found at his companion's residence contained documents bearing defendant's name and fingerprint, scores of small plastic bags filled with crack cocaine, cocaine, and marijuana, extensive drug paraphernalia, and a loaded gun; she testified the bag belonged to defendant).

## 6.21.841B Controlled Substances – *(Manufacture) (Distribute)* a Controlled Substance (21 U.S.C. § 841(a) & (b))

**Count** *(no.)* **of the indictment charges the defendant** *(name of defendant)* **with** *(manufacturing) (distributing) [X grams or more]* **of a mixture or substance containing a controlled substance, specifically** *(identity of controlled substance alleged)*, **which is a violation of federal law.**

**In order to find** *(name)* **guilty of this offense, you must find that the government proved each of the following three** *[four – see Alternative 2 below]* **elements beyond a reasonable doubt:**

**First: That** *(name) (manufactured) (distributed)* **a mixture or substance containing a controlled substance;**

**Second: That** *(name) (manufactured) (distributed)* **the controlled substance knowingly or intentionally;**

**Third: That the controlled substance was** *(identity of controlled substance)*.

*[When the indictment alleges one of the weight thresholds authorizing increased maximum penalties under 21 U.S.C. § 841(b) or the government otherwise seeks the increased maximum penalties based on the weight thresholds, use one of the following alternatives:*

***Alternative 1***

*Use the appropriate Verdict Form with Special Interrogatories With Respect to Substance Identity and Weight, as provided in Instruction 6.21.841C.*

***Alternative 2***

*Give the following additional instruction, and also consider giving a lesser included offense instruction on distribution or manufacture of a weight meeting a lower maximum penalty threshold:*

*Fourth: That the weight of the mixture or substance containing the controlled substance was (approximate weight) (X grams or more).]*

**Comment**

*See* 2B O'Malley et al, supra, § 64.03; First Circuit §§ 4.23-4.24; Eighth Circuit § 6.21.841B; Ninth Circuit § 9.15; Tenth Circuit § 2.85.1.

21 U.S.C. § 841(a) provides in pertinent part:

> (a) Unlawful acts. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense . . . a controlled substance. . . .

21 U.S.C. § 841(b) sets forth the authorized penalties for violation of (a)(1). These penalties vary depending on the identity and, in some cases, the weight of the controlled substance manufactured, distributed or possessed with the intent to manufacture or distribute. *See* the Drug Penalties Chart in the Comment to Instruction 6.21.841C.

**Identity and Weight of Controlled Substance as Elements; Alternatives.** As discussed in the Comment to Instruction 6.21.841A, with respect to the offenses defined by 21 U.S.C. § 841(a), the Third Circuit has held that the identity and quantity of controlled substance involved usually must be treated as elements of the offense charged that must be found by the jury beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Ordinarily, the government will charge and prove a specific type of controlled substance; this element is covered in the *Third* paragraph of the instruction. If the government proves and the jury finds that the controlled substance is, for example, heroin, cocaine, cocaine base, and methamphetamine, the maximum penalty is 20 years in prison and $1 million fine regardless of the weight of the substance. In cases in which the indictment alleges or the government otherwise seeks to prove a weight threshold that would authorize higher maximum penalties under 21 U.S.C. § 841(b), different practices are followed in different districts. Like Instruction 6.21.841A, this instruction provides for flexibility in handling this issue by providing bracketed alternatives with respect to the

weight of the substance. *See* discussion in Comment to Instruction 6.21.841A. If special interrogatories are used, *see* Instruction 6.21.841C.

**Death or Serious Bodily Injury.** Under 21 U.S.C. § 841(b), the maximum penalties available are also increased "if death or serious bodily injury results from the use of such substance." When the indictment alleges or the government otherwise seeks to prove resulting death or serious bodily injury, to authorize the increased penalties available under this provision, the jury must find "death or serious bodily injury" beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The trial judge may ask the jury to consider resulting death or serious bodily injury by way of special interrogatories answered after it finds the defendant guilty of the core offense. *See* Instruction 6.21.841C. Alternatively, the trial judge may include in the offense instruction a "death or serious bodily injury" element, as follows: "*[(Fourth) (Fifth), that death or serious bodily injury resulted from the use of the controlled substance.]*" Under this alternative, the judge should also consider instructing on the lesser included offense of possession with intent not resulting in death or serious injury. *See* Comment to Instruction 6.21.841A.

**Additional Controlled Substances Offenses.** As discussed in the Comment to Instruction 6.21.841A (Controlled Substances – Possession with Intent to *(Manufacture) (Distribute)*), Congress has supplemented the core offenses under 21 U.S.C. § 841 with several additional offenses carrying increased maximum penalties, when the core section 841 crimes are committed under certain specified circumstances. For example, 21 U.S.C. § 860 provides that the penalties for manufacturing, distributing, and possessing with intent to distribute are doubled or tripled when the offense is committed within a specified distance of a school or other facility regularly used by children. These statutes create separate substantive offenses in addition to the core section 841 offenses, but the Third Circuit has held that the mental state element for the 21 U.S.C. § 860 is found in the underlying 841 offense, and that the government does not have to prove that the defendant knew he was within the specified distance or intended to distribute or manufacture the controlled substance within that area. *United States v. Jackson*, 443 F.3d 293, 299 (3d Cir. 2006).

If the defendant is charged with one of these separate offenses, the trial judge must give a separate instruction on that offense, modifying the instruction suggested in the Instruction 6.21.841A Comment to fit the distribution or manufacture offense charged.

**Lesser Included Offenses.** Distribution (or manufacture) of a weight meeting a lower maximum penalty threshold, distribution (or manufacture) of an unspecified amount of controlled substance, possession with intent to distribute (or manufacture), and simple possession are lesser included offenses of distribution (or manufacture) of a specific amount of controlled substance. *See United States v. Lacy*, 446 F.3d 448 (3d Cir.

2006). The trial judge should, therefore, consider Instruction No. 3.11 (Lesser Included Offenses). The trial judge should also consider the need to give an instruction on attempt to distribute (or manufacture). *See* Instructions No. 7.01 and 21.846A. *See* Fed. R. Crim. P. 31(c) (Jury Verdict – Lesser Included Offense or Attempt).

(Revised 11/10)

## 6.21.841C Controlled Substances – Verdict Form with Special Interrogatories With Respect to Substance Identity and Weight *[Death or Serious Bodily Injury]*

*[The following verdict form and special interrogatories may be used when the indictment charges or the government otherwise seeks to prove the weight thresholds (or resulting death or serious bodily injury) which would authorize the higher maximum penalties under 21 U.S.C. § 841(b). See the alternatives set forth in Instructions 6.21.841A and B, and discussed in the Comments to those instructions.]*

**If you find** *(name)* **guilty of the offense charged in Count** *(no.)***, you must answer some questions, called jury interrogatories, to decide whether the offense involved certain weig hts or quantities of controlled substances. Do not answer these jury interrogatories until after you have reached your verdict. If you find that the government has not proved** *(name)* **guilty of the offense charged in Count** *(no.)***, then you do not need to answer the interrogatories.**

**If you find** *(name)* **guilty, then in answering these interrogatories, as in deciding your verdict, you must be unanimous, and in order to find that the offense involved a certain weight or quantity of controlled substances, you must all be satisfied that the government proved the weight or quantity beyond a reasonable doubt. Weight or quantity means the total weight of any mixture or substance which contains a detectable amount of the controlled substance charged.**

**Jury Interrogatory Number One relates to Count** (*no.*) **and first asks whether you unanimously find beyond a reasonable doubt that the weight or quantity of** (*type*

*of controlled substance*) **which was** (*possessed with intent to distribute*) (*distributed*) (*involved in the conspiracy*) **was** *(X grams or more)***.** *[For conspiracy charge: In making this decision, you should consider all controlled substances that the members of the conspiracy actually (possessed with intent to distribute) (distributed) (intended to distribute).]*

**If your answer to this question is "yes," that completes Jury Interrogatory Number One. If your answer is "no," you must then answer the second question, whether you unanimously find beyond a reasonable doubt, that the quantity of** (*type of controlled substance*) **which was** (*possessed with intent to distribute*) (*distributed*) (*involved in the conspiracy*) **was** *(next lower threshold)* **or more.**

**If you unanimously find that the government did not prove beyond a reasonable doubt that the offense involved** (*lowest threshold*) **or more, but rather involved an amount less than** (*lowest threshold*)**, your answer should be "no" to both questions. That completes Jury Interrogatory Number One.**

(*Add instructions regarding all thresholds and all counts.*)

**VERDICT FORM with SPECIAL INTERROGATORIES**

**COUNT NO. __ (Possession With Intent to Manufacture or Distribute)**

**_____ Guilty**

**_____ Not Guilty**

**If you find** *(name of defendant)* **not guilty of possession with intent to** *(manufacture)*

*(distribute)* **a controlled substance as charged in Count No. __, please proceed to the next count; do not answer the jury interrogatories. If you find** *(name)* **guilty of possession with intent to** *(manufacture) (distribute)* **a controlled substance as charged in Count No. __, please answer the following jury interrogatories before proceeding to the next count.**

**JURY INTERROGATORY COUNT NO. __ (Possession With Intent to Manufacture or Distribute):**

**Do you unanimously find that the government proved beyond a reasonable doubt that the weight of the mixture or substance containing** *(identity of controlled substance)* **that** *(name)* **possessed with intent to** *(manufacture) (distribute)* **was** *(X grams or more)***?**

**_____ Yes**

**_____ No**

**If your answer to this questions is "yes," that concludes this Jury Interrogatory. Do not go on to the next question. If your answer to this question is "no," please answer the following question:**

**Do you unanimously find that the government proved beyond a reasonable doubt that the weight of the mixture or substance containing** *(identity of controlled substance)* **that** *(name)* **possessed with intent to** *(manufacture) (distribute)* **was** *(X grams or more – one of the lower thresholds; if necessary a separate interrogatory should be given for each lower threshold that applies)***?**

**_____ Yes**

**_____ No**

**COUNT NO. __ (Manufacture or Distribute)**

**_____ Guilty**

**_____ Not Guilty**

**If you find** *(name of defendant)* **not guilty of** *(manufacture) (distribution)* **of a controlled substance as charged in Count No. __, please proceed to the next count; do not answer the jury interrogatories. If you find** *(name)* **guilty of** *(manufacture) (distribution)* **of a controlled substance as charged in Count No. __, please answer the following jury interrogatories before proceeding to the next count.**

**JURY INTERROGATORY COUNT NO. __ (Manufacture or Distribution):**

**Do you unanimously find that the government proved beyond a reasonable doubt that the weight of the mixture or substance containing** *(identity of controlled substance)* **that** *(name) (manufactured) (distributed)* **was** *(X grams or more)***?**

**_____ Yes**

**_____ No**

**If your answer to this questions is "yes," that concludes this Jury Interrogatory. Do not go on to the next question. If your answer to this question is "no," please answer the following question:**

**Do you unanimously find that the government proved beyond a reasonable**

**doubt that the weight of the mixture or substance containing** *(identity of controlled substance)* **that** *(name) (manufactured) (distributed)* **was** *(X grams or more – one of the lower thresholds; if necessary a separate interrogatory should be given for each lower threshold that applies)***?**

**_____ Yes**

**_____ No**

**COUNT NO. __ (Conspiracy)**

**_____ Guilty**

**_____ Not Guilty**

**If you find** *(name of defendant)* **not guilty of the conspiracy as charged in Count No. __, please proceed to the next count; do not answer the jury interrogatories. If you find** *(name)* **guilty of the conspiracy as charged in Count No. __, please answer the following jury interrogatories before proceeding to the next count.**

**JURY INTERROGATORY COUNT NO. __ (Conspiracy):**

**Do you unanimously find that the government proved beyond a reasonable doubt that the weight of the mixture or substance containing** *(identity of controlled substance)* **involved in the conspiracy to** *(possess with intent to distribute or manufacture) (manufacture) (distribute)* **which you have found was** *(X grams or more)***?**

**_____ Yes**

**_____ No**

**If your answer to this questions is "yes," that concludes this Jury Interrogatory. Do not go on to the next question. If your answer to this question is "no," please answer the following question:**

**Do you unanimously find that the government proved beyond a reasonable doubt that the weight of the mixture or substance containing** *(identity of controlled substance)* **that** *(name)* **involved in the conspiracy to** *(possess with*

*intent to manufacture or distribute) (manufacture) (distribute)* **which you have found was** *(X grams or more – one of the lower thresholds; if necessary a separate interrogatory should be given for each lower threshold that applies)***?**

**_____ Yes**

**_____ No**

*[When the indictment alleges that death or serious bodily injury resulted from the use of the controlled substance involved in the offense or the government otherwise seeks increased maximum penalties under 21 U.S.C. § 841(b) based on resulting death or serous injury, the following special interrogatory may be used:*

*If you find (name of defendant) not guilty of the offense charged in Count No. __, please proceed to the next count; do not answer the jury interrogatory. If you find (name) guilty of the offense charged in Count No. __, please answer the following jury interrogatory before proceeding to the next count.*

*JURY INTERROGATORY COUNT NO. __:*

*Do you unanimously find that the government proved beyond a reasonable doubt that death or serious bodily injury resulted from the use of the controlled substance?*

*_____ Yes*

*_____ No]*

**Comment**

*See* 2B O'Malley et al, supra, § 64.14 (should not be followed in *Apprendi*-affected cases); Eighth Circuit § 6.21.841A.1 (Verdict Form; with Lesser Included Offense). The interrogatories and verdict forms provided in this instruction are based on those "prepared by the Office of the United States Attorney for the Eastern District of Pennsylvania and used without incident or problem by the judges of the district court ...." *United States v. Vasquez*, 271 F.3d 93, 114 (3d Cir. 2001 (Becker, C.J., concurring).

**Special Interrogatories as Alternatives.** The special interrogatories may be used, as one of the alternatives in Instructions 6.21.841A and B, in cases in which the government seeks to prove the weight thresholds that would authorize the higher maximum penalties under 21 U.S.C. § 841(b). *See* Comments to Instructions 6.21.841A and B. *Also see* discussion of special interrogatories in the Comment to Instruction No. 3.18 (Special Verdict Form; Special Interrogatories). When the government seeks the increased penalties available under 21 U.S.C. § 841(b) "if death or serious bodily injury results from the use of such substance," the trial judge may use the bracketed special interrogatory at the end of this instruction.

**Determining Weight of Controlled Substance For Conspiracy Charge.** Where the defendant is charged with conspiracy to violate the controlled substances provisions under 21 U.S.C. § 846, the weight or quantity thresholds for the maximum authorized penalties are determined based on the weight or quantity involved in the entire conspiracy, not merely the weight or quantity that the particular defendant conspired to possess, distribute, or manufacture. *See* Comment to Instruction 6.21.846B (Controlled Substances – Conspiracy to *(Distribute) (Possess with Intent to Manufacture / Distribute) (Manufacture) (Possess)*(21 U.S.C. § 846)). However, where multiple conspiracies are alleged and the defendant was not involved in a single overall conspiracy or in all of the multiple conspiracies, the special interrogatory with respect to conspiracy may need to be modified.

**Drug Penalties Chart.** The weight thresholds and maximum sentences for the most commonly charged controlled substances (with or without "death or serious bodily injury"), provided by 21 U.S.C. § 841(b), are set forth in the following chart (provided by the office of the United States Attorney for the Eastern District of Pennsylvania).

## DRUG PENALTIES FOR INDIVIDUALS

| | | PRIOR CONVICTIONS | | |
|---|---|---|---|---|
| | | NONE | ONE | TWO |
| HIGH QUANTITY - § 841(b)(1)(A) - no death or serious bodily injury | | | | |
| ≥5 kilograms cocaine<br>≥1 kilogram heroin<br>≥50 grams crack cocaine<br>≥50 grams meth<br>≥500 grams meth mixture<br>≥1000 kg or plants marijuana | minimum imprisonment | 10 years | 20 years | life |
| | maximum imprisonment | life | life | life |
| | maximum fine | $4 million | $8 million | $8 million |
| | min. supervised release | 5 years | 10 years | n/a |
| | special assessment | $100 | $100 | $100 |
| HIGH QUANTITY - § 841(b)(1)(A) - death or serious bodily injury | | | | |
| ≥5 kilograms cocaine<br>≥1 kilogram heroin<br>≥50 grams crack cocaine<br>≥50 grams meth<br>≥500 grams meth mixture<br>≥1000 kg or plants marijuana | minimum imprisonment | 20 years | life | life |
| | maximum imprisonment | life | life | life |
| | maximum fine | $4 million | $8 million | $8 million |
| | min. supervised release | 5 years | n/a | n/a |
| | special assessment | $100 | $100 | $100 |
| MEDIUM QUANTITY - § 841(b)(1)(B) - no death or serious bodily injury | | | | |
| ≥500 grams cocaine<br>≥100 grams heroin<br>≥5 grams crack cocaine<br>≥5 grams meth<br>≥50 grams meth mixture<br>≥100 kg or plants marijuana | minimum imprisonment | 5 years | 10 years | 10 years |
| | maximum imprisonment | 40 years | life | life |
| | maximum fine | $2 million | $4 million | $4 million |
| | min. supervised release | 4 years | 8 years | 8 years |
| | special assessment | $100 | $100 | $100 |
| MEDIUM QUANTITY - § 841(b)(1)(B) - death or serious bodily injury | | | | |
| ≥500 grams cocaine<br>≥100 grams heroin<br>≥5 grams crack cocaine<br>≥5 grams meth<br>≥50 grams meth mixture<br>≥100 kg or plants marijuana | minimum imprisonment | 20 years | life | life |
| | maximum imprisonment | life | life | life |
| | maximum fine | $2 million | $4 million | $4 million |
| | min. supervised release | 4 years | n/a | n/a |
| | special assessment | $100 | $100 | $100 |
| LOW QUANTITY - § 841(b)(1)(C) - no death or serious bodily injury | | | | |
| <500 grams cocaine<br><100 grams heroin<br><5 grams crack cocaine<br>< 5 grams meth<br><50 grams meth mixture<br>>50 kg or plants marijuana* | minimum imprisonment | none | none | none |
| | maximum imprisonment | 20 years | 30 years | 30 years |
| | maximum fine | $1 million | $2 million | $2 million |
| | min. supervised release | 3 years | 6 years | 6 years |
| | special assessment | $100 | $100 | $100 |
| LOW QUANTITY - § 841(b)(1)(C) - death or serious bodily injury | | | | |
| <500 grams cocaine<br><100 grams heroin<br><5 grams crack cocaine<br><5 grams meth<br><50 grams meth mixture<br>>50 kg or plants marijuana* | minimum imprisonment | 20 years | life | life |
| | maximum imprisonment | life | | |
| | maximum fine | $1 million | $2 million | life |
| | min. supervised release | 3 years | n/a | n/a |
| | special assessment | $100 | $100 | $100 |

* for <50 kg or plants marijuana, see § 841(b)(1)(D)

## 6.21.844 Controlled Substance – Possession (21 U.S.C. § 844)

**Count** *(no.)* **of the indictment charges the defendant** *(name of defendant)* **with possessing** *[X grams or more]* **of a mixture or substance containing a controlled substance, specifically** *(identity of controlled substance)***, which is a violation of federal law.**

**In order to find** *(name)* **guilty of this offense, you must find that the government proved each of the following** *(two) (four)* **elements beyond a reasonable doubt:**

**First: That** *(name)* **possessed a mixture or substance containing a controlled substance; and**

**Second: That** *(name)* **possessed the controlled substance knowingly or intentionally.**

*[When the indictment charges possession of cocaine base and alleges one of the weight thresholds authorizing increased maximum penalties under 21 U.S.C. § 844, use one of the following alternatives:*

***Alternative 1***

*Use a Verdict Form with Special Interrogatories With Respect to Substance Identity and Weight of the type provided in Instruction 6.21.841C.*

***Alternative 2***

*Give the following additional instructions and consider giving a lesser included offense instruction on possession of an amount of cocaine base meeting a lower maximum penalty threshold:*

*Third: That the controlled substance was cocaine base; and*

*Fourth: That the weight of the mixture or substance containing the controlled substance was (approximate weight) (X grams or more).]*

**Comment**

2B O'Malley et al, supra, § 64.12.

21 U.S.C. § 844(a) provides in part:

> (a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter." The penalties prescribed under § 844(a) are "a term of imprisonment of not more than 1 year, and . . . a minimum fine of $1,000, or both. . . . . Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram.

**Identity and Weight of Cocaine Base as Elements; Alternatives.** Under this provision, the authorized maximum penalties for possession of a controlled substance depend on the identity and quantity of the substance only when possession of cocaine base is charged. (The authorized maximum penalty for possession of a controlled substance other than cocaine base is the same regardless of the type and weight of the substance possessed.) As a result, when the charge is possession of cocaine base and the government seeks a penalty greater than the default penalties for possession of a controlled substance generally, identity and weight must be treated as elements of the offense and found by the jury beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *United States v. Lacy*, 446 F.3d 448, 453 (3d Cir. 2006), the Third Circuit stated, "Although we have not previously discussed this issue in the context of a section 844 simple possession offense, we conclude that applying *Apprendi* to that statute yields the same result that we reached with respect to section 841: drug identity and quantity should be considered the functional equivalents of elements of a simple possession offense when they increase a defendant's maximum statutory sentence exposure." *See* discussion in the Comment to Instruction 6.21.841A.

Accordingly, when possession of cocaine base is charged, the trial judge should either

instruct that there are four elements of the offense and give the *Third* and *Fourth* elements stated in the bracketed portion of this instruction, or obtain jury findings on these issues by asking the jury to answer a special interrogatory of the type set forth in Instruction 6.21.841C, after it has found the defendant guilty.

## 6.21.846A Controlled Substances – Attempt to *(Distribute) (Possess with Intent to Manufacture / Distribute) (Manufacture) (Possess)* **(21 U.S.C. § 846)**

*[For recommended instruction, see Instruction 7.01 (Attempt).]*

**Comment**

*See* Eighth Circuit § 6.21.846B; Ninth Circuit § 9.14 & § 9.16.

21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter [dealing with controlled substances] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

**Attempt Defined.** With respect to conspiracy under this provision, the Supreme Court has recognized, according to "the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 513 U.S. 10, 13-14 (1994). This same principle has also been applied to attempt under various federal statutes. *See, e.g., United States v. Earp*, 84 Fed. Appx. 228, 232-34 (3d Cir 2004) (unpublished opinion); *United States v. Hsu*, 155 F.3d 189, 202-03 (3d Cir. 1998); *United States v. Cicco*, 10 F.3d 980, 984-85 (3d Cir. 1993); *United States v. Cruz-Jiminez*, 977 F.2d 95, 102 (3d Cir. 1992); *United States v. Kikumura*, 918 F.2d 1084, 1108 (3d Cir. 1990); *United States v. Everett*, 700 F. 2d 900, 903-04 (3d Cir. 1983). The law with respect to attempt under federal criminal statutes, is set forth in Instruction 7.01 (Attempt) and in the Comment to that instruction.

As discussed in the Comment to Instruction 6.21.841A, identity and, in some cases, weight must be treated as elements of the controlled substance offense and found by the jury beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because the penalties for attempt under 21 U.S.C. § 846 are the same as those prescribed for the controlled substance offense(s) that was (were) the object of the attempt, identity and quantity of the controlled substance involved must be treated as elements of attempt in those cases in which they would be treated as elements of the offense attempted. Accordingly, when the trial judge instructs on the elements of the controlled substance offense(s) the defendant is charged with attempting, the judge should instruct on the identity and weight elements or adapt the special interrogatories set forth in Instruction 6.21.841C. *See* Instructions 6.21.841A, B, and C, and the Comments to these instructions.

**6.21.846B Controlled Substances – Conspiracy to** *(Distribute) (Possess with Intent to Manufacture / Distribute) (Manufacture) (Possess)*
**(21 U.S.C. § 846)**

**Count** *(no.)* **of the indictment charges that on or about the___ day of _____, 2__, in the _____ District of _____,** *(name)* **agreed or conspired with one or more other person***(s)* **to** *(distribute) (possess with the intent to distribute) (manufacture) (possess)* **a controlled substance.**

**It is a federal crime for two or more persons to agree or conspire to commit any offense against the United States, even if they never actually achieve their objective. A conspiracy is a kind of criminal partnership.**

**In order for you to find** *(name)* **guilty of conspiracy to** *(distribute) (possess with the intent to distribute) (manufacture) (possess)* **a controlled substance, you must find that the government proved beyond a reasonable doubt each of the following three (3) elements:**

**First: That two or more persons agreed to** *(distribute) (possess with the intent to distribute) (manufacture) (possess)* **a controlled substance.** *(I have explained the elements of this offense already.) (I will explain the elements of this offense to you shortly.)***;**

**Second: That** *(name)* **was a party to or member of that agreement; and**

**Third: That** *(name)* **joined the agreement or conspiracy knowing of its objective***(s)* **to** *(distribute) (possess with the intent to distribute) (manufacture) (possess)* **a controlled substance and intending to join together with at least one**

**other alleged conspirator to achieve that** *(those)* **objective***(s)***; that is, that** *(name)* **and at least one other alleged conspirator shared a unity of purpose and the intent to achieve that** *(those)* **objective***(s)***.**

**I will explain these elements in more detail.**

*[The trial court should also give the applicable, additional conspiracy instructions provided in Instructions 6.18.371C-E and G-L.]*

**Comment**

*See* Fifth Circuit § 2.89; Eighth Circuit § 6.21.846A & § 6.21.846A.1 (*Apprendi* - Affected); Eleventh Circuit § 87; Tenth Circuit § 2.87.

21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter (dealing controlled substances laws) shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

**Conspiracy to Commit Controlled Substances Offenses Defined.** Conspiracy to commit a controlled substances offense under 21 U.S.C. § 846 is generally defined the same as under the general conspiracy statute 18 U.S.C. § 371, except that 21 U.S.C. § 846 does not include an overt act requirement. When the charge is conspiracy under 21 U.S.C. § 846, the trial judge should also give the instructions with respect to conspiracy generally that are applicable in the case. *See* Instructions 6.18.371C - E and G - L. If the defendant is charged in the same case both with conspiracy under 18 U.S.C. § 371 and with conspiracy under 21 U.S.C. § 846, the trial judge must be careful to make clear that an overt act is required with respect to the former but not the latter.

In *United States v. Boria*, 592 F.3d 476, 481-82 (3d Cir. 2010) (footnotes omitted), the Third Circuit reiterated a point it had made in several previous cases:

> To sustain a conviction for conspiracy with intent to distribute a controlled substance, we have consistently required the Government to introduce drug-related evidence, considered with the surrounding circumstances, from which a rational trier of fact could logically infer that the defendant knew a controlled substance was involved in the transaction at issue. In a series of cases, this Court has been

> reluctant to uphold drug conspiracy convictions unless the Government introduces evidence from which the jury could infer knowledge of drugs, as opposed to some other contraband. *See, e.g., United States v. Cooper,* 567 F.2d 252, 254-55 (3d Cir.1977); *United States v. Wexler,* 838 F.2d 88, 92 (3d Cir.1988); *United States v. Salmon,* 944 F.2d 1106, 1114-15 (3d Cir.1991); *Thomas,* 114 F.3d at 406; *United States v. Idowu,* 157 F.3d 265, 270 (3d Cir.1998); *Cartwright*, 359 F.3d at 291. Despite the presence of otherwise suspicious circumstances, we have nevertheless required some additional piece of evidence imputing knowledge of drugs to the defendant.

The court in *Boria* reviewed the previous cases in which it had held that evidence was not sufficient to allow the jury to infer that the defendant knew a controlled substance was involved in the transaction (*id.* at 482-84, discussing the cases cited in the quote above) and two cases in which it had held that the evidence was sufficient. *Id.* 484-85, discussing *United States v. Reyeros*, 537 F.3d 270 (3d Cir.2008), *cert. denied,* --- U.S. ----, 129 S.Ct. 2780 (2009); *United States v. Iafelice,* 978 F.2d 92 (3d Cir.1992). The court then concluded that, in the case before it the evidence was sufficient to sustain the controlled substances conspiracy conviction, specifically that "[a] rational trier of fact could infer that [the defendant] knew drugs were involved based on [a co-conspirator's] testimony and the suspicious circumstances under which [the defendant] became associated with the tractor-trailer," with "[t]he 'truly distinguishing fact' " being the co-conspirator's testimony. *Id.* at 485-85 (quoting *United States v. Iafelice*, 978 F.2d 92, 97 (3d Cir. 1992). In cases in which this point is contested, the trial court may want to emphasize in its instructions that the government must persuade the jury that the defendant knew the conspiracy involved controlled substances.

**No Overt Act Requirement.** As to the lack of an overt act element under 21 U.S.C. § 846, the Supreme Court explained in *United States v. Shabani*, 513 U.S. 10, 13-14 (1994):

> The language of [21 U.S.C. § 846 does not] require that an overt act be committed to further the conspiracy, and we have not inferred such a requirement from congressional silence in other conspiracy statutes. . . .
>
> *Nash [ v. United States,* 229 U.S. 373 (1913)] and *Singer* [ *v. United States,* 323 U.S. 338 (1945)] follow the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms. See *Molzof v. United States,* 502 U.S. 301, 307-308, 112 S.Ct. 711, 715-716, 116 L.Ed.2d 731 (1992). We have consistently held that the common law understanding of conspiracy "does not make the doing of any act other than the act of conspiring a condition of liability." *Nash, supra,* 229 U.S., at 378, 33 S.Ct., at 782; see also *Collins v. Hardyman,* 341 U.S. 651, 659, 71 S.Ct. 937, 941, 95 L.Ed.

1253 (1951); *Bannon v. United States,* 156 U.S. 464, 468, 15 S.Ct. 467, 469, 39 L.Ed. 494 (1895) ("At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy ...").

> [W]e find it instructive that the general conspiracy statute, 18 U.S.C. § 371, contains an explicit requirement that a conspirator "do any act to effect the object of the conspiracy." In light of this additional element in the general conspiracy statute, Congress' silence in § 846 speaks volumes. After all, the general conspiracy statute preceded and presumably provided the framework for the more specific drug conspiracy statute. "*Nash* and *Singer* give Congress a formulary: by choosing a text modeled on § 371, it gets an overt-act requirement; by choosing a text modeled on the Sherman Act, 15 U.S.C. § 1, it dispenses with such a requirement." *United States v. Sassi,* 966 F.2d 283, 284 (CA7 1992). Congress appears to have made the choice quite deliberately with respect to § 846.

**Identity and Weight of Controlled Substance Involved in Conspiracy.** As with attempt under 21 U.S.C. § 846, the penalties for conspiracy under 21 U.S.C. § 846 are the same as those prescribed for the controlled substance offense(s) that was (were) the object of the conspiracy. Accordingly, when the trial judge instructs on the elements of the controlled substance offense the defendant is charged with conspiring to commit, the judge should instruct on the identity and weight elements or should use the special interrogatories set forth in Instruction 6.21.841C. *See* Instructions 6.21.841A, B, and C, and the Comments to these instructions.

In *United States v. Phillips*, 349 F.3d 138 (3d Cir. 2003), the Third Circuit held that, under *Apprendi v. New Jersey,* 530 U.S. 466 (2000), a jury in a multi-defendant drug conspiracy case need only determine the amount of drugs involved in the conspiracy as a whole, not the amount attributable to each defendant. Finding persuasive the analyses of cases from other circuits, the court reasoned (349 F.3d at 142-43):

> In drug conspiracy cases, *Apprendi* requires the jury to find only the drug type and quantity element as to the conspiracy as a whole, and not the drug type and quantity attributable to each co-conspirator. The finding of drug quantity for purposes of determining the statutory maximum is, in other words, to be an offense-specific, not a defendant-specific, determination. The jury must find, beyond a reasonable doubt, the existence of a conspiracy, the defendant's involvement in it, and the requisite drug type and quantity involved in the conspiracy as a whole. Once the jury makes these findings, it is for the sentencing judge to determine by a preponderance of the evidence the drug quantity attributable to each defendant and sentence him or her accordingly, provided that the sentence does not exceed the applicable statutory maximum.

In *Phillips*, the Third Circuit affirmed the trial court's instruction to the jury to decide, beyond a reasonable doubt, only the amount of crack involved in the conspiracy itself, and upheld sentences for the individual defendants that were within the statutory maximum of life imprisonment triggered by the jury's finding that the amount of crack attributable to the conspiracy was 50 or more grams. 349 F.3d at 140.

(Revised 11/10)

## 6.21.853 Criminal Forfeiture of Property (21 U.S.C. § 853)

*[If the indictment contains notice that the government will seek forfeiture of property as part of sentencing in accordance with 21 U.S.C. § 853 and, if a party requests a jury determination under Fed. R. Crim . P. 32.2(b)(4) that the property is subject to forfeiture, the trial court should instruct the jury regarding this matter at three points during the trial proceedings.*

*First: When the court instructs the jury at the end of trial with respect to its deliberations and the trial verdict, the court should alert the jury that:*

> ***Depending on the verdict you reach, there may be a brief additional proceeding after you have returned your verdict.***

*Second: If the jury has returned a guilty verdict, at the outset of the forfeiture proceeding before the jury, the trial court should explain preliminarily the nature and purpose of the forfeiture proceeding that is about to take place, as follows:*

> ***You have found*** *(name)* ***guilty of*** *(state the offense(s))****, as charged in Count****(s) (no.)* ***of the indictment. You will now need to consider a further question regarding property that the indictment alleges is subject to forfeiture by*** *(name)* ***to the government. Forfeiture means that*** *(name)* ***would lose any ownership or interest*** *(he) (she)* ***has or claims to have in the specified property, as a part of the penalty for engaging in criminal activity. After the parties have presented any additional evidence on this subject, I will instruct you further on the law with respect to forfeiture. In considering whether the property is subject to forfeiture,***

***you should consider the evidence you have already heard and any additional evidence presented by the parties. You should evaluate that evidence and its credibility as I explained to you earlier in my instructions.***

*Third: At the end of the forfeiture proceeding, the trial court should give the instruction below.]*

**You have found** *(name)* **guilty of** *(state the offense(s))***, as charged in Count**(s) *(No.)* **of the indictment. You now need to consider a special verdict concerning property that the indictment alleges is subject to forfeiture by** *(name)* **to the government. Forfeiture means that** *(name)* **would lose any ownership or interest** *(he) (she)* **has or claims to have in the specified property, as a part of the penalty for engaging in criminal activity. I instruct you that you are bound by your previous finding that** *(name)* **is guilty of** *(state the offense(s))***.**

**Under federal law, any person convicted of** *(state the offense(s))* **shall forfeit to the government any property that is the proceeds of the offense, any property that was derived from the proceeds of the offense, and any property that was used or was intended to be used to commit or to facilitate the commission of the offense** *[in the case of a person convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848, add: and any property that provided the person with a source of control over or that represents his or her interest in or claim against the continuing criminal enterprise]***.**

**In deciding whether property is subject to forfeiture, you should not concern**

**yourself with or consider whether any other person may own or have an interest in the property. I will resolve any such claims. Similarly, you are not to consider whether the property is presently available. Your only concern is whether the government has proven the required connection between the property and the offense***(s)* **for which you have found** *(name)* **guilty.**

**Count** *(no.)* **allege***(s)* **that** *(describe the particular property alleged to be subject to forfeiture)* **should be forfeited because of the connection between this property and** *(name's)* **commission of** *(state offense(s) asserted as the basis for forfeiture)***.** *[Describe as to each count for which there has been a conviction, the specific property alleged to be subject to forfeiture.]* **This property is subject to forfeiture if you find that the government has proved by a preponderance of the evidence either:**

**First: That the property is or was derived from any proceeds** *(name)* **obtained, directly or indirectly, as a result of the offense***(s)* **for which you have found** *(him) (her)* **guilty; or**

**Second: That the property was used, or was intended to be used, in any manner or part, to commit or to facilitate the commission of an offense***(s)* **for which you have found** *(name)* **guilty.**

*[In the case of a person convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848: or Third, the property provided (name) with a source of control over, or represented (his) (her) interest in or claims against, the*

*continuing criminal enterprise.]*

**Property is "proceeds" of a controlled substance offense if the property was obtained directly or indirectly, as a result of the offense. Property "was derived" from the proceeds of a controlled substance offense if the property was obtained, directly or indirectly, using money or any other source of wealth gained as a result of the commission of the offense.**

**Property that "was used, or was intended to be used, in any manner or part, to commit or to facilitate the commission of an offense" means property that makes the commission of the offense easier or which is used to assist in the commission of the offense. This includes, but is not limited to, property that is used or intended to be used to purchase, manufacture, transport, store, conceal, or protect the controlled substances used in the offense, or the persons committing the offense. Property that was used or was intended to be used to commit or facilitate the offense is subject to forfeiture even if only a portion of it was so used, or if it was also used for other purposes.**

**You may, but you are not required to, find that the property is subject to forfeiture if you find that the government established by a preponderance of the evidence: (1) that the property was acquired by** *(name)* **during the time period when** *(name)* **was committing the offense***(s)* **for which you have found** *(him) (her)* **guilty, or within a reasonable time after the commission of that** *(those)* **offense***(s)***, and (2) that there was no likely source for the property other than the offense***(s)* **for which you**

**have found *(name)* guilty.**

**Preponderance of the evidence is a lower standard than proof beyond a reasonable doubt, which is the standard you applied in your previous deliberations. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. If you put the credible evidence that is favorable to government and the credible evidence that is favorable to *(name)* on opposite sides of a scale, the scale would have to tip somewhat on the government's side in order for you to find that the property is subject to forfeiture. However, if the scale tips in favor of *(name)*, or if the credible evidence appears to be equally balanced, or if you cannot say on which side the credible evidence is weightier, then you must find that the property is not subject to forfeiture.**

**In making this determination, you should consider all of the evidence presented on the subject during this proceeding and during the trial, regardless of who offered it. All of my previous instructions continue to apply, and you should evaluate the evidence and its credibility according to the instructions I gave you earlier.**

**A Special Verdict Form has been prepared for your use. With respect to each item of property, you are asked to decide whether it is subject to forfeiture to the government, based on the reasons I have explained to you. Your decision must be unanimous. Indicate on the verdict form whether you find that the property listed is subject to forfeiture, and then the foreperson should sign and date the form.**

## *SPECIAL VERDICT FORM*

**We, the Jury, return the following Special Verdict as to the defendant** *(name's)* **interest in each item of property alleged in Count**(s) *(insert count number(s))* **to be subject to forfeiture by** *(name)* **to the United States:**

*(Insert dollar amount in United States currency and description of real property or other tangible or intangible personal property as alleged in indictment.)*

**Do you unanimously find by a preponderance of the evidence that this property is subject to forfeiture?**

**YES _____**

**NO _____**

**This _____ day of _____, 20_____.**

**_____**

**Foreperson**

**Comment**

*See* Eighth Circuit § 6.21.853 (Controlled Substances); Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal* (2003) [hereinafter, Sand et al.] 52.06 (RICO Forfeiture).

This instruction addresses criminal forfeiture after a conviction for a controlled substance offense, under 21 U.S.C. § 853 (Criminal Forfeiture), which provides in pertinent part:

> (a) Property subject to criminal forfeiture
> Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law–
>
> (1) any property constituting, or derived from, any proceeds the person

obtained, directly or indirectly, as the result of such violation;
(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. . . .

(b) Meaning of term "property"
Property subject to criminal forfeiture under this section includes--
(1) real property, including things growing on, affixed to, and found in land; and
(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities. . . .

(d) Rebuttable presumption
There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that–
(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and
(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter. . . .

21 U.S.C. § 853(a), (b), (d).

**Other Criminal Forfeiture Statutes.** In 1970, when Congress enacted this controlled substances forfeiture provision, it also enacted a RICO forfeiture provision (18 U.S.C. § 1963). The RICO provision is broader than the controlled substances provision with respect to the property subject to forfeiture, but the RICO provision does not provide the rebuttable presumption set forth in subsection (d) of the controlled substances provision. With respect to the RICO forfeiture provision, *see* Instruction 6.18.963 (RICO – Criminal Forfeiture of Property (18 U.S.C. § 1963)).

Since 1970, Congress has expanded the availability of criminal forfeiture to other

federal criminal offenses. For example, 18 U.S.C. § 982 provides for criminal forfeiture as part of the sentence for persons convicted of a number of federal crimes, including money laundering, and mail, bank and wire fraud. Also, *see, e.g.,* 18 U.S.C. § 1467 (obscene materials); 18 U.S.C. § 2253 (exploitation of children in producing obscene materials); 18 U.S.C. § 924(d)(1) (firearms and ammunition used or involved in a knowing violation of the federal firearms act and other federal criminal statutes); 18 U.S.C. § 3665 (firearms possessed by convicted felons); 18 U.S.C. §§201, 981(a)(1)(C), 3666 (bribery); 18 U.S.C. § 3667 (liquors and related property).

Further, in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. 106-185, § 16, Apr. 25, 2000, 114 Stat. 221, Congress enacted 28 U.S.C. § 2461(c), which provides that a forfeiture judgment may be obtained in any criminal prosecution on the basis of a violation for which a civil forfeiture provision but no corresponding criminal forfeiture provision exists. The Third Circuit confirmed this expansion of the reach of criminal forfeiture proceedings in *United States v. Vampire Nation*, 451 F.3d 189, 198-201 (3d Cir. 2006). In addition, Section 2461(c), as amended by the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177, Title IV, § 410, Mar. 9, 2006, 120 Stat. 192, 246, directs that the criminal forfeiture procedures in 21 U.S.C. § 853 are the controlling procedures for all criminal forfeiture cases with the exception of § 853(d)'s rebuttable presumption provision, which applies only to forfeiture under the Controlled Substances Act.

Except in RICO forfeiture cases, where a different forfeiture provision is charged, the Controlled Substances forfeiture instructions should be modified to reflect the standard for forfeiture stated in the particular provision. For example, the provision at 18 U.S.C. § 981(a)(1)(C), which is applicable by virtue of 28 U.S.C. § 2461(c) to numerous offenses, allows for forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable" to the offense. These terms are defined in various decisions. *See, e.g., United States v. Stewart*, 185 F.3d 112, 129-30 (3d Cir. 1999) (tainted funds traced into account were forfeitable as "involved in" and "traceable to" money laundering); *United States v. Bornfield*, 145 F.3d 1123, 1134 (10th Cir. 1998) ("property 'traceable to' means property where the acquisition is attributable to the money laundering scheme rather than from money obtained from untainted sources" and "proof that the proceeds of the money laundering transaction enabled the defendant to acquire the property is sufficient to warrant forfeiture as property 'traceable to' the offense"); *United States v. Voigt*, 89 F.3d 1050, 1084-87 (3d Cir. 1996). *See also United States v. Cheeseman*, 600 F.3d 270, 275-81 (3d Cir. 2010) (interpreting "any firearm or ammunition involved in or used in" a knowing violation of 18 U.S.C. § 922(g)(3) which prohibits possession of a firearm by any person "who is an unlawful user of or addicted to any controlled substance").

In RICO forfeiture cases, the trial judge should give Instruction 6.18.1963 (RICO – Criminal Forfeiture of Property (18 U.S.C. § 1963)).

In some cases, where money was the proceeds of an offense but has been dissipated, the government may seek to forfeit that sum of money, and receive a money judgment. "Given that § 853 does not contain any language limiting the amount of money available in a forfeiture order to the value of the assets a defendant possesses at the time the order is issued, we think it clear that an in personam forfeiture judgment may be entered for the full amount of the criminal proceeds." *United States v. Vampire Nation*, 451 F.3d 189, 201-02 (3d Cir. 2006).

**Notice and Jury Determination.** Where criminal forfeiture is authorized by statute, a judgment of forfeiture can be considered in a particular case only when "the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute." Fed. R. Crim. P. 32.2(a). A jury determination that property is subject to forfeiture is required when a party requests it under Fed. R. Crim. P. 32.2(b)(4), which provides:

> (4) Jury Determination. Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

Rule 32.2 and the relevant statutes also provide that issues with respect to third party claims of ownership of or an interest in the property subject to forfeiture are to be determined by the trial judge on the petition of the third party, in an ancillary proceeding without a jury. *See, e.g.,* Fed. R. Crim. P. 32.2(c); 21 U.S.C. § 853(n).

**Burden of Proof.** Criminal forfeiture is part of the sentence authorized after conviction; it is not an element of the offense. *See, e.g., United States v. Libretti*, 516 U.S. 29, 41, 49 (1995) (holding, because forfeiture is not an element of the offense, there is no constitutional right to a jury determination of the issues relevant to forfeiture). Because forfeiture is a part of the sentence and does not involve an element of the offense, there is no constitutional requirement that the issues with respect to forfeiture must be proved by the government beyond a reasonable doubt. Thus, in *United States v. Voight*, 89 F.3d 1050, 1082-84 (3d Cir. 1996), the Third Circuit held that the government's burden of proof was a preponderance of evidence under 18 U.S.C. § 982, even though the statute does not itself address the standard of proof. In *United States v. Sandini*, 816 F.2d 869, 874-76 (3d Cir. 1987), the court held that 21 U.S.C. § 853(d) (quoted above), which creates a rebuttable presumption that the property is subject to forfeiture if the government establishes certain facts by a preponderance of the evidence, is constitutional as long as the forfeiture proceeding follows conviction based on proof beyond a reasonable doubt. Even after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Booker,* 543 U.S. 220 (2005), the Third Circuit held in *United States v. Leahy*, 438 F.3d 328, 331-33 (3d Cir. 2006), that, "[a]s to forfeiture, based upon the Supreme Court's decision in *Libretti v.*

*United States,* 516 U.S. 29, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995), we conclude that the amount a defendant must forfeit also need not be admitted or proved to a jury beyond a reasonable doubt."

Nevertheless, the Third Circuit has interpreted the RICO forfeiture statute (18 U.S.C. §1963) as imposing on the government the burden of proof beyond a reasonable doubt. Thus, in *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994), the court distinguished *Sandini*, attaching much significance to the fact that although Congress enacted 21 U.S.C. § 853 and 18 U.S.C. § 1963 at the same time, Congress did not include in the RICO forfeiture section, the rebuttable presumption provision it included in the controlled substances statute. *Id.* at 902-06

Two years later, in *Voight*, however, the Third Circuit concluded that the lack of a rebuttable presumption in 18 U.S.C. § 982 (criminal forfeiture after conviction of, e.g., money laundering, mail, bank, and wire fraud) did not mean that Congress intended the beyond a reasonable doubt standard to apply to forfeiture under that provision. The court distinguished its *Pelullo* decision by noting that the RICO section was the most far reaching federal criminal forfeiture provision and, therefore, the beyond a reasonable doubt standard was appropriate to insure a greater degree of fact finding accuracy in RICO actions. *See United States v. Lebed*, 2005 WL 2495843 (E.D. Pa. 2005) (discussing that a different burden of proof applies depending on the specific statutory forfeiture provision, citing *Voight*, *Pelullo*, and *Sandini*). Further, the *Pelullo* court's holding was based on the court's interpretation of the statute, which is not affected by the Third Circuit's holding in *Leahy* that, even after *Apprendi* and *Booker*, the Constitution does not require proof beyond a reasonable doubt of the issues related to forfeiture.

It appears that the Third Circuit may apply the preponderance of evidence standard to criminal forfeitures authorized by the Civil Asset Forfeiture Reform Act of 2000, since the procedures under 21 U.S.C. § 853 apply to forfeitures under that Act as well. Whether *Pelullo* will be revisited on the basis of subsequent developments is an open question.

**Rebuttable Presumption.** The rebuttable presumption created by 21 U.S.C. § 853(d) seems to be treated more like a permissive inference than a presumption. Thus, in *United States v. Sandini*, 816 F.2d at 876, responding to the defendant's argument that there was no rational connection between the proven facts and the ultimate facts, the Third Circuit stated:

> In some circumstances the defendant's argument might marshal some force. But as the Court stated in *Ulster County Court v. Allen,* 442 U.S. 140, 157, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777 (1979), "[w]hen reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him." Only if "under the facts of the case, there is no rational way the trier could make the

connection permitted by the inference" does a permissible inference affect the burden of proof. *See also Barnes v. United States,* 412 U.S. 837, 843-47, 93 S.Ct. 2357, 2361-63, 37 L.Ed.2d 380 (1973).

In this case, the jury was free to reject the inference derived from the statutory presumption, and the burden of proof remained with the government. The huge profits generated by the illegal drug trade are well known, and the jury rationally may give some weight to the statutory inference when other evidence demonstrates sudden and unexpected wealth. On its face, we cannot say the presumption is improper. . . .

The presumption here does not exist in a vacuum and to establish its invalidity the defendant must take the inference in the context of other facts in the record. We conclude at this stage only that the inference is not facially invalid. *Ulster County v. Allen,* 442 U.S. at 163, 99 S.Ct. at 2227.

(Revised 11/10)

## 6.26.5861 Possession of an Unregistered Firearm (26 U.S.C. § 5861)

**Count** *(No.)* **of the indictment charges** *(name of defendant)* **with possession of an unregistered firearm, namely** *(describe the firearm; e.g., a shotgun having a barrel of less than 18 inches in length)***, which is a violation of federal law.**

**In order to find** *(name)* **guilty of the offense charged in the indictment, you must find that the government proved each of the following four elements beyond a reasonable doubt.**

**First: That** *(name)* **knowingly possessed a firearm;**

**Second: That this firearm was a** *(describe the firearm; e.g., a shotgun having a barrel of less than 18 inches in length)***;**

**Third: That** *(name)* **knew of the characteristics of the firearm,** *(that is, that it was (describe the firearm; e.g., a shotgun having a barrel of less than 18 inches in length))***;**

**Fourth: That this firearm was** *(could readily have been put)* **in operating condition; and**

**Fifth: That this firearm was not registered to the defendant in the National Firearms Registration and Transfer Record. It does not matter whether** *(name)* **knew that the firearm was not registered or had to be registered.**

**The evidence in this case contains a certificate showing that after diligent search of the National Firearms Registration and Transfer Record, no record was**

**found that the firearm which the government claims was involved in this case was registered to *(name)*. From such evidence you may, but do not need to, find that the government has sustained its burden of proving beyond a reasonable doubt the non-registration of the firearm.**

**Comment**

Fifth Circuit § 2.94.

This instruction should be used when the defendant is charged with violating 26 U.S.C. § 5861. Section 5861 provides:

> It shall be unlawful for any person–
> * * * *
> (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.

The term firearm is used differently in this section than in the firearms offenses found in Title 18. 26 U.S.C. § 5845 includes the following definitions of "firearm" :

> (1) a shotgun having a barrel or barrels of less than 18 inches in length;
> (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length;
> (3) a rifle having a barrel or barrels of less than 16 inches in length;
> (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length;
> (5) any other weapon, as defined in subsection (e);
> (6) a machinegun;
> (7) any silencer (as defined in section 921 of title 18, United States Code); and
> (8) a destructive device.

Section 5845(a) further provides:

> The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

Sections 5845(b) through (f) define the terms "machinegun," "rifle," "shotgun," "any other weapon," and "destructive device" respectively. The description of the firearm used in the instruction should track the statutory language of section 5845. For the definition of possessed, *see* Instruction 6.18.922G-4 (Firearm Offenses – Knowing Possession Defined).

It is not clear whether the provisions excepting some devices from the definition of firearms clarify the elements of the offense or define affirmative defenses. In *United States v. Neil*, 138 F. App'x. 418 (3d Cir. 2005), a non-precedential opinion, the Third Circuit noted that the circuits are divided and this circuit has not addressed the issue. The court cited *United States v. Hammond*, 371 F.3d 776, 780 (11th Cir. 2004), treating the question of whether a device was designed for use as a weapon as an element of the offense and *United States v. Beason*, 690 F.2d 439, 445 (5th Cir. 1982), concluding that the statutory exceptions are affirmative defenses.

To establish a violation of section 5861(d), the Government must prove beyond a reasonable doubt that the defendant knowingly possessed the item and also knew "the item he possessed had the characteristics that brought it within the statutory definition of a firearm" but need not prove that the defendant knew that the item fell within the statutory definition. *Rogers v. United States*, 522 U.S. 252, 254-55 (1998); *Staples v. United States*, 511 U.S. 600, 619 (1994). As a result, the court must inform the jury of the characteristics of the item that bring it within the statutory definition of firearm found in section 5845. For example, in *Rogers*, the court's instructions adequately communicated to the jury that it could not convict unless it found that the defendant knew that the item he possessed was a silencer. The Government does not need to prove that the defendant knew the firearm was unregistered. *United States v. Freed*, 401 U.S. 601, 607-10 (1971).

If the defendant is charged with possession of an unregistered destructive device as defined in section 5845(f), the Government may be required to prove that the defendant intended to use the components as a weapon. In *United States v. Urban,* 140 F.3d 229, 233 (3d Cir. 1998), the Third Circuit held that "intent is a required element when the components are commercial in nature and are not designed or redesigned for use as a weapon." However, if there is no ambiguity concerning the nature of the device, the government need not prove that the defendant intended to use the components as a weapon. 140 F.3d at 234. For example, in *Urban*, where it was "undisputed that the parts were clearly designed to create a grenade," the trial court was not required to instruct on intent to use the components as a weapon. 140 F.3d at 234.

In *United States v. Hull*, 456 F.3d 133, 143-44 (3d Cir. 2006), the Third Circuit further clarified the intent requirement. The court rejected the defendant's argument for additional intent instructions and explained:

> The Government was required to prove that Hull knew of the features that made what he was making, possessing, or transferring, a "firearm," . . . and indeed the District Court instructed the jury accordingly. However, Hull claims that the Government also had to prove that he intended for the unassembled parts of the

pipe bomb to be assembled into a fully functioning pipe bomb. This is simply not an element of 26 U.S.C. § 5861.* * * Accordingly, we discern no error in the District Court's refusal to instruct the jury that the Government must prove Hull intended that the parts be converted into a destructive device. (Citations omitted.)

# Tax Offenses *(26 U.S.C. §§ 7201, 7203, 7206(1))*

## 6.26.7201 Tax Evasion - Elements of the Offense (26 U.S.C. § 7201)

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with income tax evasion, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **had a substantial income tax deficiency;**

**Second: That** *(name)* **made an affirmative attempt to evade or defeat the** *(assessment) (payment)* **of the income tax; and**

**Third: That** *(name)* **acted willfully.**

### Comment

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 59-2 (Matthew Bender 2003) [hereinafter, Sand et al., supra]; Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions § 67.03 [hereinafter O'Malley et al., supra].

> 26 U.S.C. § 7201 provides:
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony . . . .

If the charge involves a tax other than the income tax, the instructions should be modified.

> In *Sansone v. United States*, 380 U.S. 343 (1965), the Court stated:
>
> [T]he elements of § 7201 are willfulness; the existence of a tax deficiency; and an affirmative act constituting an evasion or attempted evasion of the tax.

380 U.S. at 351 (citations omitted); *see also Boulware v. United States,* 128 S.Ct. 1168, 1173 n. 2 (2008) (stating elements); *United States v. Voigt*, 89 F.3d 1050, 1089 (3d Cir. 1996) (stating elements); *United States v. Farnsworth*, 302 Fed.Appx. 110, 2008 WL 5174899 (3d Cir. 2008) (stating elements). The deficiency must be substantial. *See United States v. McKee*, 506 F.3d. 225, 235-36 (3d Cir. 2007). In addition to this instruction, the court should also give Instructions

6.26.7201-1 (Tax Evasion - Tax Deficiency Defined), 6.26.7201-2 (Tax Evasion - Computation of Tax Deficiency), 6.26.7201-3 (Tax Evasion - Affirmative Attempt to Evade or Defeat Defined), and 6.26.7201-4 (Tax Evasion - Willfully Defined).

There are two types of tax evasion: evasion of assessment and evasion of payment. This distinction may require further explanation to the jury in some cases. The Third Circuit has explained:

> Section 7201 encompasses two kinds of affirmative behavior: the evasion of assessment and the evasion of payment. Evasion of assessment cases are far more common. The affirmative act requirement in such a case is satisfied, inter alia, with the filing of a false return. *See, e.g., Sansone,* 380 U.S. at 351-52, 85 S.Ct. at 1010-11. If the false filing is shown to be willful, the offense is complete with the filing. *See id.* Evasion of payment cases are rare, and the required affirmative act generally occurs after the filing, if there is a filing at all. *United States v. Mal,* 942 F.2d 682, 687 (9th Cir. 1991) (evasion of payment "involves conduct designed to place assets beyond the government's reach after a tax liability has been assessed") (emphasis added). . . .
>
> Affirmative acts of evasion of payment include: placing assets in the name of others; dealing in currency; causing receipts to be paid through and in the name of others; and causing debts to be paid through and in the name of others. For example, in *Spies,* the petitioner "insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the names of others of his family, and kept inadequate and misleading records." The Supreme Court found this evidence sufficient to sustain a finding of attempted evasion. *Spies,* 317 U.S. at 499, 63 S.Ct. at 368 (emphasis added). In *Conley,* the Court of Appeals for the Seventh Circuit affirmed a § 7201 conviction where the defendant placed assets in his sons' names, deposited his assets with others, dealt in currency, and paid creditors but not the government.

*United States v. McGill,* 964 F.2d 222, 230 (3d Cir. 1992) (emphasis omitted) (citing *United States v. Conley*, 826 F.2d 551, 557 (7th Cir. 1987)). *See also United States v. Root*, 585 F.3d 145, 151-54 (3d Cir. 2009) (discussing distinction).

If a defendant is charged with tax evasion of either type and failed to file a tax return, the court may need to instruct the jury that the government must prove a tax assessment beyond a reasonable doubt. When a defendant files a tax return, the return represents a self-assessment, so the issue does not arise.

According to Sand, the Third Circuit is alone in suggesting that evasion of payment and evasion of assessment are two separate offenses, a suggestion found only in dictum. *See* Sand et al., supra, 59-3 (Comment). In *United States v. Farnsworth*, 456 F.3d 394 (3d Cir. 2006), the Third Circuit raised a question concerning the elements of evasion of payment. Denying the

government's petition for mandamus, the court held that the trial court "did not commit a clear error of law when it ruled that it would instruct the jury that the existence of an assessment is a prerequisite to a conviction for attempted evasion of payment under 26 U.S.C. § 7201." 456 F.3d at 401. The court noted that "[t]he only two Third Circuit opinions to discuss whether attempted evasion of payment requires an assessment have commented in dicta that it does." 456 F.3d at 401.

In *Farnsworth*, the court discussed its dicta in *United States v. McGill*, 964 F.2d 222 (3d Cir. 1992), and *United States v. McLaughlin*, 126 F.3d 130 (3d Cir. 1997). In *McGill*, the court stated that "[e]vasion of payment cases are rare, and the required affirmative act generally occurs after the filing, if there is a filing at all" and cited a Seventh Circuit case as standing for the proposition that "evasion of payment 'involves conduct designed to place assets beyond the government's reach after a tax liability has been assessed.'" 964 F.2d at 230. In *McLaughlin*, the court stated that, "[h]ad the government charged the [defendants] with evasion of payment, it would have had to prove a valid assessment from which the [defendants] hid assets." 126 F.3d at 136 (citations omitted).

In *Farnsworth*, the court acknowledged that several other Courts of Appeals have determined that proof of an assessment is not necessary. 456 F.3d at 402. The court then concluded:

> Given this relevant precedent, we agree with the Government that the weight of authority favors its view that an assessment is not required to prove attempted evasion of payment under § 7201. In the end, however, in light of our own dicta in *McGill* and *McLaughlin*, and the general lack of clarity in this area of law, we cannot conclude that the District Court's proposed jury instruction was clearly erroneous.

456 F.3d at 403.

Ultimately, the district court did not instruct on assessment in Farnsworth's trial. Farnsworth then unsuccessfully challenged the resulting conviction. In *United States v. Farnsworth*, 302 Fed.Appx. 110, 2008 WL 5174899 (3d Cir. 2008), a non-precedential opinion, the Third Circuit explained that its earlier decision in *Farnsworth* addressed only the question of whether the proposed assessment instruction "constituted 'a clear error of law.'" Stressing the reservations the court had expressed in the first *Farnsworth* decision, the Third Circuit concluded that the trial court did not commit error by declining to instruct that an assessment is a necessary element of attempted evasion of payment.

Section 7203 is a lesser included offense under 26 U.S.C. § 7201. *McGill*, 964 F.2d at 231.

(Revised 11/10)

**6.26.7201-1 Tax Evasion - Tax Deficiency Defined**

**The first element that the government must prove beyond a reasonable doubt is that** (*name*) **had a substantial tax deficiency due and owing, that is that** *(name)* **owed** *(a substantial federal income tax) (substantially more federal income tax than (he)(she) reported on (his)(her) tax return) (substantially more federal income tax than (he)(she) paid)* **for calendar year***(s) (specify year(s))***.**

**The government does not have to prove the exact amount that** *(name)* **owed or that** *(name)* **evaded all of the taxes charged in the indictment. The government is required to establish only that** *(name)* **owed a substantial amount of income tax during the year***(s)* **in question, regardless whether it is more or less than the amount set forth in the indictment.**

**Comment**

Sand et al., supra, 59-4.

In *United States v. Burdick*, 221 F.2d 932, 934 (3d Cir. 1955), the Third Circuit explained "it is not necessary to prove evasion of the entire amount alleged in the indictment. It is sufficient to prove that a substantial amount of tax liability has been wilfully evaded." *See United States v. McKee*, 506 F.3d. 225, 235-36 (3d Cir. 2007). In *United States v. Wilson*, 601 F.2d 95, 99 (3d Cir. 1979), the Third Circuit stated that, where the government relies on proof that the defendant did not report income, the government does not have to prove the exact amount of the unreported income, but only that the defendant failed to report a substantial amount of income.

The court may want to consider providing the jury guidance in determining whether the amount of tax evaded was "substantial." The Third Circuit has not defined the term in this context, nor have most of the other circuits. *But see United States v. Nunan*, 236 F.2d 576, 585 (2d Cir. 1956). In light of the limited case law on the meaning of "substantial" in this context, the court may instruct the jury to rely on the common meaning for the word "substantial."

Alternatively, the court may instruct the jury:

Whether the amount is "substantial" turns on whether under the surrounding circumstances the amount of the deficiency would be significant to an ordinary person.

**6.26.7201-2 Tax Evasion - Computation of Tax Deficiency**

**In order to prove a tax deficiency in this case, the government has introduced evidence that** *(name)* **received income that was omitted from** *(his)(her)* **tax return, that is,** *(describe the specific item of income or other evidence which is the basis for the allegation of evasion)***.**

**If you find, based on all the evidence, that the government has established beyond a reasonable doubt that** *(name)* **received income** *(in addition to what (he)(she) reported on (his)(her) income tax return for the year in question)***, then you must decide whether there was a substantial tax due** *(in addition to what was shown to be due on the return)(in addition to what (name) paid)***, as a result of** *(name)***'s** *(additional,)* **unreported income. In reaching your decision on this issue, you should consider, along with all the other evidence, the testimony introduced during the trial concerning the computation of** *(name)***'s tax liability, when the alleged** *(additional)* **income was taken into account.**

**If you find, based on all the evidence, that the government has established beyond a reasonable doubt that** *(name)* **received** *(additional)* **income, and that there was a substantial tax due** *(in addition to what was shown to be due on (his)(her) income tax return) (in addition to what (name) paid)***, as a result of this** *(additional)* **income, then this first element has been satisfied.**

**Comment**

Sand et al., supra, 59-5.

This instruction addresses tax evasion based on unreported income. If the government relies on the proof that the defendant overstated deductions, the court should modify the instruction accordingly.

In *United States v. Smith*, 206 F.2d 905, 910 (3d Cir. 1953), the Third Circuit addressed the way in which the government established the defendant's tax deficiency. First, the court addressed the government's approach to establishing income:

> [T[he Government did not rely upon bald cash items and let it go at that. Whether the item was cash or a check, it was traced to its source and shown to be income within the legal sense of that term.

Second, the court addressed and rejected the defendant's argument that he was entitled to additional deductions and exemptions.

> Defendant filed no returns and refused to make his records available to the investigating revenue agents. Having reconstructed defendant's income from what material it could unearth, the Government showed substantial net income. Defendant complains, however, that he was not allowed exemptions for his wife and his two children, that he had certain bad debts, charitable contributions, and expenses which are deductible. The trouble is that there is no proof as to these matters or, where there are intimations in the record, the jury did not draw the inference which defendant seeks. The Government made out a case for the jury by showing substantial net income. Of course, defendant could controvert this evidence by testimony that he was entitled, under the law, to certain deductions which the Government did not allow him. The only testimony he introduced on this point was in attempting to establish certain business expenses. No one would doubt that the jury was not bound to believe the underlying facts upon which he says those deductions are based.

*Smith*, 206 F.2d at 910 (citations omitted). *See also United States v. Marabelles*, 724 F.2d 1374, 1383 (9th Cir. 1984) (noting defendant's burden to establish deductions).

In *Boulware v. United States*, 128 S.Ct. 1168 (2008), the Supreme Court rejected the argument that the defendant was required to present evidence of intent to treat a corporate distribution as a return of capital rather than income. The Court stated:

> Sections §§ 301 and 316(a) [of Title 26] govern the tax consequences of constructive distributions made by a corporation to a shareholder with respect to

its stock. A defendant in a criminal tax case does not need to show a contemporaneous intent to treat diversions as returns of capital before relying on those sections to demonstrate no taxes are owed.

128 S.Ct. At 1182.

In certain cases, it may be appropriate to instruct that in determining the issue of the taxable income of the defendant, no distinction is made between income derived from lawful or unlawful sources. *See* 2 Devitt, Blackmar & O'Malley, *Federal Jury Practice and Instructions* § 56.21 (4th ed. 1990).

(revised 12/09)

**6.26.7201-3 Tax Evasion - Affirmative Attempt to Evade or Defeat Defined**

**The second element that the government must prove beyond a reasonable doubt is that** *(name)* **made an affirmative attempt to evade or defeat a tax. The phrase "attempt to evade or defeat any tax" involves two things: first, the formation of an intent to evade or defeat a tax; and, second, willfully performing some act to accomplish the intent to evade or defeat that tax.**

**The government must first prove beyond a reasonable doubt that** *(name)* **knew and understood that during the calendar year***(s) (specify year(s))***,** *(he)(she)* **had a tax deficiency. The government then must prove beyond a reasonable doubt that** *(name)* **intended to evade or defeat the tax due and that** *(name)* **also willfully did some affirmative act to try to accomplish this intent to evade or defeat that tax.**

**An affirmative act is an act done to mislead the government with respect to the amount of taxes due and owing for the year***(s)* **in question or to conceal income to avoid the assessment or payment of a tax. In this case, the government alleges in the indictment that** *(name) (describe specific affirmative act(s) alleged in the indictment)***. Even otherwise lawful or innocent conduct may constitute an affirmative act if you find that** *(name)* **acted with intent to conceal income or mislead the government. An act likely to mislead the government or conceal funds satisfies this element**. *[However, failing to file a federal tax return, standing alone, is not an affirmative attempt to evade or defeat a tax.]*

*[The government needs only to prove one act to satisfy this element of the offense, but you must unanimously agree on which (act was) (or acts were) committed.]*

**Comment**

O'Malley et al., supra, § 67.04, Sand et al., supra, 59-7.

The court should instruct on the unanimity requirement if the government alleges more than one affirmative act. If the proof establishes that the defendant failed to file a tax return as required, the court should instruct that failure to file alone is not sufficient to establish an affirmative act.

This offense requires proof of an affirmative act to mislead or conceal. A mere omission is not sufficient. *See United States v. McKee*, 506 F.3d. 225, 235-36 (3d Cir. 2007); *United States v. McGill*, 964 F.2d 222 (3d Cir. 1992). In *McGill*, the Third Circuit stated:

> [T]he failure of the taxpayer to report the opening of an account in his or her own name in his or her own locale cannot amount to an affirmative act of evasion. Omissions, including failures to report, do not satisfy the requirements of § 7201; the Government must prove a specific act to mislead or conceal. McGill testified that he opened the account on the advice of counsel in response to IRS criticism for banking under the names of others. There is no evidence that McGill concealed this new account from the IRS apart from the fact that he did not inform the IRS of its existence.

*McGill*, 964 F.2d at 233-234 (internal citation omitted). Thus, failure to file a return does not violate the statute in the absence of proof of affirmative conduct to mislead or conceal. *See United States v. Goodyear*, 649 F.2d 226, 228 (4th Cir. 1981).

In *Spies v. United States*, 317 U.S. 492, 499 (1943), the Court discussed the affirmative act requirement:

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner'. By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to

conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

The government does not need to introduce direct evidence of intent to evade payment of taxes in order to prove the affirmative act required by the statute. Instead, intent can be inferred from the defendant's conduct, even from acts that are entirely consistent with innocent behavior. *See United States v. Voigt*, 89 F.3d 1050, 1090 (3d Cir. 1996). The affirmative act may be otherwise lawful or innocent conduct. *See Voigt*, 89 F.3d at 1089 (concluding that acts such as defendant's "refusal to pay for a piece of jewelry in cash; his use of bizarre confidentiality agreements; and his maintenance of overseas bank accounts taken together, provided the jury with sufficient evidence from which it could infer that they were 'designed' to evade the payment of admitted tax deficiencies, even if such actions otherwise might constitute wholly innocent conduct . . . ."). Some courts have held that filing a false document with the IRS constituted an affirmative act under the statute. *See, e.g.*, *United States v. King*, 126 F.3d 987, 990 (7th Cir. 1997) (holding conviction could rest on false W-4); *United States v. Robinson*, 974 F.2d 575 (5th Cir. 1992) (holding conviction could rest on false 1040 form even if it did not qualify as a "return").

An affirmative act may apply to the evasion of tax owed for more than one tax year. Moreover, an indictment may also charge in one count a continuing series of affirmative acts designed to evade the payment of tax during multiple years. Thus, in *United States v. Pollen,* 978 F.2d 78 (3d Cir. 1992), the Court upheld convictions on three 7201 counts which each charged a particular act of evasion, such as a transfer of funds, taken with the intent to evade the payment of tax for the same seven tax years. In addition, the Court affirmed a conviction for an additional count which charged that, during a three-year period, the defendant engaged "in a continuous scheme and course of conduct to conceal assets from the IRS." *Id.* at 82. The scheme included the use of currency, money orders, and cashier's checks to buy assets and pay expenditures, and the use of nominees to conceal expenditures. *Id.* Thus, the appropriate unit of prosecution may be either a single affirmative act, or a course of conduct. *Id.* at 84-85.

**6.26.7201-4 Tax Evasion - Willfully Defined**

**The third element the government must prove beyond a reasonable doubt is that** *(name)* **acted willfully. "Willfully" means a voluntary and intentional violation of a known legal duty.** *(Name)***'s conduct was not willful if** *(he)(she)* **acted through negligence, mistake, accident, or due to a good faith misunderstanding of the requirements of the law. A good faith belief is one that is honestly and genuinely held.**

*[This definition of "willfulness" applies to all of the tax offenses charged in this case.]*

*[However, mere disagreement with the law or belief that the tax laws are unconstitutional or otherwise invalid does not constitute a good faith misunderstanding of the requirements of the law; all persons have a duty to obey the law whether or not they agree with it.]*

**Comment**

*See Cheek v. United States*, 498 U.S. 192 (1991). For model instructions on willfully and the good faith defense generally, *see* Instructions 5.05 (Willfully) and 5.07 (Good Faith Defense). Those instructions may be used, when appropriate under the circumstances of the case, to supplement this instruction.

In *Cheek*, the Court reaffirmed that "willfully" in federal tax statutes means "voluntary, intentional violation of a known legal duty" and therefore requires proof that the defendant had actual knowledge that the law imposed a legal duty and voluntarily and intentionally violated that duty. 498 U.S. at 201-02. However, it is not necessary to define "willful" in terms of "evil motive" or "bad purpose." *United States v. Pomponio*, 429 U.S. 10, 11-12 (1976). The definition of "willfully" in tax cases mandates the conclusion that a defendant cannot be found guilty if the jury concludes that the defendant honestly believed the tax laws did not make his or her conduct criminal, even if that belief was unreasonable. *Cheek*, 498 U.S. at 201-02. In *Cheek*,

the Court reasoned that, because of the complexity of federal tax laws, citizens may honestly not realize their conduct is criminal and thus may innocently believe they are not violating the law. If the jury finds that the defendant made a mistake about or was ignorant whether his or her conduct violated the law, then the jury must find that the government failed to meet its burden of proving willfulness beyond a reasonable doubt. The mistake or ignorance need not be reasonable, as long as it is honest or genuine. Of course, the jury can disbelieve the defendant's claim of mistake, find that it was not honestly or genuinely held, and therefore find that the defendant did act willfully. *Cheek*, 498 U.S. at 201-02. *See also United States v. Evans*, 356 F. App'x. 580 (3d Cir. 2009) (non-precedential).

The Third Circuit case law tracks that of the Supreme Court. *See also United States v. Stadtmauer,* --- F.3d ----, 2010 WL 3504321 (3d Cir. 2010) (noting requirement that government prove the defendant voluntarily and intentionally violated a known legal duty and holding that willful blindness instruction should not be given on question of willful violation of legal duty); *United States v. Evans*, 356 F. App'x. 580 (3d Cir. 2009) (non-precedential) (holding that willfullness instruction adequately covered good faith and allowed defendant to argue his theory of the case); *United States v. DePaoli*, 41 F. App'x. 543 (3d Cir. 2002) (holding that instructions in tax evasion case properly conveyed good faith defense and did not lead jury to apply requirement that good faith belief be objectively reasonable); *see also United States v. Moses*, 148 F.3d 277, 283 (3d Cir. 1998) (discussing "willfully" requirement in failure to file case); *United States v. Greenlee*, 517 F.2d 899 (3d Cir. 1975) (same). The definition of "willfully" is the same for all tax offenses. *Pomponio*, 429 U.S. at 12.

Disagreement with the law does not amount to good faith. *Cheek*, 498 U.S. at 206; *United States v. Simkanin,* 420 F.3d 397, 404-12 (5th Cir. 2005). An instruction to this effect should be given in appropriate cases.

In some cases, the judge may choose to instruct the jury specifically that the defendant's claim that the tax laws are invalid, unconstitutional, or inapplicable is incorrect as a matter of law.

(Revised 11/10)

## 6.26.7203 Failure to File a Tax Return - Elements of the Offense (26 U.S.C. § 7203)

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with willfully failing to file tax returns in the years** *(year number)* **through** *(year number)***, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:**

**First: That** *(name)* **was required to file an income tax return;**

**Second: That** *(name)* **did not file a tax return at or before the time required by law or regulation;**

**Third: That** *(name)***'s failure to file was willful.**

**Comment**

26 U.S.C. § 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor . . . . * * * In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

The court should also give Instructions 6.26.7203-1 (Failure to File a Tax Return - Requirement That a Return Be Filed), 6.26.7203-2 (Failure to File a Tax Return - Failure To File), and 6.26.7201-4 (Tax Evasion - Willfully Defined). If the defendant is charged with failing to pay tax or estimated tax, keep records, or supply information, the instruction should be modified.

§ 6050I (a) provides:

> Cash receipts of more than $10,000.--Any person--
> (1) who is engaged in a trade or business, and
> (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),
> shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

If the government alleges a violation of § 6050I, the court should modify the instruction to clarify that the first element requires proof of receipt in trade or business of more than $10,000 in a single transaction or related transactions.

In *United States v. McGill*, 964 F.2d 222 (3d Cir. 1992), the Third Circuit distinguished between tax evasion in violation of § 7201 and willful failure to file under § 7203:

> Merely failing to pay assessed taxes, without more, however, does not constitute evasion of payment, though it may satisfy the requirements for the willful failure to pay taxes under § 7203. Only affirmatively evasive acts – acts intending to conceal – are punishable under § 7201.

*McGill*, 964 F.2d at 231 (citation omitted). A defendant need not take affirmative action to be convicted under § 7203. Section 7203 is a lesser included offense under 26 U.S.C. § 7201. *McGill*, 964 F.2d at 231.

In *United States v. Street*, 370 Fed. Appx. 343 (3d Cir. 2010) (non-precedential), the Third Circuit rejected the argument that the defendant had not violated the statute because his accountant had "made" the returns, although the defendant had not then filed them. The court quoted the Seventh Circuit's explanation that "[m]aking a tax return is a term of art for the combination of completing and filing; any accountant or lawyer would have told [the defendant] so, had he asked." *United States v. Dunkel*, 900 F.2d 105, 108 (7th Cir.1990), vacated on other grounds, 498 U.S. 1043, 111 S.Ct. 747, 112 L.Ed.2d 768 (1991).

(Revised 11/10)

**6.26.7203-1 Failure to File a Tax Return - Requirement That a Return Be Filed**

**The first element that the government must establish beyond a reasonable doubt is that** *(name)* **was required to file an income tax return for the tax year***(s)* **in question.**

**During the relevant tax year,** *(specify year)***, the law of the United States required that anyone having a gross income of** *(specify amount)* **or more during a tax year was required to file an income tax return, regardless of whether a tax was due for that year. Therefore, the government must establish, beyond a reasonable doubt, that** *(name)***'s gross income for the calendar year ending December 31,** *(specify year)***, was more than** *(specify amount)***.**

**Comment**

Sand et al., supra, 59-15.

If an issue arises concerning whether certain amounts should be included in gross income, the court should instruct on that question. O'Malley includes the following language:

> A person is required to file a federal income tax return for any calendar year in which [he] [she] has gross income in excess of $ ____ . Gross income means the total of all income received before making any deductions allowed by law. Gross income includes the following: (1) Compensation for services, including fees, commissions and similar items; (2) Gross income derived from business; (3) Gains derived from dealings in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.

O'Malley § 67.12. The Eleventh Circuit includes the following language in its instruction on tax evasion:

> Federal income taxes are levied upon income derived from compensation for personal services of every kind and in whatever form paid, whether as wages, commissions, or money earned for performing services. The tax is also levied upon profits earned from any business, regardless of its nature, and from interest, dividends, rents and the like. The income tax also applies to any gain derived from the sale of a capital asset. In short, the term "gross income" means all income from whatever source unless it is specifically excluded by law.
>
> On the other hand, the law does provide that funds acquired from certain sources are not subject to the income tax. The most common non-taxable sources are loans, gifts, inheritances, the proceeds of insurance policies, and funds derived from the sale of an asset to the extent those funds equal the cost of the asset.

*See* Eleventh Circuit § 93.1.

**6.26.7203-2 Failure to File a Tax Return - Failure To File**

**The second element that the government must establish beyond a reasonable doubt is that** *(name)* **failed to file an income tax return for the tax year***(s)* **in question at or before the time required.**

**An individual taxpayer who must file an income tax return is required to file** *(his)(her)* **return on or before April 15 of the year following the taxable year in question. Therefore, in order to satisfy this second element, the government must prove beyond a reasonable doubt that** *(name)* **failed to file** *(his)(her)* **income tax return***(s)* **on or before April 15,** *(specify year(s))***.**

**Comment**

Sand et al., supra, 59-16.

If the date for filing taxes was extended later than April 15 in one of the tax years involved, the instruction should be modified accordingly.

## 6.26.7206 False Income Tax Return - Elements of the Offense (26 U.S.C. § 7206(1))

**Count** *(No.)* **of the indictment charges the defendant** *(name)* **with filing a false tax return** *(statement) (document)***, which is a violation of federal law.**

**In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:**

**First: That** *(name)* **made and subscribed and filed an income tax return** *(statement) (document)***;**

**Second: That the tax return** *(statement) (document) [(contained) (is verified by)]* **a written declaration that it was made under the penalties of perjury;**

**Third: That the return was false regarding a material matter;**

**Fourth: That** *(name)* **did not believe the return** *(statement) (document)* **was true and correct as to that material matter; and**

**Fifth: That** *(name)* **acted willfully.**

**Comment**

26 U.S.C. § 7206(1) provides that any person who

> Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter

shall be guilty of a felony.

The court should also give Instructions 6.26.7206-1 (False Income Tax Return - Making or Subscribing a Return Defined), 6.26.7206-2 (False Income Tax Return - Return Made Under Penalties of Perjury), 6.26.7206-3 (False Income Tax Return - Return Was Materially False),

6.26.7206-4 (False Income Tax Return - Defendant's Knowledge of Falsity), and, if appropriate, 6.26.7206-5 (False Income Tax Return - Unanimity as to Falsity).

In *United States v. Gollapudi*, 130 F.3d 66, 71-72 (3d Cir. 1997), the Third Circuit stated that in order to convict the defendant under this section

> the government had to prove that (1) defendant made and subscribed a return which was false as to a material matter; (2) the return contained a written declaration that it was made under the penalties of perjury; (3) defendant did not believe the return was true and correct as to every material matter; and (4) defendant falsely subscribed to the return willfully, with the specific intent to violate the law.

As indicated, the offense requires specific intent. As a result, the court must also instruct on willfully. *See* 6.26.7201-4 (Tax Evasion - Willfully Defined). The court may give a willful blindness instruction addressing the defendant's knowledge of the falsity of the information. See 6.26.7206-4 (False Income Tax Return - Defendant's Knowledge of Falsity). However, the court should not give an instruction that suggests that willful blindness will satisfy the requirement that the defendant had specific intent to violate the law. *See United States v. Stadtmauer,* --- F.3d ----, 2010 WL 3504321 (3d Cir. 2010).

The existence of a tax deficiency or loss to the government is not an element of the offense. *United States v. Olgin*, 745 F.2d 263, 272 (3d Cir. 1984).

In *Gollapudi*, the defendant argued unsuccessfully that "the literal truth of the information on a tax return is a complete defense, even if the response on the return was highly misleading." 130 F.3d at 72. The Third Circuit concluded nevertheless that

> there was ample evidence for the District Court to find that Gollapudi filed a false statement. First, an IRS agent testified that Gollapudi admitted that he prepared and signed the W-2 forms and that they were false. Additionally, although Gollapudi presented evidence that the withholding amounts were true based on his "gross up" method, the District Court found this theory to be without merit based on the testimony of another IRS agent who demonstrated that no withholding was actually made. Moreover, it was established that the alleged withholding was never submitted to the IRS, but rather, was maintained in Gollapudi's corporate checking account. * * * [H]e misstated the amount of his withholdings. Despite the fact that he understood his obligations, he submitted a form which he did not believe was true and accurate as to every material matter.

130 F.3d at 72 (citation omitted).

(Revised 11/10)

**6.26.7206-1 False Income Tax Return - Making or Subscribing a Return Defined**

**The first element that the government must prove beyond a reasonable doubt is that** ***(name)*** **made and subscribed and filed a tax return** ***(statement) (document)*****.**

**A tax return is made and subscribed to at the time it is signed. A tax return is filed at the time it is delivered to the Internal Revenue Service.**

**Comment**

Sand et al., supra, 59-21

### 6.26.7206-2 False Income Tax Return - Return Made Under Penalties of Perjury

**The second element that the government must prove beyond a reasonable doubt is that the return** *(statement) (document) [(contained) (was verified by)]* **a written declaration that it was made under penalty of perjury.**

**To satisfy this element, the government must prove that on its face the return** *(statement) (document)* **contained a statement indicating that the return was made under penalty of perjury.**

**Comment**

Sand et al., supra, 59-22.

**6.26.7206-3 False Income Tax Return - Return Was Materially False**

**The third element that the government must prove beyond a reasonable doubt is that the return was false regarding a material matter.**

**An income tax return may be false not only by reason of understatement of income, but also because of an overstatement of lawful deductions or because deductible expenses are mischaracterized on the return.**

**The false statement in the return must be material. This means that it must be essential to an accurate determination of *(name)*'s tax liability. However, the government does not need to prove the existence of a tax deficiency or loss to the government.**

**Comment**

Sand et al., supra, 59-23.

The question of materiality is for the jury. *See Neder v. United States*, 527 U.S. 1, 119 (1999); *United States v. Gaudin*, 515 U.S. 506, 509 (1995). The Eighth Circuit has held that for prosecutions under 26 U.S.C. § 7206(2), the government must establish that the return contained untrue information and that the defendant knew that the information was false. *See United States v. Holecek*, 739 F.2d 331, 335 (8th Cir. 1984).

**6.26.7206-4 False Income Tax Return - Defendant's Knowledge of Falsity**

**The fourth element that the government must prove beyond a reasonable doubt is that** *(name)* **did not believe the return** *(statement) (document)* **was true and correct as to that material matter.**

**Whether** *(name)* **did not believe the return to be true and correct as to that material matter may be proven by** *(name)***'s conduct and by all of the facts and circumstances surrounding the case.**

**Comment**

Sand et al., supra, 59-23.

The government must establish not only that the return contained untrue information but also that the defendant knew that the information was false. *See United States v. Holecek*, 739 F.2d 331, 335 (8th Cir. 1984).

In *United States v. Stadtmauer*,--- F.3d ----, 2010 WL 3504321 (3d Cir. 2010), the Third Circuit approved the following willful blindness instruction addressed to the knowledge requirement:

> The element of knowledge on the part of the defendant may be satisfied by inferences drawn from proof that the defendant closed his eyes to what would otherwise have been obvious to the defendant. A finding beyond a reasonable doubt of a conscious purpose by the defendant to avoid knowledge that the tax returns at issue were false or fraudulent as to a material matter would permit an inference that he had such knowledge.
>
> Stated another way, the defendant's knowledge of a fact or circumstance may be inferred from his willful blindness to the existence of that fact and circumstance.
>
> No one can avoid responsibility for a crime by deliberately ignoring what is obvious. Thus, you may find that the defendant knew that the tax returns at issue were false or fraudulent as to a material fact based on evidence that you find exists that proves beyond a reasonable doubt that the defendant was aware of a high probability that the tax returns at issue were false or fraudulent as to a material matter; and two, that defendant consciously and deliberately tried to avoid

learning about this fact or circumstance.

Reviewing the instruction, the Third Circuit concluded that the jury would understand it as applying both to the defendant's knowledge of the facts and to his knowledge of the law but not to the issue of specific intent and that it was therefore a correct statement of the law.

(Revised 11/10)

### 6.26.7206-5 False Income Tax Return - Unanimity as to Falsity

**The indictment charges that *(name)*'s income tax returns were materially false in at least one of several respects, that is *(specify alleged falsities)*.**

**The government is not required to prove that all of the items alleged are materially false: proof that a single item is materially false is sufficient. However, each of you must agree with each of the other jurors that the same item is materially false. Unless you unanimously agree that the government has proved the same item was materially false beyond a reasonable doubt, you must find the defendant not guilty.**

**Comment**

This instruction should be given if the government alleges more than one theory of falsity. In such a case, proof of any one material falsity will support conviction. *See United States v. Broscoe*, 65 F.3d 576, 588 (7th Cir. 1995); *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969). But the jury must unanimously agree as to at least one material falsity in order to convict. *See United States v. Ryan*, 828 F.2d 1019, 1020 (3d Cir. 1987) (discussing unanimity requirement in conviction for making false statement to federally insured bank under 18 U.S.C. § 1014).

## Chapter 7. Final Instructions: Additional Bases for Criminal Responsibility

**7.01 Attempt**

*(Name)* **is charged with attempt to commit the crime of** *(state offense defendant is alleged to have attempted)*. **An attempt to** *(state offense)* **is a federal crime even though the defendant did not actually complete the crime of** *(state offense)*.

**In order to find** *(name)* **guilty of attempt to** *(state offense)*, **you must find that the government proved beyond a reasonable doubt each of the following two (2) elements:**

**First: That** *(name)* **intended to commit the crime of** *(state offense)*, *(as I have defined that offense) (as I will define that offense)*; **and**

**Second: That** *(name)* **performed an act***(s)* **constituting a substantial step***(s)* **toward the commission of** *(state offense)* **which strongly corroborates or confirms that** *(name)* **intended to commit that crime.**

**With respect to the first element of attempt, you may not find** *(name)* **guilty of attempt to commit** *(state offense)* **merely because** *(he) (she)* **thought about it. You must find that the evidence proved beyond a reasonable doubt that** *(name)***'s mental state passed beyond the stage of thinking about the crime to actually intending to commit it.**

**With respect to the substantial step element, you may not find** *(name)* **guilty of attempt to commit** *(state offense)* **merely because** *(he) (she)* **made some plans to or some preparation for committing that crime. Instead, you must find that** *(name)*

**took some firm, clear, undeniable action to accomplish** *(his) (her)* **intent to commit** *(state offense)***. However, the substantial step element does not require the government to prove that the defendant did everything except the last act necessary to complete the crime.**

**Comment**

*See* Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 2 *Federal Jury Practice and Instructions* (5th ed. 2000) [hereinafter O'Malley et al] §§ 21.01. 21.03, 21.04. For variations in other Circuits, *see* First Circuit § 4.01; Fifth Circuit § 1.32; Sixth Circuit § 5.01; Eighth Circuit § 8.01; Ninth Circuit § 5.3; Tenth Circuit § 1.32.

**When to Instruct on Attempt.** When the indictment charges a completed offense but does not also charge an attempt to commit that offense, the trial court should consider instructing on attempt if one of the parties requests an attempt instruction and the evidence would permit a rational jury to acquit of the charged offense but find the defendant guilty of attempt to commit it. Fed. R. Crim. P. 31(c) provides:

> Lesser Offense or Attempt. A defendant may be found guilty of any of the following:
> (1) an offense necessarily included in the offense charged;
> (2) an attempt to commit the offense charged; or
> (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.

Either as part of this instruction or separately, the trial judge should also instruct the jury on the definition or elements of the offense the defendant is charged with attempting, so that the jury will understand what the defendant must have intended to commit and taken a substantial step toward committing.

**Federal Attempt Provisions.** There is no separate, general federal attempt statute. However, there are specific federal attempt statutes with respect to particular federal offenses or groups of offenses. *See, e.g.*, 21 U.S.C. §§ 846, 963 (which identically provide that "[a]ny person who attempts ... to commit any offense defined by this subchapter [the federal narcotics offenses] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt ...."). Other federal offenses include within their statutory definitions an attempt to commit the offense. *See, e.g.,* 18 U.S.C. 2113(a) ("Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, ... any property or money or any other thing of value belonging to, or in

the care, custody, control, management, or possession of, any bank, ....").

**Attempt Defined.** There is also no federal statutory definition of "attempt." The Third Circuit has noted that when Congress uses a common law term, like attempt, it is presumed to adopt the common law meaning. However, with respect to attempt as used in federal statutes, the Third Circuit and most federal appeals courts have adopted the Model Penal Code's formulation. *See, e.g., United States v. Earp*, 84 Fed. Appx. 228, 232-34 (3d Cir 2004) (unpublished opinion containing thorough discussion of Third Circuit attempt law, citing many published decisions); *United States v. Hsu*, 155 F.3d 189, 202-03 (3d Cir. 1998) ("We adopt the Model Penal Code ... test for attempt because it is consistent with our own case law and with the great weight of modern precedent," citing *Kikumura*, *Cruz-Jiminez*, and *Everett*); *United States v. Cicco*, 10 F.3d 980, 984-85 (3d Cir. 1993); *United States v. Cruz-Jiminez*, 977 F.2d 95, 102 (3d Cir. 1992); *United States v. Kikumura*, 918 F.2d 1084, 1108 (3d Cir. 1990); *United States v. Everett*, 700 F. 2d 900, 903-04 (3d Cir. 1983).

Model Penal Code section 5.01(1)(c) provides: "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the crime, he ... purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Model Penal Code § 5.01(1)(c). *See, e.g., United States v. Earp*, 84 Fed. Appx. at 233; *United States v. Cruz-Jiminez*, 977 F.2d at 102. In *Cruz-Jiminez*, the Third Circuit stated that this definition requires the government to prove: "(1) the intent, or kind of culpability otherwise required, to engage in criminal conduct; and (2) conduct constituting a 'substantial step' toward the commission of the substantive offense that strongly corroborates the criminal intent." 997 F. 2d at 101-02 & n. 8. Although this language reflects the Model Penal Code's statement that the person must act "with the kind of culpability otherwise required for the commission of the crime," the Third Circuit has also stated that the mental state element for attempt is the intent to commit the offense the defendant is charged with attempting. *See, e.g, United States v. Earp*, 84 Fed. Appx. at 234 (stating that the District Court's instruction "that the government was required to prove beyond a reasonable doubt that Earp had intended to commit each substantive offense" was "consistent with the law of attempt"); *United States v. Hsu*, 155 F.3d at 202 ("the defendant must (1) have the intent needed to commit a crime defined by the EEA"); *United States v. Dworken*, 855 F.2d 12, 16-17 (1st Cir. 1988), cited by, *e.g., United States v. Cruz-Jiminez*, 977 F.2d at 102 & n.8 ("'Conduct *designed* to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity.". . . "Thus, the Code's standard for attempt is focused on discerning a significant intent or design to commit crime generally . . . . Under the Code's standard, individuals with serious criminal propensities are identifiable, and may be convicted, upon proof of two elements: (1) an intent to engage in criminal conduct and (2) conduct constituting a 'substantial step' toward the commission of the substantive offense that strongly corroborates the criminal intent."). *See United States v. Bailey*, 444 U.S. 394, 404 (1980) (in discussion of the distinction between specific and general intent, the Supreme Court observed that although general intent or knowledge is ordinarily sufficient for federal crimes, "[i]n certain

narrow classes of crimes, however, heightened culpability [specific intent or purpose] has been thought to merit special attention. ... Another such example is the law of inchoate offenses such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior.").

**Proof of the Mental State Requirement.** Third Circuit cases state that when the government's only evidence of a defendant's intent to commit the offense attempted is the conduct alleged to constitute the substantial steps towards commission of the offense, those steps must unambiguously or unequivocally show the defendant's intent. However, when the government presents other evidence of the defendant's intent besides the alleged substantial steps, those steps need not unambiguously or unequivocally show the defendant's criminal intent, they need only strongly corroborate or confirm his or her intent. *See, e.g., United States v. Earp*, 84 Fed. Appx. 228, 233 (3d Cir. 2004) (not precedential); *United States v. Cruz-Jiminez*, 977 F.2d 95, 102 (3d Cir. 1992), citing *United States v. Dworken*, 855 F.2d 12, 17 & n.3 (1st Cir. 1988); *United States v. Everett*, 700 F.2d 900, 908-09 (3d Cir. 1983). The trial judge should instruct the jury on one or the other of these points depending on the nature of the evidence in the particular case.

**Substantial Step.** With respect to the "substantial step" element generally, *see, e.g., United States v. Earp*, 84 Fed. Appx. at 234 (citing cases from other circuits). The Model Penal Code § 5.01(2) lists various typical acts that should not be held insufficient as substantial steps as a matter of law as long as they strongly corroborate criminal purpose, but the Third Circuit has not explicitly adopted this provision.

**Defense of Impossibility.** These model instructions do not include an instruction on the common law defense of impossibility. Under the common law, so-called "legal impossibility" was a defense to attempt, but "factual impossibility" was not. However, the distinction between the two types of impossibility has become largely semantic and, because the two types are often indistinguishable, most jurisdictions have abolished the legal impossibility defense. *United States v. Hsu*, 155 F.3d 189, 199 (3d Cir. 1998). *See Osborn v. United States,* 385 U.S. 323, 333 (1966) (Supreme Court questioned whether the doctrine of impossibility "with all its subtleties" had any "continuing validity" in the law of criminal attempt). In *Hsu*, the Third Circuit stated, "In fact, we are the only circuit which continues to recognize a common law defense of legal impossibility. We established its validity in *United States v. Berrigan*, 482 F.2d [171] at 190 [(3d Cir. 1973)], where we held that legal impossibility is a defense to certain crimes of attempt." 155 F.3d at 199-200. *Berrigan* held that legal impossibility was a defense to attempt to smuggle letters in and out of a federal prison without the knowledge and consent of the warden in violation of 18 U.S.C. § 1791. The Third Circuit recognized that the modern position is to eliminate the impossibility defense, but it nonetheless concluded that legal impossibility was a valid defense unless the specific federal statute involved provided otherwise.

In more recent cases, however, the Third Circuit "noted that *Berrigan* was a case of statutory interpretation, and we found that we should limit its reasoning to the particular law in

that case." *United States v. Hsu*, 155 F.3d at 200, referring to *United States v. Everett*, 700 F.2d 900, 908 (3d Cir. 1983). In these cases, the Third Circuit analyzed Congressional intent and concluded that Congress intended to eliminate the defense of impossibility for the statutory provisions defining the specific attempt crimes charged. *See, e.g., United States v. Tykarsky*, 446 F.3d 458, 465-69 (3d Cir. 2000) (attempt to persuade, etc, any person under the age of 18 to engage in prostitution or other criminal sexual activity, in violation of 18 U.S.C. § 2422(b)); *United States v. Hsu*, 155 F.3d at 199-203 (attempt to misappropriate trade secrets in violation of 18 U.S.C. § 1832(a)(4)); *United States v. Everett*, 700 F.2d at 904-09 (attempted distribution of a controlled substance in violation of 21 U.S.C. § 846). In support of these decisions, the Third Circuit analyzed the relevant statutory text, its purpose and legislative history, the potential damage to law enforcement if impossibility were a defense, and the fact that the statutes were enacted "at a time when 'the doctrine of impossibility had become mired in fine distinctions and had lost whatever acceptance at common law it may have possessed when the statute considered in *Berrigan* was first enacted in 1930.'" *United States v. Tykarsky*, 446 F.3d at 468. The Third Circuit also noted in *Tykarsky*, 446 F.3d at 466, that the purpose of the Model Penal Code's definition of attempt, which the Third Circuit has adopted, was to eliminate the legal impossibility defense. Thus, although *Berrigan* has not been overruled, the Third Circuit has clearly suggested that legal impossibility will be a defense in few if any other situations, only in what seem to be very rare cases in which, applying the analysis of *Everett*, *Hsu*, and *Tykarsky*, it is possible to find that Congress did not intend to eliminate the impossibility defense.

**Abandonment (Renunciation).** These instructions also do not include an instruction on abandonment as a defense to attempt. First, abandonment would be a defense to attempt if the defendant abandoned his or her intent to commit the crime before he or she took a substantial step toward its commission, because the government must prove beyond a reasonable doubt both that the defendant had the intent to commit the offense and that he or she performed conduct constituting a substantial step. This type of abandonment "defense" is covered by the instruction's explanation that the government must prove the elements of attempt beyond a reasonable doubt.

Second, the Model Penal Code provides an affirmative defense to attempt where the evidence proves that the defendant voluntarily and completely abandoned his or her attempt at some point in time after performing a substantial step, and defines when abandonment is voluntary and complete. Model Penal Code §5.01(4) ("[I]t is an affirmative defense that he abandoned his effort to commit the crime ... under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."). However, the Third Circuit does not seem to have adopted this defense or even discussed it except in the non-precedential opinion in *United States v. Davis*, 41 Fed Appx 566, 572-73 (3d Cir. 2002).

In *Davis*, responding to the defendant's argument that he had abandoned his attempt to receive a certain child pornography videotape, the Third Circuit stated:

We have recognized, in *United States v. Kikumura,* 918 F.2d 1084, 1108 (3d Cir.1990),

that Model Penal Code § 5.01 is representative of the 'well-settled principles of the law of attempts.' Assuming for the purposes of this opinion that the defense of abandonment is available to Davis, that defense is only available if the asserted abandonment was voluntary. *See United States v. Shelton,* 30 F.3d 702, 706 (6th Cir.1994) ('[W]ithdrawal, abandonment and renunciation, however characterized, do not provide a defense to an attempt crime. As noted, the attempt crime is complete with proof of intent together with acts constituting a substantial step toward commission of the substantive offense.')....
Here, the only reason Davis did not receive [the tape] was that he was in the hospital. Following his return from the hospital he asked that it be re-sent. He eventually selected and received a different child pornography video. The district court properly found Davis guilty of attempting to possess child pornography." Also *see United States v. Dworken*, 855 F.2d 12, 20-22 (1st Cir. 1988).

## Chapter 7 Final Instructions: Additional Bases for Criminal Responsibility

### 7.02 Accomplice Liability: Aiding and Abetting (18 U.S.C. § 2(a))

**A person may be guilty of an offense***(s)* **because** *(he) (she)* **personally committed the offense***(s) (himself) (herself)* **or because** *(he) (she)* **aided and abetted another person in committing the offense. A person who has aided and abetted another person in committing an offense is often called an accomplice. The person whom the accomplice aids and abets is known as the principal.**

**In this case, the government alleges that** *(name of defendant)* **aided and abetted** *(name of alleged principal, if known)* **in committing** *(state offense(s))* **as charged in the indictment. In order to find** *(name of defendant)* **guilty of** *(state offense(s))* **because** *(he) (she)* **aided and abetted** *(name of alleged principal)* **in committing** *(this) (these)* **offense***(s)***, you must find that the government proved beyond a reasonable doubt each of following four (4) requirements:**

**First: That** *(name of alleged principal)* **committed the offense***(s)* **charged by committing each of the elements of the offense***(s)* **charged, as I have explained those elements to you in these instructions.** *((Name of alleged principal) need not have been charged with or found guilty of the offense(s), however, as long as you find that the government proved beyond a reasonable doubt that (he) (she) committed the offense(s)).*

**Second: That** *(name of defendant)* **knew that the offense***(s)* **charged** *(was)*

*(were)* **going to be committed or** *(was) (were)* **being committed by** *(name of alleged principal)*, **and**

**Third: That** *(name of defendant)* **knowingly did some act for the purpose of** *[aiding] [assisting] [soliciting] [facilitating] [encouraging] (name of alleged principal)* **in committing the specific offense***(s)* **charged and with the intent that** *(name of alleged principal)* **commit that** *[those]* **specific offense***(s)*, **and**

**Fourth: That** *(name of defendant)*'**s acts did, in some way,** *[aid,] [assist,] [facilitate,] [encourage,] (name of alleged principal)* **to commit the offense***(s)*. *(Name of defendant)*'**s acts need not themselves be against the law.**

**In deciding whether** *(name of defendant)* **had the required knowledge and intent, you may consider both direct and circumstantial evidence including** *(name of defendant)*'**s words and actions and the other facts and circumstances. However, evidence that** *(name)* **merely associated with persons involved in a criminal venture or was merely present or was merely a knowing spectator during the commission of the offense***(s)* **is not enough for you to find** *(name)* **guilty as an aider and abetter. If the evidence shows that** *(name)* **knew that the offense was being committed or was about to be committed, but does not also prove beyond a reasonable doubt that it was** *(name)*'**s intent and purpose to** *[aid] [assist] [encourage] [facilitate]* **or otherwise associate** *(himself) (herself)* **with the offense, you may not find** *(name)* **guilty of the offense***(s)* **as an aider and abetter. The government must prove beyond a reasonable**

**doubt that** *(name)* **in some way participated in the offense committed by** *(name of alleged principal)* **as something** *(name of defendant)* **wished to bring about and to make succeed. The government needs to show some affirmative participation by** *(name)* **which at least encouraged** *(name of alleged principal)* **to commit the offense.**

## Comment

*See* 1A O'Malley et al., supra, § 18.01. For variations in other Circuits, *see* First Circuit §4.02, Fifth Circuit § 2.06, Sixth Circuit § 4.01, Eighth Circuit § 5.01, Ninth Circuit § 5.1.

18 U.S.C. § 2(a) provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Although some Third Circuit opinions conflate the elements of aiding and abetting liability into two or three, this instruction reflects the Third Circuit's more precise articulation of four elements in *United States v. Nolan*, 718 F.2d 589, 592 (3d Cir. 1983).

Ordinarily, where the principal is also being prosecuted for the offenses, the principal and the accomplice will be tried jointly. However, if the principal has not yet been prosecuted, or has been acquitted, or is not known, the trial judge should include the bracketed language in the *First* requirement. Also, if the alleged principal is known by name, the trial judge should use his or her name when referring to the principal in this instruction, but if the name of the alleged principal is not known, the judge should substitute "another person" or "the other person" for the name of the principal wherever that appears in this instruction. Finally, the judge should use the appropriate word(s) in describing the nature of the defendant's alleged participation (aid, assist, encourage, facilitate, etc), in accordance with the government's theory of the case.

In *Nye & Nissen v. United States*, 336 U.S. 613 (1949), the Supreme Court explained: "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wished to bring about, that he seek by his action to make it succeed.' L. Hand, J., in United States v. Peoni, 100 F.2d 401, 402." 336 U.S. at 618. The Third Circuit has called this the "classic definition" of accomplice liability. *United States v. Nolan*, 718 F.2d at 591. The Supreme Court in *Nye & Nissen* also discussed the differences and similarities between accomplice liability and co-conspirator's liability under *Pinkerton v. United States*, 328 U.S. 640 (1946). Although a defendant may be guilty as an accomplice and also guilty of conspiracy, aiding and abetting and

conspiracy are separate theories of criminal responsibility. *See, e.g., United States v. Nolan*, 718 F.2d at 594. A defendant may aid and abet the commission of an offense without conspiring with the principal, *United States v. Krogstad*, 576 F.2d 22, 29 (3d Cir. 1978), and a jury may acquit a defendant on a conspiracy charge yet convict on an aiding and abetting theory. *See, e.g., United States v. Van Scoy*, 654 F.2d 257, 263 (3d Cir. 1981); *United States v. McCrane*, 527 F.2d 906, 912 (3d Cir. 1975).

This instruction is phrased in terms of "act(s)." A defendant may also be responsible as an accomplice (aider and abetter) based on his or her failure to act despite having a legal duty to act. When the government's theory is that the defendant was an accomplice through failure(s) to act or omission(s), the court should give Instruction 5.10 (Failure to Act, Omission).

**No Need to Indict for Aiding or Abetting.** A defendant need not be indicted specifically as an aider and abettor (accomplice) in order to be convicted on that theory. *United States v. Donahue*, 885 F.2d 45, 48 (3d Cir. 1989). Aiding and abetting is implied in every indictment for a substantive offense. *United States v. Frorup*, 963 F.2d 41, 52 n.1 (3d Cir. 1992) (the Third Circuit also stated, as to the requirement that the accomplice must in fact render some aid or assistance to the principal, that aiding and abetting requires "some affirmative participation which at least encourages the principal offender to commit the offense," 963 F. 2d at 43 quoting *United States v. Raper*, 676 F. 2d 841, 850 (D.C. Cir. 1982)).

**Mental State Requirement for Accomplice Liability.** As for the mental state element of accomplice liability, Third Circuit case law is clear that the defendant must know that the principal is committing or will commit an offense and must intend to aid the principal in some way. *See, e.g., United States v. Carbo*, 572 F.3d 112, 118 (3d Cir. 2009) ("Our conclusion is merely an application of the rule that, 'in order to convict a defendant of aiding and abetting, the government must prove that "the defendant charged with aiding and abetting that crime knew of the commission of the substantive offense and acted with the intent to facilitate it." ' " Citing *United States v. Kemp,* 500 F.3d 257, 293 (3d Cir. 2007), quoting *United States v. Dixon,* 658 F.2d 181,189 n. 17 (3d Cir. 1981)). Indeed, the Third Circuit has specifically stated that, "When the charge of aiding and abetting is submitted to the jury, the court must include in its instructions that mere knowledge of the crime is insufficient to bring about a conviction." *United States v. Bey*, 736 F.2d 891, 895-96 (3d Cir. 1984). The requirement of intentional participation means that it must be the accomplice's purpose (conscious objective) or specific intent that the principal commit the offense and that the accomplice help bring it about. *See, e.g., United States v. Soto*, 539 F. 3d 191, 194-97 (3d Cir. 2008); *United States v. Wexler*, 838 F.2d 88, 92 (3d Cir. 1988); *United States v. Bey*, 736 F.2d at 895; *United States v. Newman*, 490 F.2d 139, 143 (3d Cir. 1974). As stated in Judge Learned Hand's oft quoted explanation in *United States v. Peoni*, 100 F. 2d 401, 402 (2d Cir. 1938), quoted in, e.g., *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949), the defendant must wish to bring about the offense and desire that it succeed. *See, e.g., United States v. Bey*, 736 F.2d at 895; *United States v. Newman*, 490 F.2d at 143.

In *United States v. Mercado*, 610 F.3d 841 (3d Cir. 2010), which the Third Circuit

admitted was a close case, the court held "that a defendant's presence on multiple occasions during critical moments of drug transactions may, when considered in light of the totality of the circumstances, support an inference of the defendant's [intentional] participation in the criminal activity," "particularly . . . because [the principal] and [the defendant] switched cars on three occasions during the day; thus, [defendant] got out of one of [principal's] cars and chose to get into another car on three separate instances to continue accompanying [the principal] at important junctures during a prolonged drug transaction. . . . in conjunction with the phone call patterns, which establish[ed] [defendant's] association with [the principal]." *Id.* at 848-49. The court explained that:

> [W]e require proof that the defendant had the specific intent to facilitate the crime. *United States v. Garth,* 188 F.3d 99, 113 (3d Cir.1999). . . . We have emphasized that "facilitation" for aiding and abetting purposes is " 'more than associat[ion] with individuals involved in the criminal venture.' " *Soto,* 539 F.3d at 194 (quoting *United States v. Dixon,* 658 F.2d 181, 189 (3d Cir.1981)). Rather, the defendant must "participate in" the criminal enterprise. *Id.* Neither mere presence at the scene of the crime nor mere knowledge of the crime is sufficient to support a conviction. *Id.* Thus, to convict for aiding and abetting, the Government must prove the defendant associated himself with the venture and sought by his actions to make it succeed. *United States v. Powell,* 113 F.3d 464, 467 (3d Cir.1997). The Government need only show some affirmative participation which, at least, encourages the principal offender to commit the offense. *United States v. Frorup,* 963 F.2d 41, 43 (3d Cir.1992). An aiding and abetting conviction can be supported solely with circumstantial evidence as long as there is a " 'logical and convincing connection between the facts established and the conclusion inferred.' " *Soto,* 539 F.3d at 194 (quoting *Cartwright,* 359 F.3d at 287).

*United States v. Mercado*, 610 F.3d at 846.

In *United States v. Peterson*, --- F.3d ----, 2010 WL 3817087 (3d Cir. 2010), the Third Circuit rejected the defendant's argument that, because its precedent stated that the government must prove the accomplice had the "specific intent" of facilitating the crime, the aiding and abetting instruction must contain the words "specific intent." The court reasoned that:

> [The] argument fails for two reasons. First, the district court used the Third Circuit's Model Criminal Jury Instructions § 7.02 for aiding and abetting. The district court's instruction on intent is taken verbatim from those model instructions. We have a hard time concluding that the use of our own model jury instruction can constitute error, and nothing that [defendant] says removes our doubt that use of such an instruction can constitute error. Moreover, [defendant] does not even contend that the model instruction is wrong. Second, we believe that the phrases "the defendant's intent and purpose to aid or otherwise associate himself with the offense" and "that the defendant in some way participated in the offense as something the defendant wished to bring about and make succeed" sufficiently informed the jury that it had to find that [defendant] had the specific intent to aid and abet the crime charged in the indictment.

*See also United States v. Berscht*, 370 Fed. Appx. 325, 329 (3d Cir. 2010) (non-precedential) (where the Third Circuit upheld an aiding and abetting instruction stated in the words of this instruction, without citing to the Model Instructions.).

The instructions also need to be clear that the accomplice must intend to aid and abet the specific offense or criminal scheme charged in the indictment. *See, e.g., United States v. Kemp*, 500 F.3d 257, 299-300 (3d Cir. 2007); *United States v. Dobson*, 419 F.3d 231, 236 (3d Cir.2005). In *Kemp* the Third Circuit concluded that the trial court's instructions "left no danger that [defendant] would be convicted for aiding and abetting some other scheme. Accordingly, we conclude that the instructions are consistent with *Dobson*'s teaching. . . ." The trial judge had instructed in *Kemp* that the government must prove "the defendant knowingly and deliberately associated himself or herself in some way with the crime charged and participated in it with the intent to commit the crime. . . . [T]hat the defendant: First, knew that the crime charged was to be committed or was being committed. Second, knowingly did some act for the purpose of aiding the commission of that crime. And third, acted with the intention of causing the crime charged to be committed.." *Id. See also United States v. Rawlins*, 606 F.3d 73, 80-82 (3d Cir. 2010) (evidence of the involvement of defendant (an airport baggage handler) in the cocaine conspiracy, including his tag-switching activities and serving as a lookout, supported a reasonable inference that defendant knowingly and intentionally aided and abetted possession of cocaine with intent to distribute).

Some Third Circuit opinions have also used "willfully" in describing the mental element. For example, in *United States v. Waller*, 607 F.2d 49, 51-52 (3d Cir. 1979), the Third Circuit rejected a challenge to an instruction which stated that it was "necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it, as he would in something he wishes to bring about; that is to say, that he willfully would seek, by some act or omission of his, to make the criminal venture successful." The defendant in *Waller* asserted that the instruction did not explicitly state that unknowing participation was insufficient, but the Third Circuit responded that, "the trial judge's charge viewed in its entirety was a correct statement of the law. Having earlier stressed the requisite willfulness and intent for an aiding and abetting conviction, the trial judge's latter explanation was neither misleading nor erroneous." *Id.* at 52. Also *see, e.g., United States v. Bey*, 736 F.2d at 895 (rejecting defendant's contention that there was plain error in the jury charge because it did not include "willfully;" without stating specifically that "willfully" was required and defining "willfully" merely as "doing a voluntary, deliberate or intentional act;" the Third Circuit reasoned that the instructions were sufficient because "the trial court's charge makes clear that Bey's mere presence and knowledge of the crime would not constitute aiding and abetting, but on the contrary, that his intentional involvement was required."); *United States v. Newman*, 490 F.2d at 143 (concluding that it was error not to charge the jury that aiding and abetting required willful participation, where, "Consistent with the court's instructions, the jury might have convicted Garca on the basis of a conclusion that the defendant participated in the activities charged without knowing of their criminal objective. Unknowing participation is not sufficient to constitute an offense under the aiding and abetting statute. Rather, the government must prove beyond a reasonable doubt that

the defendant participated in a substantive crime with the desire that the crime be accomplished.").

It is not clear, however, whether the Third Circuit used the word "willfully"in these cases simply to require a purpose or an intent to bring about the principal's commission of an offense, or also to require that the alleged accomplice must be aware that the principal's conduct was against the law and have a "bad purpose" to violate or disobey the law. *See* Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Ford. L. Rev. 1341, 1425 (2002) (concluding that the federal circuits have defined the mental state required for accomplice liability in several different ways, including specific intent or purpose to bring about commission of the offense and bad purpose to disobey the law (what is often called willfully); noting a distinction between the language of the aiding and abetting section,18 U.S.C.§ 2(a), which does not include an explicit mens rea, and 18 U.S.C. § 2(b), prohibiting causing another to commit a crime, which explicitly requires that the defendant "willfully cause").

This distinction may seem a fine one, and it is an issue in few cases. One consequence of the distinction is that mistake or ignorance of the law would disprove the mental state requirement if bad purpose to violate the law is required (*see* Instruction 5.05 (Willfully) and Comment), but would not disprove the mental state requirement where purpose only to bring about commission of the offense is used. The Third Circuit has recognized that, "with respect to most specific-intent crimes . . . ignorance of the law is no excuse. There is an exception to this rule, however, when intent to violate a legal duty is an element of a crime." *United States v. Carbo*, 572 F.3d 112, 116, 117-18 (3d Cir, 2009) (footnote omitted). (Holding that, "when a private citizen is charged with aiding and abetting or conspiracy to commit honest services fraud by a public official, the prosecution must prove that the defendant knew that the public official was required by law to disclose the conflict of interest. Without the knowledge that the failure to disclose the conflict of interest is illegal, we cannot be certain that the defendant formed the specific intent to defraud the public.")

In the model instruction we avoid this confusion by not using the word "willfully" and by explaining the mental state requirement in the traditional sense of specific intent or purpose.

**Scope of Accomplice Responsibility for Additional Offenses.** Once the government proves the defendant was an accomplice to an offense, the scope of the defendant's responsibility for additional offenses is often said to depend on application of the "natural and probable consequences doctrine." Under this doctrine, an accomplice is responsible for all crimes committed by the principal that were the "natural and probable consequence" of the crime aided and abetted. This doctrine for accomplice liability has a "close counterpart in the well-established *Pinkerton* doctrine" for co-conspirator's liability. Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Ford. L. Rev. 1341, 1425 (2002). Indeed, the "natural and probable consequences doctrine" and the *Pinkerton* doctrine would seem to be essentially the same. *See* Instruction 7.03 regarding the

*Pinkerton* doctrine.

Although the federal courts, like their state counterparts, are split on the acceptability of the "natural and probable consequences doctrine," one commentator noted that, "[m]ost of the circuits have adopted, or at least recognized the existence of" the doctrine. *Id.* In *United States v. Green*, 25 F.3d 206, 209 (3d Cir.1994), the Third Circuit only recognized the existence of the doctrine, but did not decide whether to adopt it. That was unnecessary in *Green*, because the additional offense there was not in any event the natural and probable consequence of the offense aided and abetted. *See* Weiss, *id.* at 1425, n. 388. The Third Circuit stated, "Whatever the scope of the doctrine of foreseeability in connection with aiding and abetting generally, *compare* view set out in Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.8(b), at 157 (1986) ("accomplice liability extends to acts of the principal in the first degree which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided") *with* that at *id.* at 158 (" 'natural and probable consequences' rule of accomplice liability ... is inconsistent with more fundamental principles of our system of criminal law," the view adopted by the Model Penal Code), we believe it inapplicable here." 25 F.3d at 209.

In addition to being split on the acceptability of this rule, the circuits also disagree on its meaning – what is the standard for determining natural and probable or foreseeable consequences? *See* Weiss, at 1424-36. Because the Third Circuit has not adopted the natural and probable consequences doctrine, this point is not covered in the model instruction.

(Revised 11/10)

**7.03 Responsibility For Substantive Offenses Committed By Co-Conspirators (*Pinkerton* Liability)**

**Count***(s) (no.)* **of the indictment charge***(s)* **that on or about the___ day of _____, 2__, in the _____ District of _____,** *(name of defendant)* **committed** *(state offense(s))***.**

**The government may prove** *(name)* **guilty of** *(this) (these)* **offense***(s)* **by proving that** *(name)* **personally committed it** *(them)***. The government may also prove** *(name)* **guilty of** *(this) (these)* **offense***(s)* **based on the legal rule that each member of a conspiracy is responsible for crimes and other acts committed by the other members, as long as those crimes and acts were committed to help further or achieve the objective of the conspiracy and were reasonably foreseeable to** *(name)* **as a necessary or natural consequence of the agreement. In other words, under certain circumstances the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by any one or more of them, even though they did not all personally participate in that crime themselves.**

**In order for you to find** *(name)* **guilty of** *(state offense(s))* **charged in Count***(s) (no.)* **based on this legal rule, you must find that the government proved beyond a reasonable doubt each of the following four (4) requirements:**

**First: That** *(name)* **was a member of the conspiracy charged in the indictment;**

**Second: That while** *(name)* **was still a member of the conspiracy, one or more of the other members of the conspiracy committed the offense***(s)* **charged in**

**Count***(s) (no)***, by committing each of the elements of** *(that) (those)* **offense***(s)***, as** *(I explained) (will explain)* **those elements to you in these instructions.**

*[However, the other member(s) of the conspiracy need not have been found guilty of (or even charged with) the offense(s), as long as you find that the government proved beyond a reasonable doubt that the other member(s) committed the offense(s).]*

**Third: That the other member***(s)* **of the conspiracy committed** *(this) (these)* **offense***(s)* **within the scope of the unlawful agreement and to help further or achieve the objective***(s)* **of the conspiracy; and**

**Fourth: That** *(this) (these)* **offense***(s) (was) (were)* **reasonably foreseeable to or reasonably anticipated by** *(name)* **as a necessary or natural consequence***(s)* **of the unlawful agreement.**

**The government does not have to prove that** *(name)* **specifically agreed or knew that** *(this) (these)* **offense***(s)* **would be committed. However, the government must prove that the offense***(s) (was) (were)* **reasonably foreseeable to** *(name)***, as a member of the conspiracy, and within the scope of the agreement as** *(name)* **understood it.**

**Comment**

*See* 1A O'Malley et al., supra, § 31.10. For variations in other Circuits, *see* Fifth Circuit § 2.22, Sixth Circuit § 3.10, Seventh Circuit § 5.09 & 5.10, Ninth Circuit § 8.20.

The *Pinkerton* doctrine applies to conspiracies charged under the general conspiracy statute, 18 U.S.C. § 371, and also under specific conspiracy statutes. *See, e.g., United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999) (general conspiracy § 371); *United States v. Turcks*, 41 F.3d 893 (3d Cir. 1994) (conspiracy to commit access device fraud under 18 U.S.C. § 1029(b)(2)); *United States v. Gonzalez*, 918 F.2d 1129 (3d Cir. 1990) (conspiracy to commit federal drug offenses under 21 U.S.C. § 846); *United States v. American Investors of Pitsburgh, Inc.*, 879 F.2d 1087 (3d Cir. 1989) (general conspiracy to defraud the United States under § 371). *Pinkerton v. United States*, 328 U.S. 640 (1946), was tried under 18 U.S.C. § 88, the predecessor to 18 U.S.C. § 371.

The Third Circuit has sometimes said that there are three exceptions to the *Pinkerton* rule: that the substantive offense was not within the scope of the unlawful project; or that the offense was not committed in furtherance of the conspiracy; or that the offense was not reasonably foreseeable to the defendant. *See, e.g., United States v. Gonzalez*, 918 F.2d 1129, 1135 (3d Cir. 1990), citing *Pinkerton*, 328 U.S. at 647-48. However, these "exceptions" are merely statements of situations in which the evidence does not prove the requirements of the rule. The trial judge should be careful to consider these requirements or exceptions in deciding when to give a *Pinkerton* instruction.

The trial judge must be careful to explain that the defendant can be convicted of substantive offenses under the *Pinkerton* doctrine only if a co-conspirator committed the offenses "both 'in furtherance of' *and* 'as a foreseeable consequence of' the conspiracy." Thus, in *United States v. Turcks*, 41 F.3d 893, 897-98 (3d Cir. 1994), the Third Circuit held that the trial judge erred in using the disjunctive "or" rather than the conjunctive "and," thereby failing to make clear that both prongs of the *Pinkerton* doctrine had to be met, though the Court ultimately held the error was harmless.

In *Gonzalez*, the Third Circuit rejected a rule or presumption that carrying a firearm during a drug deal was foreseeable, noting that "the very term 'foreseeability' implies a prediction about uncertain events in terms of probability.... We should, however, be wary of importing into criminal law the expansive notions the term foreseeability has acquired from its talismanic use in defining duty for purposes of liability in tort." 918 F.2d at 1136 n.5. Further, "reasonable foreseeability" under the *Pinkerton* doctrine means that the substantive offense must have been reasonably foreseeable to the defendant as a necessary or natural consequence of the conspiracy. *See id.* at 1136. It is not enough that the offense may be reasonably foreseeable to the jury; the jury must find beyond a reasonable doubt that the offense was reasonably foreseeable to the defendant.

If the other member(s) of the conspiracy alleged to have committed the substantive

offense(s) have not yet been prosecuted or charged, or has (have) been acquitted, or is (are) not known, the trial judge should include the bracketed language within the second requirement.

**Conspiracy Need Not be Charged for *Pinkerton* Liability.** In *United States v. Lopez*, 271 F.3d 472 (3d Cir. 2001), the Third Circuit held that, "[[i]t is not required that a conspiracy be charged in the indictment for *Pinkerton* liability to apply, as long as the evidence at trial establishes beyond a reasonable doubt that a conspiracy existed and that the substantive offense was committed in furtherance of the conspiracy." *Id.* at 480-81. ("Though this is our first opportunity to address this issue, we have little difficulty following our sister circuit courts of appeals in determining that a conspiracy need not be charged in order for *Pinkerton's* doctrine to apply.") (citations omitted). The instruction provided here assumes that the indictment does charge conspiracy. In cases where the government asserts *Pinkerton* co-conspirator's responsibility without a separate conspiracy charge, the trial judge should modify the *First* requirement to state: "*First*, a conspiracy existed and *(name)* was a member of that conspiracy," and should also give the jury Instructions with respect to the elements of conspiracy. *See* Instructions 6.18.371A-6.18.371K.

**7.04 Withdrawal as a Defense to Substantive Offense Committed by Co-conspirators**

*(Name)* **has argued that** *(he) (she)* **is not guilty of** *(state offense)*, **which was allegedly committed by** *(his) (her)* **co-conspirator, because** *(name)* **withdrew from the conspiracy before the co-conspirator committed that offense. If you find, based on the evidence, that** *(name)* **withdrew from the conspiracy before** *(his) (her)* **co-conspirator committed** *(state offense)*, **then you must find** *(name)* **not guilty of that offense.**

**In order to withdraw from the conspiracy,** *(name)* **must have taken some clear, definite and affirmative action to terminate** *(his) (her)* **participation, to abandon the illegal objective, and to disassociate** *(himself) (herself)* **from the agreement. Withdrawal requires proof that** *(name)* **changed** *(his) (her)* **intent about participating in the agreement. If the evidence only shows that** *(name)* **stopped activities in furtherance of the conspiracy, or stopped cooperating with the conspiracy, or merely was inactive for a period of time, that is not enough to find that** *(name)* **withdrew from the conspiracy.**

**It is the government's burden to prove beyond a reasonable doubt that** *(name)* **was a member of the conspiracy at the time when** *(his) (her)* **co-conspirator committed** *(state offense)*. **If, after considering all the evidence in this case, you have a reasonable doubt about whether *(name)* was a member of the conspiracy at the time when** *(his) (her)* **co-conspirator committed** *(state offense)*, **you must find *(name)***

**not guilty of that offense. However, even if you find that** *(name)* **withdrew from the conspiracy at some point in time, you should still find** *(name)* **guilty of** *(state offense)* **if you find that the government proved beyond a reasonable that** *(his) (her)* **co-conspirator committed** *(state offense)* **before** *(name)* **withdrew, that** *(his) (her)* **co-conspirator committed** *(state offense)* **to help further or achieve the objective of the conspiracy, and that this offense was reasonably foreseeable to** *(name)* **as a necessary or natural consequence of the agreement.**

**Comment**

*See* 2 O'Malley et al., supra, § 31.11. For variations in other Circuits, *see* Sixth Circuit § 3.11B.

For the instruction on withdrawal as a defense to conspiracy, *see* Instruction 6.18.371.J (Withdrawal Before the Commission of an Overt Act as a Defense to Conspiracy [Withdrawal as a Defense to Conspiracy Based on the Statute of Limitations]). The Comment to that instruction discusses the "withdrawal defense" generally, and is relevant to the present instruction.

**7.05 Causing the Criminal Acts of Another (18 U.S.C. § 2(b))**

**A person may be guilty of an offense because** *(he) (she)* **personally committed the offense** *(himself) (herself)* **or because** *(he) (she)* **willfully caused** *(another person)* **to commit acts which would constitute the offense if the acts had been performed by** *(him) (her)* **directly.**

**In this case,** *(name of defendant)* **is charged with** *(state offense(s))* **because** *(he) (she)* **is alleged to have caused** *(name of other person defendant allegedly caused to commit the acts)* **to commit acts which would constitute** *(state offense(s))* **if the acts had been performed by** *(name of defendant)* **directly. To find** *(name of defendant)* **guilty of** *(this) (these)* **offense***(s)* **because** *(he) (she)* **caused** *(name of other person)* **to commit the act***(s)* **constituting the offense***(s)***, you need not find that** *(name of defendant)* **committed any of the acts** *(himself) (herself)***. You must, however, find that the government proved beyond a reasonable doubt each of the following three (3) requirements:**

**First: That acts constituting the offense***(s)* **charged were committed by** *(name of other person)***;**

**Second: That** *(name of defendant)* **had the mental state required for the offense that** *(he) (she)* **caused** *(name of other person)* **to commit. In this case that means the government must prove beyond a reasonable doubt that** *(name)* **acted** *(state the mental state required for the offense charged)***; and**

**Third: That** *(name)* **willfully caused** *(name of other person)* **to commit the acts constituting** *(state offense charged)*. **In this case that means the government must prove beyond a reasonable doubt that** *(name)* **willfully caused** *(name of other person)* **to** *(state the acts required for the offense charged)*. **To find that** *(name)* **"caused" this other person to commit those acts, you must find that the government proved beyond a reasonable doubt that** *(name)* **brought about those acts.**

**As I stated, the government must prove beyond a reasonable doubt that** (*name of other person*) **committed the acts constituting the offense. However, it is not necessary for you to find that** (*name of other person*) **is** *(himself) (herself)* **guilty of the offense as a matter of criminal law. For example, there may be a situation in which a person commits all of the acts which comprise a federal crime, but is not responsible for the crime because of, for example, mental impairment or youth, or is not guilty of the crime because he or she acted innocently, and did not have the mental state required to commit that crime. Nevertheless,** *(name)* **may be guilty of causing that crime, under the instructions I have given to you, where** *(name)* **did intend that the crime be committed and willfully caused the criminal acts to be committed by another person. Thus, to find** *(name)* **guilty of causing another person to commit a crime, it is not necessary that this other person be found guilty of a crime, be charged in the indictment, or even be known, so long as you find beyond a**

**reasonable doubt that** *(name)* **willfully caused the other person to commit the offense.**

**Comment**

For variations in other Circuits, *see* Seventh Circuit § 5.06, Eighth Circuit § 5.02.

18 U.S.C. § 2(b) provides:

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

**Causing Another to Commit Crime; Not Accomplice Liability.** This section states a theory of criminal responsibility for the acts of another that is different from aiding and abetting (accomplice liability) under 18 U.S.C. § 2(a). In giving this instruction the court should name the person whom the defendant allegedly caused to commit the acts, if that person is known; otherwise, the court should simply refer to him or her as "the other person."

Unlike accomplice liability, criminal responsibility for causing the acts of another does not require that the government prove that the other person committed an offense. Indeed, 18 U.S.C. § 2(b) often applies where the defendant caused an innocent person or intermediary (*e.g.,* one without the mental state required for the offense) to commit the acts that would constitute the offense. Thus, causing responsibility is imposed when the "actor" is a child, a mentally impaired person, someone acting under duress, someone who was duped and who believed his or her acts were innocent, etc.

Where the government alleges that the defendant is responsible on alternative theories, aiding and abetting and causing acts of another, the trial judge should give both this instruction and Instruction 7.02 (Accomplice Liability; Aiding and Abetting), and the judge should explain carefully the differences between the two theories.

**Mental State Requirements.** This theory of responsibility has two mental state requirements: the defendant must willfully cause another person to commit the acts constituting the offense charged, and the defendant must also have the mental state required for that offense. *See, e.g., United States v. Wright*, 363 F.3d 237 (3d Cir. 2004); *United States v. Gumbs*, 283 F.3d 128 (3d Cir. 2002); *United States v. Krogstad*, 576 F.2d 22 (3d Cir. 1978); *United States v. Catena*, 500 F.2d 1319 (3d Cir. 1974). Thus, the Third

Circuit stated in *United States v. Gumbs*, 283 F.3d at 134:

> Section 2(b) imposes liability on a defendant who does not himself commit the prohibited *actus reus*, but intentionally manipulates an innocent intermediary to commit the prohibited *actus reus*:
>
> > It is but to quote hornbook law to say that in every crime there must exist a union or joint operation of act, or failure to act, and intent. However, this is far from suggesting that the essential element of criminal intent must always reside in the person who does the forbidden act. Indeed, the latter may act without any criminal intent whatever, while the *mens rea*--"willfulness"--may reside in a person wholly incapable of committing the forbidden act. When such is [the] case, as at bar, the joint operation of act and intent prerequisite to commission of the crime is provided by the person who willfully causes the innocent actor to commit the illegal act. And in such a case, of course, only the person who willfully causes the forbidden act to be done is guilty of the crime.
>
> *United States v. Lester,* 363 F.2d 68, 73 (6th Cir.1966), *quoted in United States v. American Investors of Pittsburgh, Inc.,* 879 F.2d 1087, 1095 (3d Cir.1989). Consistent with these principles, we read § 2(b) as establishing two general *mens rea* elements. First, to be guilty under § 2(b), a defendant must possess the *mens rea* required by the underlying criminal statute that the defendant caused the intermediary to violate, in this case § 287. *See United States v. Curran,* 20 F.3d 560, 567 (3d Cir.1994). ... In addition to requiring the defendant to possess the mental state necessary to violate the underlying statute, § 2(b) also requires the defendant to possess the intent to cause the act prohibited by the underlying statute. This element arises from the explicit requirement in § 2(b) that the defendant "willfully" cause the prohibited *actus reus*....

One commentator concluded that the federal courts of appeals have not been consistent in their interpretation of "willfully" in 18 U.S.C. § 2(b). Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Ford. L. Rev. 1341, 1436-61 (2002). However, in *United States v. Curran*, 20 F.3d 560, 567-69 (3d. Cir. 1994), the Third Circuit held that the Supreme Court's definition of willfully in *United States v. Ratzlaf*, 510 U.S. 135 (1994) (*i.e.*, that the defendant must be aware that his or her conduct was unlawful and must act with a purpose to violate the law) applied to "willfully causing" under 18 U.S.C. § 2(b). *Also see, e.g., United States v. Barel*, 939 F.2d 26, 43 (3d Cir. 1991) (conviction for causing employees to file false entries in bank records, in violation of 18 U.S.C. § 1105, reversed

because government failed to prove that defendant had specific intent to cause bank to violate federal law). Thus, when the trial court instructs on causing the criminal acts of another under 18 U.S.C. § 2(b), the court should also define "willfully" by giving Instruction 5.05, which states the general definition of willfully.

**7.06 Corporate Criminal Responsibility**

**A corporation is a legal entity that may act only through individuals who are called its agents. The agents of a corporation are its officers, directors, employees, and other persons who are authorized by the corporation to act for it.**

**You must give to a corporate defendant the same impartial consideration of the evidence that you would give to an individual defendant. You may find a corporate defendant guilty or not guilty of the offense charged under the same instructions that apply to an individual.**

**The legal responsibility of a corporation, if any, is based on the conduct of its agents.** *[In this case, the government alleges that those agents were (name(s) of agent) (type(s) of agents).]*

**To find** *(name of corporate defendant)* **guilty of** *(state offense(s) charged)***, as charged in Count** *(no.)* **of the indictment, you must find that the government proved beyond a reasonable doubt each of the following three (3) requirements:**

**First: That each of the elements of** *(state offense(s) charged)* **was committed by an officer, director, employee, or other agent of** *(name of corporate defendant)***. I** *(will explain) (have explained)* **in these instructions the elements of** *(state offense(s) charged)***.**

**Second: That each of the acts committed by** *(state the name of the agent or the type of agent alleged to have committed the acts)* **were within the course and**

**scope of the employment or agency given to** *(name of agent) (type of agent)* **by** *(name of corporate defendant)***; and**

**Third: That** *(name of agent) (type of agent*) **committed each of these acts with the intent to benefit** *(name of corporate defendant)***.**

**In order to find that an act was committed within the course and scope of the employment or agency given to** *(name of agent) (type of agent)***, the evidence must prove that the act related directly to the general duties that** *(name of agent) (this type of agent)* **was expected to perform by** *(name of corporate defendant)***. However, the government does not need to prove that the act was authorized by** *(name of corporate defendant)* **formally or in writing.**

*[If the acts were not within the course and scope of employment or agency of (name of agent) (type of agent) at the time the acts were committed, the acts of (name) (type) may have been later approved or adopted by (name of corporate defendant). An act of an agent has been approved or adopted by the corporation if another agent of the corporation, who was acting within the course and scope of (his) (her) employment or agency and with the intent to benefit (name of corporate defendant), later approved the earlier act with knowledge of the earlier act.]*

*(Name of agent) (Type of agent)* **was not acting within the course and scope of** *(his) (her)* **employment if that person performed an act which** *(name of corporate defendant)***, in good faith, had forbidden** *(name of agent) (type of agent*) **to perform. A**

**corporate defendant is not responsible for acts which it tries to prevent. However, a corporate defendant, like an individual defendant, may not avoid criminal responsibility by meaningless or purely self-serving pronouncements.**

**Comment**

*See* 1A O'Malley et al., supra, § 18.05. For other Circuit instructions on the point, *see* Eighth Circuit §5.03.

The bracketed alternative language in paragraph 3 allows the trial judge to identify the name or type of agent alleged to have committed the criminal act(s). This choice is also presented in succeeding paragraphs. *(Type of agent)* would require the trial judge to state the particular type of agent or agents – director, officer, employee, etc – who is or are alleged to have acted on the corporate defendant's behalf in the case.

Paragraph 4 refers to the elements of the offense(s) charged; these will be explained in separate instructions related specifically to those offenses.

The bracketed language in paragraph 6 should only be given when the evidence shows that the agent's acts or omissions were not within the course or scope of employment or agency when committed, but were later approved or adopted by another agent of the corporate defendant.

This instruction is phrased in terms of "act(s)." If the government's theory is that the defendant committed the offense charged through failure(s) to act or omission(s), Instruction 5.10 should be given.

## 7.07 Personal Criminal Responsibility Of A Corporate Agent

**A person is personally responsible under the criminal law for acts** *(he) (she)* **performs or causes to be performed on behalf of a corporation, just the same as if** *(he) (she)* **performed those acts on** *(his) (her)* **own behalf.**

**However, a person who is a** *(state the type of agent alleged to have committed the acts)* **of a corporation is not criminally responsible for illegal acts committed by another agent on behalf of that corporation merely because of** *(his) (her)* **status as an** *(type of agent)* **of the corporation** *[, unless the defendant had, by reason of (his)(her) position in the corporation, responsibility and authority either to prevent in the first instance, or promptly correct, the violation complained of, and failed to do so]***.**

### Comment

*See* 1A O'Malley et al., supra, § 18.04. For other Circuit instructions on the point, *see* Eighth Circuit §5.04.

*(Type of agent)* requires the trial judge to state the particular type of agent or agents – director, officer, employee, etc – who is or are alleged to have acted on the corporate defendant's behalf.

**Responsible Corporate Agent Doctrine; Liability for Failure to Prevent Violations of the Law.** The bracketed language at the end of the Instruction should be used in those cases in which the "responsible corporate agent" doctrine applies. The Supreme Court recognized in *United States v. Park*, 421 U.S. 658 (1975), and *United States v. Dotterweich*, 320 U.S. 277 (1943), that with respect to certain federal statutes that impose criminal liability without any mental state requirement, responsible corporate officers or agents may be held criminally liable without performing any acts, but instead for failing to prevent violations of the law. Thus, in *Park* the Court observed:

[T]he principle had been recognized that a corporate agent, through whose act,

> default, or omission the corporation committed a crime, was himself guilty individually of that crime. The principle had been applied whether or not the crime required "consciousness of wrongdoing," and it had been applied not only to those corporate agents who themselves committed the criminal act, but also to those who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for its commission.
>
> In the latter class of cases, the liability of managerial officers did not depend on their knowledge of, or personal participation in, the act made criminal by the statute. Rather, where the statute under which they were prosecuted dispensed with "consciousness of wrongdoing," an omission or failure to act was deemed a sufficient basis for a responsible corporate agent's liability. It was enough in such cases that, by virtue of the relationship he bore to the corporation, the agent had the power to prevent the act complained of. . . .

421 U.S. at 670-71. The *Park* Court also noted:

> The theory upon which responsible corporate agents are held criminally accountable for "causing" violations of the Act permits a claim that a defendant was "powerless" to prevent or correct the violation to "be raised defensively at a trial on the merits." . . . If such a claim is made, the defendant has the burden of coming forward with evidence, but this does not alter the Government's ultimate burden of proving beyond a reasonable doubt the defendant's guilt, including his power, in light of the duty imposed by the Act, to prevent or correct the prohibited condition. . . .
>
> Turning to the jury charge in this case, it is of course arguable that isolated parts can be read as intimating that a finding of guilt could be predicated solely on respondent's corporate position. But . . . . Reading the entire charge satisfies us that the jury's attention was adequately focused on the issue of respondent's authority with respect to the conditions that formed the basis of the alleged violations. Viewed as a whole, the charge did not permit the jury to find guilt solely on the basis of respondent's position in the corporation; rather, it fairly advised the jury that to find guilt it must find respondent "had a responsible relation to the situation," and "by virtue of his position . . . had . . . authority and responsibility" to deal with the situation.

*Id.* at 673-74.

**7.08 Accessory After the Fact (18 U.S.C. § 3)**

**Count** *(no.)* **of the indictment charges that on or about the___ day of _____, 2__, in the _____ District of _____,** *(name of defendant, the alleged accessory)* **acted as an accessory after the fact to the crime of** *(state offense allegedly committed by the "principal offender")* **committed by** *(name of principal offender)***.**

**It is a federal crime for a person to act as an accessory after the fact. An accessory after the fact is a person who, knowing that an offense against the United States has been committed by another person, receives, relieves, comforts, or assists that person in order to hinder or prevent that person's arrest, trial, or punishment.**

**In order for you to find** *(name of defendant)* **guilty of being an accessory after the fact, you must find that the government proved beyond a reasonable doubt each of the following three** (3) **requirements:**

**First:** *(Name of principal offender)* **committed each of the elements of** *(state offense(s))***, which elements I** *(have just explained to you) (will explain to you shortly)*;

**Second:** *(Name of defendant)* **knew that** *(name of principal offender)* **committed** *(that) (those)* **crime***(s)***; and**

**Third: With that knowledge,** *(name of defendant)* **in some way assisted** *(name of principal offender)* **in order to hinder or to prevent** *(name of principal offender)***'s arrest, trial, or punishment for the crime***(s)* **of** *(state offense(s))***.**

*[As I just explained, to find (name of defendant) guilty of being an accessory after the fact, you must first find that (name of principal offender) committed (state offense(s)). To find that (name of principal offender) committed (state offense(s)), you must find that the government proved beyond a reasonable doubt that (name of principal offender) committed each of the following elements: (state each element of the offense(s) allegedly committed by the principal offender).]*

**Comment**

*See* 2 O'Malley et al., supra, §§ 22.01-22.04. For variations in other Circuits, *see* Fifth Circuit § 2.07, Sixth Circuit § 4.02, Seventh Circuit §5.07, Eighth Circuit § 5.05, Ninth Circuit § 5.2.

18 U.S.C. § 3 provides, in part, that:

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

This section comes into play only after a principal offender has committed an offense. Commission of an offense by the principal is an essential element of the crime of being an accessory after the fact. *See, e.g., United States v. Cabrales*, 524 U.S. 1, 7-8 (1998); *Gov't. of Virgin Islands v. Aquino*, 378 F. 2d 540, 552 (3d Cir. 1967); *United States v. Anthony*, 145 F. Supp. 323 (E.D. Pa. 1956).

The principal offender need not be tried with the accessory after the fact nor convicted before the accessory. *United States v. Panarella*, 277 F.3d 678, 689 (3d Cir. 2002). If the principal offender and the accessory are tried together, the trial judge should instruct the jury on the elements of the principal offender's crime first and then give this instruction regarding the accessory after the fact. If the principal and accessory are tried separately, at the accessory's trial the judge should include the bracketed final paragraph of this instruction.

**A Separate Crime; Not Accomplice Liability.** Unlike aiding and abetting

(accomplice liability) and co-conspirator's liability, where the accomplice or co-conspirator is guilty of the same crime as the principal, accessory after the fact is a separate crime from the principal offender's crime. *United States v. Cabrales*, 524 U.S. at 7-8. Therefore, a defendant must be charged in the indictment specifically with being an accessory after the fact. Charging a defendant with an offense as a principal or an accomplice does not include an accessory after the fact charge, and in such a case it is improper to instruct the jury on accessory after the fact liability. *Gov't. of Virgin Islands v. Aquino*, 378 F.2d at 554. However, it is possible for a defendant to be both an accomplice and an accessory after the fact to the same crime and, if properly indicted, to be convicted of the substantive crime as an accomplice and also of the separate offense of being an accessory after the fact to the substantive crime. However, a person cannot be a principal offender and an accessory after the fact for the same crime. *See, e.g., Gov't. of Virgin Islands v. Aquino*, 378 F. 2d 540 (3d Cir. 1967); *United States v. Anthony*, 145 F. Supp. 323 (E.D. Pa. 1956).

## Chapter 8. Final Instructions: Defenses and Theories of Defense

## 8.01 Theory of Defense

### Comment

The defendant has a constitutional right to raise a legally acceptable defense and to present evidence in support of that defense. *See, e.g., Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988); *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973); *Washington v. Texas*, 388 U.S. 14, 18-19 (1967); *United States v. Pohlot*, 827 F.2d 889, 900-01 (3d Cir. 1987). When a defense is raised and supported by the law and the evidence, the jury should be instructed on the matter. *See, e.g., United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999) ("A defendant is entitled to an instruction on his theory of the case where the record contains evidentiary support for it."); *Government of Virgin Islands v. Carmona*, 422 F.2d 95, 99 (3d Cir. 1970) ("As long as there is an evidentiary foundation in the record sufficient for the jury to entertain a reasonable doubt, a defendant is entitled to an instruction on his theory of the case.").

In *United States v. Hoffecker*, 530 F.3d 137, 176-77 (3d Cir. 2008), the Third Circuit held that the trial court had properly refused to give the requested "theory of defense" instructions, because they were merely statements of the defense's factual arguments. The court reasoned:

> "A defendant is entitled to a theory of defense instruction if (1) he proposes a correct statement of the law; (2) his theory is supported by the evidence; (3) the theory of defense is not part of the charge; and (4) the failure to include an instruction of the defendant's theory would deny him a fair trial." *United States v. Wren,* 363 F.3d 654, 664 (7th Cir.2004), *vacated on other grounds, Yarbor v. United States,* 543 U.S. 1101, 125 S.Ct. 1021, 160 L.Ed.2d 1005 (2005). As the Court of Appeals for the Fifth Circuit has pointed out, however, a defendant is not "entitled to a judicial narrative of his version of the facts, even though such a narrative is, in one sense of the phrase, a 'theory of the defense.'" *United States v. Barham,* 595 F.2d 231, 244 (5th Cir.1979). . . .
>
> Moreover, many of Hoffecker's "theory of the defense" instructions, such as the "mistake of fact" instruction and the "lack of intent to enter a conspiracy" instruction, duplicated other instructions that the District Court gave on the subject of criminal intent, such as the charges on "knowingly and willfully" and the "good faith defense" to fraud. In these circumstances, Hoffecker was not entitled to have the court charge the jury on his requested "theory of defense" instructions and the court did not abuse its discretion when it rejected the instructions.

Although Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1 *Federal Jury Practice and Instructions* (6th ed. 2006) [hereinafter O'Malley et al] § 19.01 and some of the other Circuits' model instructions include a general theory of defense instruction (*see* Sixth Circuit 6.01 – Defense Theory), a general instruction is ordinarily unnecessary. *See* Eighth Circuit § 8.05; Ninth Circuit Introductory Comments to Chapter 6 (Specific Defenses). However, with the defendant's consent, where the defendant asserts a legally recognized and factually supported theory of defense, the trial judge may want to tell the jury at an appropriate

time during the instructions:

> *(Name)* has raised the defense of *(state the defense)*. *(State the defense)* is a legally recognized defense to a federal criminal charge. I will instruct you on the law defining this defense *(now) (shortly)*.

In no case may a defense instruction be given to the jury unless the defense is properly raised and the law and evidence support allowing the jury to consider it.

**Theories of Defense: Failure of Proof Defenses.** One theory of defense is an assertion that the evidence negates an element of the offense, or simply that the government has not proven each element beyond a reasonable doubt. *But see United States v. Pohlot*, 827 F.2d 889, 897 (3d Cir. 1987) (The Third Circuit held that the statutory provision precluding a defense of mental disease or defect other than the affirmative defense of insanity did not preclude the use of mental disease or defect evidence to prove lack of mens rea. The court reasoned that "properly understood, [use of mental disease or defect evidence to disprove mens rea] is therefore not a defense at all but merely a rule of evidence.").

A "defense" that the government failed to prove the elements of the offense charged is generally covered by the explanation of the elements of the offense (*see* the substantive offense instructions in Chapter 6), and by the instructions on burden of proof and reasonable doubt. *See* Instructions 1.13; 3.06; Instruction 5.07 (Good Faith Defense). See also *United States v. Evans*, 356 Fed. Appx. 580, 585 (3d Cir. 2009) (non-precedential) (trial judge did not err in refusing to give defendant's proposed good faith, willfulness, and theory-of-the-defense instructions, where "the [District] Court's explanation of willfulness in the jury charge substantially covered the relevant points and allowed Evans to argue his theory of the case."); *United States v. Hoffecker*, 530 F.3d at 177 ("many of Hoffecker's "theory of the defense" instructions . . . duplicated other instructions that the District Court gave on the subject of criminal intent. . . ."); *United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999) ("A court errs in refusing a requested instruction only if the omitted instruction is correct, is not substantially covered by other instructions, and is so important that its omission prejudiced the defendant.").

Nevertheless, occasionally the trial court may want to instruct more specifically on a "failure of proof defense," such as mistake of fact (or law), as follows:

> The defendant *(name)* has raised as a defense that *(his) (her)* mistake about *(describe the alleged mistake)* shows that *(he) (she)* did not have the *(the mental state element of the offense charged; e.g., intent, knowledge, willfulness)* required to be guilty of *(state offense charged)*. It is the government's burden to prove beyond a reasonable doubt that *(name)* had the *(mental state element)* required for *(offense charged)*. If, after considering all the evidence in this case, you have a reasonable doubt about whether *(name)* had the *(mental state element)* required for *(offense charged)*, because of *(name's)* mistake or for any other reason, you must find *(name)* not guilty of that offense.

**Affirmative Defenses.** The other main theories or forms of defense are "affirmative

defenses;" those defenses that exculpate the defendant even if the government proves each of the elements beyond a reasonable doubt. Common affirmative defenses are covered by the instructions in this Chapter. This Chapter also includes some other particular defenses not covered elsewhere.

**Statute of Limitations.** Although the statute of limitations is not an element of the offense, when the defendant raises the statute the government must prove that the prosecution was commenced within the statutory limitation period. *See* 18 U.S.C. Chapter 213 (Limitations). *See, e.g., United States v. Grunewald*, 353 U.S. 391, 396-97 (1957) (government must prove that conspiracy was still in existence and at least one overt act was performed within the period of limitations prior to the return of the indictment); *United States v. Steele*, 685 F.2d 793 (3d Cir. 1982) (same). The statute of limitations may be raised by pretrial motion under Fed. R. Crim. P. 12 or as a defense at trial. *See, e.g.,* Fed. R. Crim. P. 12(b)(2) (Motions That May Be Made Before Trial) Advisory Committee Note ("In the other group of objections and defenses, which the defendant at his option may raise by motion before trial, are included all defenses and objections which are capable of determination without a trial of the general issue. They include such matters as . . . statute of limitations, . . . ."); *United States v. Zavin*, 190 F. Supp. 393 (D.N.J.1961) (pretrial motion to dismiss indictment on ground prosecution was barred by limitations was authorized by Rule 12); *United States v. Dierker*, 164 F. Supp. 304 (W.D. Pa.1958) (statute of limitation is a matter of defense usually to be determined at trial); *United States v. Haramic*, 125 F. Supp. 128 (W.D. Pa.1954) (whether statute of limitations defense should be determined before trial or at trial is within discretion of the court). When raised as a defense at trial, the statute of limitations may involve questions of fact for the jury and therefore, the trial judge may need to instruct the jury regarding this defense.

(Revised 11/10)

**8.02 Alibi**

***(Name)*** **has raised a defense of alibi to Count*(s) (Nos.)* of the indictment, and you have heard evidence that *(name)* was not present at the time and place where the offense*(s)* charged is *(are)* alleged to have been committed. The government has the burden to prove beyond a reasonable doubt each of the elements of the offense*(s)*, including that *(name)* was present at the time and place where the offense is alleged to have occurred. *(Name)* does not have to prove an alibi or that *(he) (she)* was not present.**

**If, after considering all the evidence in this case regarding Count*(s) (Nos.)* of the indictment, you have a reasonable doubt about whether *(name)* was present at the time and place where the offense*(s)* charged was *(were)* committed, you must find *(name)* not guilty of that *(those)* offense*(s)*.**

**Comment**

*See* 1A O'Malley et al, supra, § 19.07; Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal* (2003) [hereinafter, Sand et al.] 8.02. For variations in other Circuits, *see* Sixth Circuit § 6.02; Eighth Circuit § 9.07; Ninth Circuit § 6.01; Eleventh Circuit Inst 14.

In *United States v. Simon*, 995 F.2d 1236, 1243 (3d Cir. 1993), the Third Circuit explained:

> This court has long held that where, as here, a defendant asserts the defense of alibi, a jury instruction must make clear that the defendant need only raise a *reasonable doubt* in the jurors' minds as to whether he was present at the scene of the charged offense at the time the offense was committed. *See United States v. Booz,* 451 F.2d 719, 723 (3d Cir.1971), *cert. denied,* 414 U.S. 820, 94 S.Ct. 45, 38 L.Ed.2d 52 (1973) (citing *United States v. Barrasso,* 267 F.2d 908, 910-911 (3d Cir.1959)).

> Accordingly, a defendant is entitled to a specific instruction that "*on the issue of alibi,* the government has to convince the jury beyond a reasonable doubt that the alibi was not true." *Booz,* 451 F.2d at 723. *See also Barrasso,* 267 F.2d 908, 910-911 (3d Cir.1959) (quoting *United States v. Marcus,* 166 F.2d 497, 503-504 (3d Cir.1948), specific instruction must be given to inform the jury "that the government's burden of proof covers the defense of alibi, as well as all other phases of the case"). We require such a specific instruction regarding an alibi defense because "the jury is likely to become confused about the burden of proof when an appellant offers this type of evidence." *Booz,* 451 F.2d at 723.

With respect to the specific instruction in the case before it, the Third Circuit in *Simon* concluded, "when the trial judge instructed the jury that '[y]ou have to decide who you believe and how much of what is said by any witness you believe,' the court failed to set forth the government's burden of proof in relation to the alibi defense, as is expressly required under *Booz* and *Barrasso.* . . . In *Barrasso,* as here, such an instruction 'may well have suggested to the jury that the accused bore the burden of persuasion on the alibi defense,' and was, therefore, in error." 995 F.2d at 1243, quoting *United States v. Barrasso*, 267 F.2d 908, 910-911 (3d Cir.1959) (error to charge that "alibi, *if you believe the testimony as to [the defendant's] being elsewhere,* is a perfectly good defense," and that *[i]f you believe that,* that ends it...." (emphasis added).). The *Simon* court also concluded that the error in the alibi instruction could not be cured by the trial judge's general instructions on the government's burden of proof beyond a reasonable doubt. 995 F.2d at 1244, citing and quoting *Booz,* 451 F.2d at 723 ("The insufficiency of the charge of the trial court is not cured by the more general language in the charge that the burden never shifts from the government."); *Barrasso,* 267 F.2d at 910-11 (insufficient charge on alibi was not "cured by a quite proper and forceful general instruction stating in clear language that throughout the case the burden remains on the government to convince the jury of guilt beyond a reasonable doubt"). Ultimately, however, the court held in *Simon* that the error in the alibi instruction was harmless. *Id.* at 1244-47.

**Notice of Alibi Defense.** Federal Rule of Criminal Procedure 12.1(a) provides for notice of an alibi defense. If the government requests in writing that the defendant notify the government of any intended alibi defense, the defendant must, within 10 days, provide written notice of the defense, stating each place where the defendant claims to have been at the time of the alleged offense, and the name, address, and telephone number of each alibi witness on whom the defendant intends to rely. If defendant complies, a reciprocal disclosure requirement is triggered, and both parties have a continuing duty to disclose. Fed. R. Crim. P. 12.1(b)-(c). If a party fails to comply, "the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify." Fed. R. Crim. P. 12.1(e).

**Cases in Which Alibi Defense May be Inapplicable.** For some offenses, such as conspiracy and ongoing fraudulent activity, there may not be a specific time and place when and where the offense was committed, and therefore the defense of alibi may be inapplicable. Also, alibi may not be a defense when the defendant is charged with responsibility for an offense that was committed by another, such as *Pinkerton* liability for a crime committed by a co-

conspirator, aiding and abetting an offense committed by another, or causing another to commit an offense.

**8.03 Duress** *[Coercion]*

*(Name)* **has raised as a defense that** *(he) (she)* **committed the offense***(s)* **charged in Count***(s) (Nos.)* **of the indictment because** *(he) (she)* **was acting under duress** *[was coerced into committing the offenses charged in the indictment]*. **If you find that the government proved beyond a reasonable doubt that** *(name)* **committed the offense***(s)* **charged, then you must consider whether** *(name)* **committed the offense***(s)* **under duress** *[was coerced into committing the offense(s)]*. **If you find that the government proved** *(name)* **committed the offense***(s)* **charged and you also find that** *(name)* **proved that** *(he) (she)* **was acting under duress** *[was coerced]*, **then you must find** *(name)* **not guilty of the charge***(s)*.

**To find that** *(name)* **is not guilty of the offense***(s)* **charged in Count***(s) (Nos.)* **of the indictment because of duress** *[coercion]*, **you must find that** *(name)* **proved by a preponderance of the evidence each of the following four elements:**

**First, that** *(name)* **was under an immediate, unlawful threat of death or serious bodily injury to** *(himself) (herself)* **or to others;**

**Second, that** *(name)* **had a well-grounded** *[reasonable]* **fear** *[belief]* **that the threat would be carried out if** *(he) (she)* **did not commit the offense***(s)* *[criminal acts]*;

**Third, that** *(name's)* **criminal action was directly caused by the need to avoid the threatened harm and that** *(name)* **had no reasonable, lawful opportunity to avoid the threatened harm without committing the offense***(s) [criminal acts]*;

**that is, that** *(name)* **had no reasonable lawful opportunity both to refuse to do the criminal act and also to avoid the threatened harm; and**

**Fourth, that** *(name)* **had not recklessly placed** *(himself) (herself)* **in a situation in which** *(he) (she)* **would be forced** *[it was probable that (he) (she) would be put in a position of having to choose whether]* **to engage in criminal conduct.**

*(Name)* **has the burden of proving the defense of duress** *[coercion]* **by a preponderance of the evidence. Preponderance of the evidence is a lower standard than proof beyond a reasonable doubt. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. If you put the credible evidence that is favorable to** *(name)* **and the credible evidence that is favorable to the government on opposite sides of a scale, the scale would have to tip somewhat on** *(name's)* **side in order for you to find that** *(name)* **is not guilty because of duress** *[coercion]***. However, if the scale tips in favor of the government, or if the credible evidence appears to be equally balanced, or if you cannot say on which side the credible evidence is heavier, then you must decide that** *(name)* **has not proved the defense of duress** *[coercion]* **by a preponderance of the evidence. In making this determination, you should consider all of the evidence presented during the trial, regardless of who offered it. You should evaluate the evidence and its credibility according to the instructions I gave you earlier.**

**You should also remember that the fact that** *(name)* **raised this defense does not relieve the government of the burden of proving all the elements of the offense***(s)*

**charged beyond a reasonable doubt.**

**Comment**

*See* 1A O'Malley et al, supra, § 19.02; Sand et al, supra, 8-6. For variations in other Circuits, *see* First Circuit § 5.05; Fifth Circuit § 1.36; Sixth Circuit § 6.05; Seventh Circuit § 6.08; Eighth Circuit § 9.02; Ninth Circuit §§ 6.5, 6.6; Tenth Circuit § 1.36; Eleventh Circuit Inst. 16.

**Duress and Justification.** Although the Third Circuit treats duress and justification (necessity) as having the same elements, separate instructions are provided for these defenses – Duress (this instruction) and Justification (Necessity) (Instruction 8.04). Which instruction to use will depend on how the defense is stated in a particular case.

In *United States v. Alston*, 526 F.3d 91, 94 n.3 (3d Cir. 2008) (holding that the danger posed by verbal threat was not sufficiently immediate to support a "justification" defense to a felon in possession of a firearm charge), the Third Circuit reaffirmed that, "[t]he defenses of duress, necessity, and justification have generally all been analyzed in terms of justification. *See United States v. Paolello,* 951 F.2d 537, 540 (3d Cir.1991)." In *Paolello* (holding that the trial court erred in failing to explicitly instruct on the defense of "justification" to a felon in possession of a firearm charge), the court treated these defenses as having the same elements, stating, "[w]hile the defenses of justification and duress were at one time distinct as duress excused criminal actions performed under an unlawful threat of imminent death or serious bodily injury caused by human forces whereas justification excused criminal conduct in response to a threat of death or serious bodily harm caused by natural forces, '[m]odern cases have tended to blur the distinction between duress and necessity.' *United States v. Bailey,* 444 U.S. 394, 410, 100 S.Ct. 624, 634, 62 L.Ed.2d 575 (1980). *See also* 1 L. Sand et al., Modern Federal Jury Instructions ¶ 8.06, 8-22 (1991) (treating duress and justification the same)." 951 F.2d at 540. Also *see, e.g., United States v. Reed*, 173 Fed. Appx. 184, (3d Cir. 2006) (not precedential) (quoting the *Paolello* elements for the justification to a felon in possession of a firearm charge); *United States v. White*, 75 Fed. Appx. 894, 897 (3d Cir. 2003) (not precedential) (same); *United States v. Miller*, 59 F.3d 417, 422 (3d Cir. 1995) (citing *Paolello* as adding a fourth element to the requirements for duress). *But see United States v. Dodd*, 225 F.3d 340, 349 n.6 (3d Cir. 2000) (In discussing the burden of proof on the defense of justification in a felon in possession of firearm case, the Third Circuit noted, "We include a description of these duress and coercion cases merely as an example of the variety with which courts have treated the burden of persuasion on common-law affirmative defenses. We do not believe that the duress and coercion cases are sufficiently similar to the justification scenario so as to be dispositive of this case, even were these duress and coercion cases to be uniform in their allocation of the burden of persuasion. *Cf.* Paul H. Robinson, 1 Criminal Law Defenses § 25(b), at 96 (1984) (placing duress and coercion in the 'excuse' category of defenses, a broad category separate from the 'justification' category)."). In addition to Sand Inst. 8-6, other Circuits also treat duress,

justification, and necessity the same in their model instructions. *See* Fifth Circuit § 1.36; Eleventh Circuit Inst. 16.

As noted by the Third Circuit in *Paolello*, traditionally duress or coercion applied to cases in which the defendant committed the offense charged because another person unlawfully threatened him or her with imminent death or serious bodily harm. Necessity, on the other hand, applied where the defendant was justified in committing the offenses because of the imminent threat of death or serious harm caused by natural, non-human forces. *United States v. Paolello*, 951 F.2 at 540. In theory, duress excuses criminal conduct that would otherwise be culpable because society recognizes that there may be situations in which no ordinary person would be able to resist another's unlawful threats to life. *See, e.g.,* Joshua Dressler, UNDERSTANDING CRIMINAL LAW, 325-26 (4th ed. 2006) ("Duress: Justification or Excuse?"); MODEL PENAL CODE AND COMMENTARIES, § 2.09 at 373-75. Necessity justifies conduct that society recognizes was necessary to protect life, usually the defendant's life; justified conduct is not culpable and therefore it is not criminal. Although the Third Circuit applies the same elements to both duress (coercion) and justification (necessity), the traditional distinction discussed above seems to have been followed in the few cases that have reached the court. *Compare, e.g., United States v. Dodd*, 225 F.3d 340 (3d Cir. 2000), and *United States v. Paolello*, 951 F.2d 537 (3d Cir. 1991) (defense of justification asserted to charges of felon in possession of a firearm based on evidence that defendants found the firearms under circumstances that would have created dangers to the public if they had not taken possession) *with, e.g., United States v. Miller*, 59 F.3d 417 (3d Cir. 1995), and *United States v. Santos,* 932 F.2d 244 (3d Cir.1991) (defense asserted duress based on evidence that defendants committed the criminal acts because of abuse and coercion by their husbands).

Justification has often been asserted as a defense to a charge of felon in possession of a firearm under 18 U.S.C. § 922(g). In *United States v. Alston*, the Third Circuit recognized that, "18 U.S.C. § 922(g) does not provide for a justification defense. Although the Supreme Court has questioned 'whether federal courts ever have authority to recognize a necessity defense not provided by statute,' *United States v. Oakland Cannabis Buyers' Coop.,* 532 U.S. 483, 490, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001), several courts of appeals, including our own, have recognized that justification is a valid defense to a felon-in-possession charge . . . . *See generally Paolello,* 951 F.2d at 540-43; *United States v. Dodd,* 225 F.3d 340 (3d Cir.2000)." *United States v. Alston*, 526 F. 3d at 94. The court in *Alston* also noted, however, that at least as to this offense, "we followed other courts finding the justification defense should be construed narrowly. *See* [*Paolello*] at 542 ('The restrictive approach is sound. Congress wrote section 922(g) in absolute terms, banning any possession of firearms by all convicted felons.')," *id.* at 94-95, and that, "[t]he defense is rarely granted." *Id.* at 94 n. 5.

**Elements of the defense of duress**. The Supreme Court has not definitively articulated the elements of the defense of duress. In *United States v. Dixon*, 126 S.Ct. 2437, 2440 n.2 (2006), the Court noted:

> There is no federal statute defining the elements of the duress defense. We have not specified the elements of the defense, see, *e.g., United States v. Bailey,* 444 U.S. 394,

409-410, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980), and need not do so today. Instead, we presume the accuracy of the District Court's description of these elements: (1) The defendant was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) the defendant had not recklessly or negligently placed herself in a situation in which it was probable that she would be forced to perform the criminal conduct; (3) the defendant had no reasonable, legal alternative to violating the law, that is, a chance both to refuse to perform the criminal act and also to avoid the threatened harm; and, (4) that a direct causal relationship may be reasonably anticipated between the criminal act and the avoidance of the threatened harm.

In *United States v. Bailey*, 444 U.S. 394, 409-11 (1980), the Supreme Court also recognized the overlap between defenses of duress, necessity, and justification:

> Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. . . .
>
> Modern cases have tended to blur the distinction between duress and necessity. . .
>
> We need not speculate now, however, on the precise contours of whatever defenses of duress or necessity are available against charges brought under § 751(a). Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail. LaFave & Scott 379.

The Third Circuit has repeatedly articulated the elements of this defense as they are set forth in this instruction. Thus, in *United States v. Alston*, 526 F.3d at 95 (footnote omitted), the court stated, "In *Paolello,* we incorporated a test for justification that had been adopted by other courts of appeals:

> (1) he was under unlawful and present threat of death or serious bodily injury;
> (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct;
> (3) he had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and
> (4) there is a direct causal relationship between the criminal action and the avoidance of the threatened harm.

*Paolello,* 951 F.2d at 540." In a footnote to the second element, the court added "Although our sister circuits have adopted what is essentially the same test, some circuits have found this element also extends to negligent conduct. . . . Other circuits have adopted our approach, which requires reckless conduct." *United States v. Alston*, 526 F.3d at 95 n.6 (citations omitted). Also *see, e.g.*, *United States v. Miller*, 59 F.3d 417, 422 (3d Cir. 1995) (holding that the district court properly barred the defense of duress to charges of bank fraud and interstate transportation of a stolen vehicle, where defendant/wife had a reasonable opportunity to avoid the harm allegedly threatened by her husband, who was in jail, many miles away, by notifying the authorities); *United States v. Paolello*, 951 F.2d at 540 (in holding that the trial judge erred in failing to instruct on justification defense to felon in possession of firearm charge, the Third Circuit emphasized that "there [must] be a 'direct causal relationship between the criminal action and the avoidance of the threatened harm.'")

**Burden of proof.** The burden of proof as to duress is less than clear. In *United States v. Dixon*, the Supreme Court held that ordinarily the federal constitution does not require the government to disprove duress: "The jury instructions in this case . . . did not run afoul of the Due Process Clause when they placed the burden on petitioner to establish the existence of duress by a preponderance of the evidence." 126 S.Ct. at 2442. The Court reasoned, "[l]ike the defense of necessity, the defense of duress does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to 'avoid liability ... because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present.' *[United States v.] Bailey,* 444 U.S., at 402." *Id.* The Court in *Dixon* also rejected the defendant's argument that the burden had to be on the government as a matter of federal statutory law, stating "Congress can, if it chooses, enact a duress defense that places the burden on the Government to disprove duress beyond a reasonable doubt. In light of Congress' silence on the issue, however, it is up to the federal courts to effectuate the affirmative defense of duress as Congress 'may have contemplated' it in an offense-specific context. . . . In the context of the firearms offenses at issue – *as will usually be the case, given the long-established common-law rule [that the defendant has the burden of proving affirmative defenses such as duress]* – we presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence." *Id.* at 2447-48 (emphasis added).

The Third Circuit does not seem to have addressed the burden of proof with respect to duress, although it has stated that the burden is on the defendant to prove justification, at least when raised as a defense to a felon in possession of a firearm charge. In *United States v. Alston*, the court stated, "The defendant has the burden of proving this affirmative defense by a preponderance of the evidence." 526 F.3d at , citing *United States v. Dodd*, 225 F.3d 340, 350 (3d Cir. 2000). In *Dodd*, although the court observed that decisions regarding duress and justification defenses do not necessarily control each other, it concluded "that a rule that places the burden of persuasion on the defendant with regard to a justification defense to a felon-in-possession charge is constitutionally permissible, consonant with the common law, preferable for practical reasons, and faithful to the strictness of the statute into which we have read this justification defense." *Id.* at 348-49 (footnotes omitted). Thus, like the Supreme Court

in *Dixon*, the Third Circuit has addressed the issue of burden of proof on affirmative defenses in the context of the specific offense charged in the case before the court. However, it seems safe to predict that the court's burden of proof analyses would ordinarily apply to all offenses absent an explicit statement by Congress. Also *see, e.g., United States v. Paolello*, 951 F.2d at 541 (in recognizing justification or duress as defenses available to a felon in possession of a firearm charge, the Third Circuit reasoned, "[t]he courts have justified this conclusion on the ground that Congress legislated against the backdrop of the common law which has historically recognized this defense. *Accord, United States v. Bailey,* 444 U.S. at 415 n. 11, 100 S.Ct. at 637 n. 11 ('Congress in enacting criminal statutes legislates against the background of Anglo-Saxon common law').").

(revised 12/09)

**8.04 Justification** *[Necessity]*

*(Name)* **has raised as a defense that** *(he) (she)* **was justified** *[by necessity]* **in committing the offense***(s)* **charged in Count***(s) (Nos.)* **of the indictment. If you find that the government proved beyond a reasonable doubt that** *(name)* **committed the offense***(s)* **charged, then you must consider whether** *(name's)* **actions were justified** *[by necessity]***, as I will define that for you. If you find that the government proved that** *(name)* **committed the offense***(s)* **charged and you also find that the** *(name)* **proved that** *(he) (she)* **was justified** *[by necessity]* **in committing the offense***(s)***, then you must find** *(name)* **not guilty of the charge***(s)***.**

**To find that** *(name's)* **actions were justified** *[by necessity]***, and therefore that** *(he) (she)* **is not guilty of the offense***(s)* **charged in Count***(s) (Nos.)* **of the indictment, you must find that** *(name)* **proved by a preponderance of the evidence each of the following four elements:**

**First, that** *(name)* **was under an immediate, unlawful threat of death or serious bodily injury to** *(himself) (herself)* **or to others;**

**Second, that** *(name)* **had a well-grounded** *[reasonable]* **fear** *[belief]* **that the threat would be carried out if** *(he) (she)* **did not commit the offense***(s) [criminal acts]***;**

**Third, that** *(name's)* **criminal action was directly caused by the need to avoid the threatened harm and *that*** *(name)* **had no reasonable, lawful opportunity to avoid the threatened harm without committing the offense***(s) [criminal acts]***;**

**that is, that** *(name)* **had no reasonable lawful opportunity both to refuse to do the criminal act and also to avoid the threatened harm; and**

**Fourth, that** *(name)* **had not recklessly placed** *(himself) (herself)* **in a situation in which** *(he) (she)* **would be forced** *[it was probable that (he) (she) would be put in a position of having to choose whether]* **to engage in criminal conduct.**

*(Name)* **has the burden of proving the defense of justification** *[necessity]* **by a preponderance of the evidence. Preponderance of the evidence is a lower standard than proof beyond a reasonable doubt. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. If you put the credible evidence that is favorable to** *(name)* **and the credible evidence that is favorable to the government on opposite sides of a scale, the scale would have to tip somewhat on** *(name's)* **side in order for you to find** *(name)* **not guilty because of justification** *[necessity]***. However, if the scale tips in favor of the government, or if the credible evidence appears to be equally balanced, or if you cannot say on which side the credible evidence is heavier, then you must decide that** *(name)* **has not proved the defense of justification** *[necessity]* **by a preponderance of the evidence. In making this determination, you should consider all of the evidence presented during the trial, regardless of who offered it. You should evaluate the evidence and its credibility according to the instructions I gave you earlier.**

**You should also remember that the fact that** *(name)* **asserts this defense does not relieve the government of the burden of proving all the elements of the offense***(s)*

**charged beyond a reasonable doubt.**

**Comment**

*See* Sand et al, supra, 8-6. For variations in other Circuits, *see* Fifth Circuit § 1.36; Sixth Circuit § 6.07; Eleventh Circuit Inst. 16.

Whether the trial judge should use the bracketed *[by necessity]* will depend on whether that language is used by the parties at trial. For further discussion of the elements and the burden of proof for duress (coercion) and justification (necessity), *see* Comment to Instruction 8.03.

**8.04 Justification** *[Necessity]*

*(Name)* **has raised as a defense that** *(he) (she)* **was justified** *[by necessity]* **in committing the offense***(s)* **charged in Count***(s) (Nos.)* **of the indictment. If you find that the government proved beyond a reasonable doubt that** *(name)* **committed the offense***(s)* **charged, then you must consider whether** *(name's)* **actions were justified** *[by necessity]***, as I will define that for you. If you find that the government proved that** *(name)* **committed the offense***(s)* **charged and you also find that the** *(name)* **proved that** *(he) (she)* **was justified** *[by necessity]* **in committing the offense***(s)***, then you must find** *(name)* **not guilty of the charge***(s)***.**

**To find that** *(name's)* **actions were justified** *[by necessity]***, and therefore that** *(he) (she)* **is not guilty of the offense***(s)* **charged in Count***(s) (Nos.)* **of the indictment, you must find that** *(name)* **proved by a preponderance of the evidence each of the following four elements:**

**First, that** *(name)* **was under an immediate, unlawful threat of death or serious bodily injury to** *(himself) (herself)* **or to others;**

**Second, that** *(name)* **had a well-grounded** *[reasonable]* **fear** *[belief]* **that the threat would be carried out if** *(he) (she)* **did not commit the offense***(s) [criminal acts]***;**

**Third, that** *(name's)* **criminal action was directly caused by the need to avoid the threatened harm and *that*** *(name)* **had no reasonable, lawful opportunity to avoid the threatened harm without committing the offense***(s) [criminal acts]***;**

**that is, that** *(name)* **had no reasonable lawful opportunity both to refuse to do the criminal act and also to avoid the threatened harm; and**

**Fourth, that** *(name)* **had not recklessly placed** *(himself) (herself)* **in a situation in which** *(he) (she)* **would be forced** *[it was probable that (he) (she) would be put in a position of having to choose whether]* **to engage in criminal conduct.**

*(Name)* **has the burden of proving the defense of justification** *[necessity]* **by a preponderance of the evidence. Preponderance of the evidence is a lower standard than proof beyond a reasonable doubt. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. If you put the credible evidence that is favorable to** *(name)* **and the credible evidence that is favorable to the government on opposite sides of a scale, the scale would have to tip somewhat on** *(name's)* **side in order for you to find** *(name)* **not guilty because of justification** *[necessity]***. However, if the scale tips in favor of the government, or if the credible evidence appears to be equally balanced, or if you cannot say on which side the credible evidence is heavier, then you must decide that** *(name)* **has not proved the defense of justification** *[necessity]* **by a preponderance of the evidence. In making this determination, you should consider all of the evidence presented during the trial, regardless of who offered it. You should evaluate the evidence and its credibility according to the instructions I gave you earlier.**

**You should also remember that the fact that** *(name)* **asserts this defense does not relieve the government of the burden of proving all the elements of the offense***(s)*

**charged beyond a reasonable doubt.**

**Comment**

*See* Sand et al, supra, 8-6. For variations in other Circuits, *see* Fifth Circuit § 1.36; Sixth Circuit § 6.07; Eleventh Circuit Inst. 16.

Whether the trial judge should use the bracketed *[by necessity]* will depend on whether that language is used by the parties at trial. For further discussion of the elements and the burden of proof for duress (coercion) and justification (necessity), *see* Comment to Instruction 8.03.

**8.05 Entrapment**

*(Name)* **has raised as a defense that** *(he) (she)* **was entrapped by** *[an agent of]* **the government to commit the offense***(s)* **charged in Count***(s) (Nos.)* **of the indictment. A defendant may not be convicted of a crime if he or she was entrapped by the government to do the acts charged. The government is permitted to use undercover agents, deception, and other means of providing opportunities for an unwary criminally-minded person to commit a crime, but the law does not permit the government to induce an unwary innocent person into committing a criminal offense.**

**The defense of entrapment includes two inquiries:**

**First, did the government induce** *(name)* **to commit the offense?**

**Second, was** *(name)* **predisposed, that is, ready and willing to the commit the offense before** *(he) (she)* **was first approached by the government?**

**It is the government's burden to prove beyond a reasonable doubt that** *(name)* **was not entrapped; it is not** *(name's)* **burden to prove that** *(he) (she)* **was entrapped. Thus, you may find** *(name)* **guilty of the offense charged in Count** *(No.)* **only if you find that, in addition to proving the elements of that offense, the government also proved beyond a reasonable doubt either (1) that the government did not induce the commission of the offense; or (2) that** *(name)* **was predisposed, meaning that** *(name)* **was ready and willing to commit the offense before the government** *[agents]* **first** *[approached]* **spoke to** *(him) (her)* **about the crime.**

**You should first consider whether there is any evidence that the government induced *(name)* to commit the offense. Government actions that could amount to inducement include persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship. The government does not induce a person to commit an offense if the government merely approaches that person, or solicits, requests, or suggests that he or she commit the offense, or affords an opportunity or facilities to commit the offense. If you find that the government proved beyond a reasonable doubt that it did not induce *(name)* to commit the offense, then you should find that there was no entrapment and you need not consider this defense any further.**

**However, if you do have a reasonable doubt about whether the government proved that it did not induce *(name)* to commit the offense, then you must decide whether the government proved beyond a reasonable doubt that *(name)* was predisposed – that is, that *(name)* was ready and willing to commit the offense before the government first approached *(him) (her)* about it. In deciding this question, you should consider all the evidence, including any evidence about whether the government initially suggested the criminal activity; the nature of the government's inducement or persuasion; whether *(name)* had already formed an intent or design to commit the offense charged; whether *(name)* was engaged in an existing course of criminal conduct similar to the offense charged; whether *(name)* was engaged in criminal activity for profit; and whether *(name)* showed a willingness to commit the**

**offense or showed any reluctance that was overcome by repeated government inducement or persuasion** *[and evidence of (name's) character or reputation, including a prior record of criminal convictions]***. If, after considering all the evidence, you have a reasonable doubt that** *(name)* **would have committed the offense charged without the government's inducement, you should find the defendant not guilty.**

**Comment**

*See* 1A O'Malley et al, supra, § 19.04; Sand et al, supra, 8-7. For variations in other Circuits, *see* Sixth Circuit § 6.03; Eighth Circuit § 9.01; Ninth Circuit §§ 6.2, 6.3; Eleventh Circuit Insts. 13.1, 13.2.

**Elements of Entrapment.** The defendant may properly assert an entrapment defense and require an instruction on it without having to admit all the elements of the offense; entrapment may be asserted along with other, inconsistent defenses. *See, e.g., Mathews v. United States*, 458 U.S. 58, 63 (1988). Although ultimately the government has the burden of persuasion on entrapment, the defendant has the burden of production. Thus, to require the government to disprove the defense and to require an instruction on entrapment, "a defendant must produce sufficient evidence of inducement on the part of the government and a lack of predisposition on his own part." *United States v. Lakhani*, 480 F.3d 171, 179 (3d Cir. 2007), citing *Mathews v. United States*, 485 U.S. 58, 63 (1988); *United States v. Wright*, 921 F.2d 42, 44 (3d Cir. 1990).

In *Sherman v. United States*, 356 U.S. 369, 371 (1957), the Supreme Court noted that "to determine whether entrapment has been established, a line must be drawn between a trap for the unwary innocent and the trap for the unwary criminal." The Court further defined this line by stating that the defense of entrapment has two elements: "[1] government inducement of a crime, and [2] a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Mathews v. United States*, 485 U.S. at 63.

**Predisposition.** Since the Supreme Court's decision in *United States v. Russell*, 411 U.S. 423 (1973), the focus has been on the defendant's predisposition, or lack of predisposition, to commit the offense charged. *See Russell*, 411 U.S. at 429. Thus, the Court in *Russell* stated that entrapment is relevant "only when the Government's deception actually implants the criminal design in the mind of the defendant." 411 U.S. at 426. That the government merely afforded opportunities for or facilitated the commission of an offense through trickery or deceit does not establish entrapment. 411 U.S. at 435-36. In *Hampton v. United States*, 425 U.S. 484, 488-489 (1976), the Court noted: "In *Russell* we … reaffirmed … that the entrapment defense 'focus[es]

on the intent or predisposition of the defendant to commit the crime,' *Russell*, … 411 U.S., at 429, 93 S. Ct., at 1641, 36 L. Ed. 2d, at 371, rather than upon the conduct of the Government's agents."

In *Jacobson v. United States*, 503 U.S. 540, 547 (1992), the Supreme Court reversed the defendant's conviction for receiving child pornography through the mail, where a sting operation consisted of twenty-six months of repeated government mailings and communications before the defendant finally ordered the child pornography, and the defendant possessed no allegedly pornographic material other than that purchased from the government. The Court stated, "[i]n their zeal to enforce the law, government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." 503 U.S. at 548. Furthermore, the Court acknowledged that the burden of proof on entrapment is ultimately on the government: "Where the Government has induced an individual to break the law and the defense of entrapment is at issue, the prosecutor must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents." *Id.*

Similarly, the Third Circuit has repeatedly observed that:

> "[T]he element of non-predisposition to commit the offense is the primary focus of an entrapment defense." *United States v. Fedroff,* 874 F.2d 178, 182 (3d Cir.1989); *see United States v. Gambino,* 788 F.2d 938, 944 (3d Cir.1986); *Jannotti,* 673 F.2d at 597. It is a "'relatively limited defense' that may defeat a prosecution only 'when the Government's deception actually implants the criminal design in the mind of the defendant.'" *Fedroff,* 874 F.2d at 181 (quoting *Russell,* 411 U.S. at 435-36, 93 S.Ct. 1637). Once properly raised by the defendant, "the [G]overnment has the burden to disprove the whole (entrapment) defense beyond a reasonable doubt." *Jannotti,* 673 F.2d at 597 (internal quotation marks omitted).

*United States v. Lakhani*, 480 F.3d 171, 178-79 (3d Cir. 2007). The Third Circuit also discussed in *Lakhani* how the government may prove predisposition and some of the relevant factors:

> In *Gambino,* we agreed with the Second Circuit Court of Appeals in noting three ways in which the Government may do so: "'(1) an existing course of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement.'" 788 F.2d at 945 (quoting *United States v. Viviano,* 437 F.2d 295, 299 (2d Cir.1971)). We have also suggested several (somewhat overlapping) factors for consideration when making a determination on predisposition:
>
> > "the character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the Government; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense,

> overcome only by repeated Government inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government."
>
> *Fedroff,* 874 F.2d at 184 (quoting *United States v. Reynoso-Ulloa,* 548 F.2d 1329, 1336 (9th Cir.1977)).

*United States v. Lakhani*, 480 F.3d at 179. With respect to these factors, the court in *United States v. Federoff* noted that lack of a prior criminal record does not alone establish lack of predisposition and that the most important factor is the defendant's reluctance to commit the offense. 874 F.2d at 183-84.

**Government Inducement.** The Supreme Court and Third Circuit have also discussed what may and may not constitute government inducement of a defendant to commit a crime. In *Mathews v. United States*, 485 U.S. at 66, the Supreme Court stated, "[o]f course, evidence that government agents merely afforded an opportunity or facilities for the commission of the crime would be insufficient to warrant such an instruction." In *United States v. El-Gawli*, 837 F.2d 142 (3d Cir. 1988), the Third Circuit approved the trial court's instruction that:

> A solicitation, request or approach by law enforcement to engage in criminal activity, standing alone, is not an inducement. . . . Inducement by law enforcement may take many forms, including persuasion, representation, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship.

837 U.S. F.2d at 149. Also *see, e.g., United States v. Wright*, 921 F.2d 42, 45 (3d Cir. 1990) (holding that the mere fact that a government agent first suggested the illegal conduct is not enough to establish inducement).

**Outrageous Government Conduct that Violates Due Process.** In *United States v. Lakhani*, 480 F.3d 171 (3d Cir. 2007), the Third Circuit also discussed the related defense that the government's conduct with respect to the offense violated Due Process. The court first distinguished this Due Process defense from entrapment, noting that unlike entrapment which focuses on the defendant and his or her predisposition to commit the crime, "the defense of due process focuses exclusively on the conduct of the Government. If that conduct is 'so outrageous' as to be 'shocking to the universal sense of justice,' then the Due Process Clause can function as an 'absolut[e] bar [on] the [G]overnment from invoking judicial processes to obtain a conviction.' *United States v. Russell,* 411 U.S. 423, 431-32, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973)." 480 F.3d at 177-78. The court then explained the Due Process defense further:

> "[T]he judiciary is extremely hesitant to find law enforcement conduct so offensive that it violates the Due Process Clause." *United States v. Voigt,* 89 F.3d 1050, 1065 (3d Cir.1996). We have said that this principle is to be invoked only in the face of "the most intolerable government conduct," *Jannotti,* 673 F.2d at 608 – not "'each time the government acts deceptively or participates in a crime that it is investigating,'" *Nolan-Cooper,* 155 F.3d at 231 (quoting *United States v. Mosley,* 965 F.2d 906, 910 (10th Cir.1992)). Moreover, due process should not be used in this context "'merely as a

device to circumvent the predisposition test [of] the entrapment defense.'" *Id.* (quoting *Mosley,* 965 F.2d at 910); *see Jannotti,* 673 F.2d at 608 ("We must be careful not to undermine the [Supreme] Court's consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense."). In this spirit, we have been "admonished" not to "exercise 'a "Chancellor's foot'" veto over law enforcement practices of which [we might] not approve." Beverly, 723 F.2d at 12-13 (quoting *Russell,* 411 U.S. at 435, 93 S.Ct. 1637). . . .

As we have quoted before,

> "[a]lthough the requirement of outrageousness has been stated in several ways by various courts, the thrust of each of these formulations is that the challenged conduct must be shocking, outrageous, and clearly intolerable .... The cases make it clear that this is an extraordinary defense reserved for only for the most egregious circumstances."

*Nolan-Cooper,* 155 F.3d at 230-31 (alteration in original) (quoting *Mosley,* 965 F.2d at 910).

*United States v. Lakhani*, 480 F.3d at 180-81. Also *see, e.g., United States v. Hoffecker*, 530 F.3d 137, 154-55 (3d Cir. 2008) (affirming district court's finding that the government did not engage in outrageous conduct by using the defendant's one-time attorney as an undercover informant; "[t]o elevate a violation of the attorney-client privilege to a constitutional claim of outrageous misconduct, a defendant must demonstrate '(1) the government's objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice.'" Quoting *United States v. Voigt*, 89 F.3d at 1067.).

In rejecting the Due Process defense in *Lakhani*, the Third Circuit distinguished *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), the only case in which the Third Circuit has held that the government's conduct offended Due Process. In *Twigg*, the government agent proposed to the defendants setting up a methamphetamine lab, acquired the production site and all the equipment and raw materials, and was in complete charge of the lab, while the defendants' assistance was minor and at the specific direction of the government agent. *Lakhani*, on the other hand, involved an international terrorism investigation in which the government agent solicited the defendant to acquire a missile, but the defendant eagerly agreed, made several trips to the Ukraine in search of the missile, relied on his own experience in the arms trade, communicated with three separate arms companies, falsified shipping documents, and deployed his own money laundering network. 480 F.3d at 182. The court noted that Due Process is not violated merely because the government is on both sides of the transaction (buyer and seller), and recognized "that where the Government is investigating 'fleeting and elusive crime(s),' it may 'require more extreme methods of investigating. . . ,'" (480 F.3d at 182-83, quoting *Twigg*, 588 F.2d at 378), and that "Government investigations of crimes that were 'difficult to uncover' because 'both parties to the transaction have an interest in concealment' would be given greater latitude." *Id.* at 183, quoting *Jannotti*, 673 F.2d at 609.

It may be questioned whether any due process defense exists at all, independent of the entrapment defense, and whether even *Twigg* was correctly decided. In *United States v. Nolan-Cooper*, 155 F.3d 221, 229-31 (3d Cir. 1998), the court explained that the Supreme Court has seemingly disavowed the earlier dicta on which the due process theory rests, many circuits have refused to recognize the doctrine, and the theory, as of 1998, had been only applied one time in the United States to dismiss a criminal case. Accordingly, the court stated, "it appears that the viability of the doctrine is hanging by a thread." *Id.* at 230. The court added: "The First Circuit similarly has declared the outrageous government misconduct doctrine 'moribund' in light of the fact that, in practice, 'courts have rejected its application with almost monotonous regularity.' *United States v. Santana*, 6 F.3d 1, 4 (1st Cir.1993) ('The banner of outrageous misconduct is often raised but seldom saluted.')." *Nolan-Cooper*, 155 F.3d at 230.

**Entrapment by Estoppel.** The entrapment defense described in this instruction should not be confused with the defense of "entrapment by estoppel," which requires different elements. "The entrapment by estoppel defense applies where the defendant has established by a preponderance of the evidence that: (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement." *United States v. Stewart*, 185 F.3d 112, 124 (3d Cir.1999). Also *see United States v. West Indies Transp., Inc.*, 127 F.3d 299, 313 (3d Cir. 1997) (thoroughly discussing the defense of "entrapment by estoppel"); Model Penal Code § 2.04(3)(b) (defining defense of reasonable reliance on an official statement of the law). If the defense of entrapment by estoppel is properly raised, an appropriate instruction should be given.

**Sentencing Entrapment.** The entrapment defense described in this instruction also does not address sentencing entrapment (where official conduct leads a person otherwise indisposed to dealing in a larger quantity or different type of controlled substance to do so, resulting in a higher sentence) or sentencing factor manipulation (where the government unfairly exaggerates the defendant's sentencing range by engaging in a longer-than-needed investigation to increase the drug quantities for which the defendant is responsible). These doctrines are only relevant at sentencing, not during trial. Although other circuits have reached different conclusions about these doctrines, the Third Circuit has not needed to address the legal merits of either. *See, e.g., United States v. Sed*, 601 F. 3d 224, 229-31 (3d Cir. 2010).

(Revised 11/10)

**8.06 Insanity**

*(Name)* **has raised as a defense that** *(he) (she)* **was insane at the time the offense***(s)* **charged in Count***(s) (Nos.)* **of the indictment was** *(were)* **committed. A defendant is not guilty of an offense if he or she was insane when the offense***(s)* **was committed.**

**Insanity means that at the time of the commission of the acts constituting the offense***(s)***, as a result of a severe mental disease or defect, the defendant was unable to appreciate the nature and quality or the wrongfulness of his or her criminal acts.** *(Name)* **has the burden of proving by clear and convincing evidence that** *(he) (she)* **was insane at the time of the offense***(s)***.**

**To prove insanity,** *(name)* **must prove by clear and convincing evidence:**

**First, that** *(name)* **suffered from a severe mental disease or defect at the time the act***(s)* **constituting the offense***(s)* **was** *(were)* **committed; and**

**Second, that as a result of that severe mental disease or defect** *(name)* **was unable to appreciate the nature and quality of** *(his) (her)* **acts or was unable to appreciate the wrongfulness of** *(his) (her)* **acts** *[that (he) (she) was doing something wrong]***.**

**By "severe mental disease or defect," I do not mean any particular medical term.** *[However, the mere fact that a person may repeatedly engage in criminal conduct does not by itself justify a finding that he or she was insane.]*

*["Unable to appreciate," as used in this instruction, means that (name) did not*

*know or did not understand the nature and quality or the wrongfulness of (his) (her) acts.]*

*["Nature and quality of (his) (her) acts" means the physical nature and consequences of what (he) (she) was doing. Therefore, in order to find that (name) was unable to appreciate the nature and quality of (his) (her) acts, you must find clear and convincing evidence that (name) did not know or did not understand the physical nature and the consequences of what (he) (she) was doing.]*

*[The term "wrongful" means contrary to or against generally accepted standards of right and wrong. Therefore, in order to find that (name) was unable to appreciate the wrongfulness of (his) (her) acts, you must find clear and convincing evidence that (name) did not know or did not understand that the acts were contrary to generally accepted standards of right and wrong. Evidence that the (name) knew and understood that (his) (her) conduct was against the law may be considered by you in determining whether (name) appreciated that (his) (her) conduct was contrary to public morality.]*

*(Name's)* **burden to prove insanity by clear and convincing evidence means that, in order to find that** *(name)* **is not guilty by reason of insanity you must find, based on the evidence, that it is highly probable that** *(he) (she)* **was insane at the time of the offense***(s)***. Clear and convincing evidence is evidence that produces in your mind a firm and clear belief that** *(name)* **was insane at the time of the offense***(s)***. Clear and convincing evidence is a lower standard than proof beyond a reasonable doubt** *[, but a higher standard than a preponderance of the evidence]***.**

**In making your decision, you may consider evidence of *(name's)* mental condition before or after the offense charged, and you may consider not only the statements and opinions of any experts who have testified, but also all of the other evidence received in the case.**

**You have been provided with a verdict form to use to record your verdict. As shown on the form, you may unanimously reach one of three verdicts: "guilty," "not guilty," or "not guilty only by reason of insanity." If you find, based on all the evidence including the evidence related to insanity, that the government failed to prove each of the elements of the offense*(s)* beyond a reasonable doubt, then you must find *(name)* not guilty, without regard to the insanity defense. If you find that the government proved the elements beyond a reasonable doubt and you also find that *(name)* proved insanity by clear and convincing evidence, then you must find *(name)* not guilty only by reason of insanity. However, if you find that the government proved the elements beyond a reasonable doubt and you find that *(name)* has not proved insanity by clear and convincing evidence, then you should find *(name)* guilty.**

**Comment**

*See* 1A O'Malley et al, supra, §§ 19.03, 20.02; Sand et al, supra, 8.09. For variations in other Circuits, *see* First Circuit § 5.07; Fifth Circuit § 1.34; Sixth Circuit § 6.04; Eighth Circuit § 9.03; Ninth Circuit § 6.4; Tenth Circuit § 1.34; Eleventh Circuit Inst. 15.

**Insanity Defense Reform Act (IDRA).** The IDRA established the federal insanity defense. 18 U.S.C. § 17 provides:

(a) Affirmative defense. – It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof. – The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

18 U.S.C. § 4242 provides further:

(a) Motion for pretrial psychiatric or psychological examination. – Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(b) Special verdict. – If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant –

(1) guilty;
(2) not guilty; or
(3) not guilty only by reason of insanity.

The insanity test under the IDRA largely codifies the traditional common law insanity test derived from *M'Naghten's Case*, 8 Eng. Rep 718 (1843). *See Clark v. Arizona*, 126 S. Ct. 2709, 2719-22 (2006) (holding that the federal constitution does not require states to adopt any particular definition of legal insanity, discussing the *M'Naghten* rule and other insanity rules that have been accepted in various American jurisdictions).

**"Mental Disease or Defect;" "Appreciate;" "Nature and Quality of Acts;" "Wrongfulness."** Important terms within the statutory insanity defense, such as "mental disease or defect," "appreciate," "nature and quality of (his) (her) acts," and "wrongfulness," have not been defined by the Supreme Court or by the Third Circuit. These terms are also not defined in O'Malley, Sand, or the model instructions of the other Circuits. Generally, Sand states that "[t]he better practice is for the court not to go beyond the recommended language in defining what may or may not constitute legal insanity." 1 L. Sand et al., Modern Federal Jury Instructions, Comment to Instruction 8-10, at 8-70 (1991). Definitions of these terms are included here in brackets. They should be used only on request and when there is a meaningful dispute about the applicability of these terms under the evidence in the case.

Legal insanity requires a "severe mental disease or defect," but the medical definitions of these concepts do not alone define legal insanity, and the federal courts have rarely attempted to

define those terms. *See, e.g.*, Joshua Dressler, UNDERSTANDING CRIMINAL LAW, at 374 (4th ed. 2006); Wayne R. Lafave, CRIMINAL LAW (4th ed. 2003) (while "[t]here has never been a clear and comprehensive determination of what type of mental disease or defect is required .... it would seem that any mental abnormality . . . will suffice *if* it has caused the consequences described. . . ."). Professor LaFave notes that "'there has been almost no judicial definition of mental disease. . . ." and "when a jury is instructed. . ., the usual practice is merely to recite the 'disease of mind' element to the jury. No effort is made to define or explain what qualifies as a mental disease." *Id.* at 377, n 15, citing A. Goldstein, THE INSANITY DEFENSE 23 (1967).

With respect to the bracketed language in the fifth paragraph regarding "severe mental disease or defect," *see, e.g., United States v. Austin*, 533 F.2d 879, 885 (3d Cir. 1976) (Third Circuit upheld an instruction stating that, "As used in these instructions the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct," noting that this language instructed the jury that such conduct is alone not enough, but may be considered with other conduct indicating mental disease or defect, and that this instruction was expressly approved in *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961).).

With respect to the meaning of "appreciate" and "nature and quality," *see, e.g.,* O'Malley § 19.03 ("*Second:* As a result of this severe mental disease or defect, *[he] [she]* was not able to *understand what [he] [she] was doing* or to understand that what *[he] [she]* was doing was wrong." (emphasis added)); LaFave, CRIMINAL LAW at 383-84, 399.

The bracketed definition of "wrongfulness" is based on *United States v. Ewing*, 494 F.3d 611 (7th Cir. 2007). In *Ewing*, the Seventh Circuit held, "that wrongfulness for purposes of the federal insanity defense statute is defined by reference to objective societal or public standards of moral wrongfulness, not the defendant's subjective personal standards of moral wrongfulness. As such, . . . . the government's instruction appropriately focused the insanity inquiry on Ewing's ability to appreciate moral wrongfulness, without making knowledge of the law conclusive as to his understanding of wrongfulness." *Id.* at 621. The Seventh Circuit reasoned that this objective societal or public morality definition "best comports with the rules established in *M'Naghten's Case,* . . . . [and] is consistent with the holdings of American courts that analyzed the issue prior to 1984, when Congress adopted the IDRA. . . .[Further,] [t]here is nothing in the IDRA to suggest that wrongfulness should be interpreted more broadly than or contrary to the traditional understanding of the *M'Naghten* test." *Id.* at 620-21. The court also noted that only the Eighth Circuit had defined the term wrongfulness since the passage of the IDRA, and that court also concluded that the term had the broader meaning of moral rather than criminal wrongfulness. *See United States v. Dubray,* 854 F.2d 1099 (8th Cir.1988).

The definition of wrongfulness is bracketed in the instruction because, as the *Ewing* court cautioned, "not every insanity defense case calls for an instruction on the distinction between moral and legal wrongfulness like the one used here. *See Dubray,* 854 F.2d at 1101 ('The jury should be instructed on the distinction between moral and legal wrongfulness ... only where the evidence at trial suggests that this is a meaningful distinction in the circumstances of the case.')." 494 F. 3d at 622.

**Burden of Proof.** With respect to the constitutionality of placing on the defendant the burden of proof regarding insanity, the Supreme Court explained in *Patterson v. New York*, 432 U.S. 197, 204-05 (1977):

> At issue in *Leland v. Oregon* [343 U.S. 790 (1952)] was the constitutionality under the Due Process Clause of the Oregon rule that the defense of insanity must be proved by the defendant beyond a reasonable doubt. . . .[T]he Court refused to strike down the Oregon scheme, saying that the burden of proving all elements of the crime beyond reasonable doubt, including the elements of premeditation and deliberation, was placed on the State under Oregon procedures and remained there throughout the trial. To convict, the jury was required to find each element of the crime beyond a reasonable doubt, based on all the evidence, including the evidence going to the issue of insanity. Only then was the jury "to consider separately the issue of legal sanity per se. . . ." *Id.*, at 795, 72 S.Ct. at 1006. . . . Subsequently, the Court confirmed that it remained constitutional to burden the defendant with proving his insanity defense when it dismissed, as not raising a substantial federal question, a case in which the appellant specifically challenged the continuing validity of *Leland v. Oregon*, . . . . *Rivera v. Delaware*, 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976). . . .

**Clear and Convincing Evidence**. The Third Circuit has not defined "clear and convincing evidence" in the context of the insanity defense. In a recent not precedential opinion, the court stated:

> Although we have not yet addressed the clear and convincing standard in the context of the IDRA, there can be no question that proof by clear and convincing evidence is a more stringent standard than proof by a preponderance of the evidence. *See United States v. Brennan,* 326 F.3d 176, 200 n. 7 (3d Cir.2003). . . . In a slightly different context, the Supreme Court of New Jersey has supplied a useful definition of clear and convincing evidence as that which
>
> > produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.
>
> *In re Jobes,* 108 N.J. 394, 529 A.2d 434, 441 (1987) (internal quotation marks omitted). The Pennsylvania Supreme Court has similarly defined clear and convincing evidence as evidence sufficient to "enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. . . . It is not necessary that the evidence be uncontradicted . . . provided it 'carries conviction to the mind' or carries 'a clear conviction of its truth.'. . ." *In re Adoption of J.J.,* 511 Pa. 590, 515 A.2d 883, 886 (1986) (citations omitted). We find these definitions appropriate here.

*United States v. Askari*, 222 Fed. Appx. 115, 119 (3d Cir. 2007) (not precedential). O'Malley and other circuits define clear and convincing evidence by explaining that the defendant must

show that it is highly probable that he or she was insane at the time of the offense. *See, e.g.*, O'Malley § 19.03; Sixth Circuit § 6.04; Ninth Circuit § 6.4. *Also see Colorado v. v. New Mexico*, 467 U.S. 310, 316 (1984) (Supreme Court stated that diversion of interstate water would be judged by a clear and convincing evidence standard, defined as meaning that "a diversion of interstate water should be allowed only if Colorado could place in the ultimate fact finder an abiding conviction that the truth of its factual contentions are 'highly probable.' *See* C. McCormick, Law of Evidence § 320, p. 679 (1954).").

**Consequences of Not Guilty By Reason of Insanity Verdict.** In *United States v. Shannon*, 512 U.S. 573 (11994), the Supreme Court held that in most cases the trial judge should not instruct the jury on the consequences of a not guilty by reason of insanity verdict: "Although we conclude that the IDRA does not require an instruction concerning the consequences of an NGI verdict, and that such an instruction is not to be given as a matter of general practice, we recognize that an instruction of some form may be necessary under certain limited circumstances. If, for example, a witness or prosecutor states in the presence of the jury that a particular defendant would 'go free' if found NGI, it may be necessary for the district court to intervene with an instruction to counter such a misstatement. The appropriate response, of course, will vary as is necessary to remedy the specific misstatement or error. We note this possibility merely so that our decision will not be misunderstood as an absolute prohibition on instructing the jury with regard to the consequences of an NGI verdict." 512 U.S. at 587-88.

**Evidence of Mental Abnormality to Negate Mens Rea.** 18 U.S.C. § 17(a), which provides for the affirmative defense of insanity, also provides that "Mental disease or defect does not otherwise constitute a defense." Nevertheless, in United *States v. Pohlot*, 827 F.2d 889, 890 (3d Cir. 1987), the Third Circuit held:

> We conclude that although Congress intended § 17(a) to prohibit the defenses of diminished responsibility and diminished capacity, Congress distinguished those defenses from the use of evidence of mental abnormality to negate specific intent or any other mens rea, which are elements of the offense. While the contours of the doctrines of diminished responsibility and diminished capacity are unclear, the defenses that Congress intended to preclude usually permit exoneration or mitigation of an offense because of a defendant's supposed psychiatric compulsion or inability or failure to engage in normal reflection; however, these matters do not strictly negate mens rea.

The court continued:

> [W]e agree that the Congressional prohibition of diminished responsibility defenses requires courts to carefully scrutinize psychiatric defense theories bearing on mens rea. . .
>
> In light of the strong danger of misuse, we join other circuits that have directed district courts to examine proffered psychiatric testimony carefully "to determine whether proof offered is grounded in sufficient scientific support to warrant use in the courtroom, and whether it would aid the jury in deciding the ultimate issues.". . . Courts should also be careful in deciding whether to issue jury instructions or to permit defense arguments

> directing the jury to consider whether any evidence of mental abnormality negates mens rea. Notions of intent, purpose and premeditation are malleable and at their margins imprecise. But the limits of these concepts are questions of law. *District courts should admit evidence of mental abnormality on the issue of mens rea only when, if believed, it would support a legally acceptable theory of lack of mens rea.*

827 F.2d at 890, 905-06 (emphasis added; citations omitted). *See Arizona v. Clark*, 126 S. Ct 2709, 2724-37 (2006) (holding no federal constitutional violation where state law excluded evidence of a defendant's mental capacity owing to mental illness or defect on the issue of mens rea).

In *Pohlot* itself, the court found that admission of the evidence and consideration by the jury was not warranted. The court stated: "[O]nly in the most extraordinary circumstances could a defendant actually lack the capacity to form mens rea as it is normally understood in American law. Even the most psychiatrically ill have the capacity to form intentions, and the existence of intent usually satisfies any mens rea requirement. . . . Mens rea is generally satisfied . . . by any showing of purposeful activity, regardless of its psychological origins." 827 F.2d at 903-04 (citations omitted). In *Pohlot*, the defendant argued that while he attempted to hire a person to kill his wife, he was experiencing a fantasy in which he actually aimed to reunite with his wife. The Third Circuit held that in this circumstance the district court correctly declined to instruct the jury that it could consider whether the defendant's mental state negated mens rea. "[I]t is clear that Pohlot acted with considerable awareness of what he was doing and with considerable purpose. Pohlot engaged in careful activity, over a lengthy period of time, sending first a deputy and then engaging in several phone calls and personal meetings all directed at one purpose: hiring someone to murder his wife. Pohlot came to a firm agreement, made payment, and expressed concern and took action to assure that the crime was not ultimately traced to him." *Id.* at 906-07.

Under *Pohlot*, in the "rare case" (*see* 827 F.2d at 900) in which evidence of mental abnormality has been admitted in support of a legally acceptable theory of lack of mens rea, the trial court should give an instruction similar to the instruction on voluntary intoxication (drug use), *see United States v. Pohlot*, 827 F.2d at 897 n.3 ("The distinction is analogous to the use of evidence of intoxication."), as follows:

> You have heard evidence that *(name)* may have had a mental abnormality *[mental disease or defect]* at the time of the offense*(s)* charged in Count*(s) (Nos.)* of the indictment. A mental disease or defect, or a mental abnormality, is not in itself a legal defense to an offense *[unless it results in insanity, which I have described for you.]* However, a mental abnormality *[mental disease or defect]* may show that *(name)* did not have the state of mind that the government must prove in order to find *(name)* guilty of the offense*(s)* charged, as I have described it to you..
>
> If you find, based on the evidence presented, that *(name)* had a mental abnormality *[mental disease or defect]* at the time of the offense*(s)*, you may find that *(name)* did not have the state of mind required for the offense*(s)* charged. On the other

hand, even if you believe that *(name)* had some mental abnormality *[mental disease or defect]*, you may still find that *(he) (she)* was capable of and did have the required state of mind for the offense*(s)* charged. As I have explained to you, if after considering all the evidence you find that the government proved each element of the offense*(s)*, including the state of mind element, beyond a reasonable doubt, then you should find *(name)* guilty, but if you find that the government has failed to prove each element beyond a reasonable doubt, then you must find *(name)* not guilty.

If the evidence supports an instruction on mental abnormality as it relates to a "legally acceptable theory of lack of mens rea," under *Pohlot*, and also supports an affirmative defense of insanity, the trial court should instruct both on the possibility that the defendant's mental abnormality negated the required mens rea and on the affirmative defense of insanity, and must carefully explain the different burdens of proof on these two "defenses." *See, e.g., United States v. Pohlot*, 827 F.2d at 901 ("[T]he mere fact that a defendant has the right to introduce psychiatric evidence in support of the affirmative defense of insanity does not justify barring the evidence from negating the government's case in chief. The Supreme Court has indicated that although a state may constitutionally shift the burden of proving insanity to the defendant, *Leland v. Oregon*, . . . , it did not sanction, and probably would not sanction, a jury charge that prevented a jury from considering evidence of mental abnormality in determining whether the state had proven premeditation and deliberation beyond a reasonable doubt. . . . [In *Martin v. Ohio*, 480 U.S. 228, (1987)] [t]he Court indicated . . . that a state's right to shift the burden on self-defense does not include the right to prevent a defendant from showing self-defense in an effort to prove that she did not act with the mens rea . . . .).

**8.07 Voluntary Intoxication** *[Drug Use]*

**You have heard evidence that** *(name)* **may have been intoxicated** *[drunk] [high on drugs]* **at the time of the offense***(s)* **charged in the indictment. Intoxication or drunkenness** *[or drug use]* **is not itself a legal defense to a criminal charge. However, intoxication or drunkenness** *[drug use]* **may show that** *(name)* **did not have the intent to commit the offense that the government must prove in order to find** *(name)* **guilty.**

**If you find based on the evidence presented that** *(name)* **was intoxicated** *[drunk] [high on drugs]* **at the time of the offense, you may find that** *(name)* **did not have the intent required for the offense charged, as I described that to you. On the other hand, even if you believe that** *(name)* **was intoxicated** *[drunk] [high on drugs]* **to some degree, you may still find that** *(he) (she)* **was capable of and did have the required intent. As I have explained to you, if after considering all the evidence you find that the government proved each element of the offense, including the intent element, beyond a reasonable doubt, then you should find** *(name)* **guilty, but if you find that the government has failed to prove each element beyond a reasonable doubt, then you must find** *(name)* **not guilty.**

**Comment**

*See* 1A O'Malley et al, supra, § 19.05; Sand et al, supra, 8.03. For variations in other Circuits, *see* First Circuit § 5.03; Seventh Circuit § 6.09; Eighth Circuit § 9.06; Ninth Circuit § 6.8.

Whether voluntary intoxication or drug use is recognized as a defense depends on whether the relevant mental state element of the offense(s) charged is characterized as general or specific intent. In *United States v. Williams*, 892 F.2d 296, 303 (3d Cir, 1989), the Third Circuit

held that the district court correctly excluded evidence of the defendant's intoxication, introduced for the purpose of negating mens rea, because the offense charged (possession of a firearm by a convicted felon) was a "general intent offense." The court stated:

> Evidence of voluntary intoxication can be introduced to negate the specific intent required to commit a particular crime. . . . For general intent crimes, evidence of voluntary intoxication is not an acceptable method of negating the required intent.
>
> [Defendant] argues that our decision in *United States v. Pohlot,* 827 F.2d 889 (3d Cir.1987), *cert. denied,* 484 U.S. 1011, 108 S.Ct. 710, 98 L.Ed.2d 660 (1988) [*see* discussion in Comment to Instruction 8.05], requires a different result. We disagree. *Pohlot* interpreted the Insanity Defense Reform Act, 18 U.S.C. § 17 (Supp. V 1987), as excluding all evidence of mental abnormality "that does not support a legally acceptable theory of lack of mens rea." 827 F.2d at 906. For crimes of general intent, voluntary intoxication is not an acceptable theory of lack of mens rea. This is not because general intent crimes require no proof of mens rea, but because the relevant mens rea has been established by a common law presumption, i.e., a person who voluntarily becomes intoxicated is presumed to intend all the actions that follow.

In *United States v. Davis*, 183 F.3d 231, 253 (3d Cir. 1999), the Third Circuit held that the trial judge did err in failing to instruct on intoxication, where "[a]ll of the charged crimes [obstruction of justice] were specific intent crimes, and intoxication can negate specific intent. *See United States v. Williams,* 892 F.2d 296, 303 (3d Cir.1989)." After discussing the evidence that supported giving an intoxication instruction, the court continued (183 F.3d at 254):

> In order to justify an intoxication instruction, most courts have held that a defendant needs more than evidence of intoxication. He also needs some evidence of interference with his ability to form the relevant intent. *See, e.g., United States v. Nacotee,* 159 F.3d 1073, 1076 (7th Cir.1998); *United States v. Washington*, 819 F.2d 221, 225 (9th Cir.1987). In *Government of the Virgin Islands v. Carmona,* [422 F.2d 95 (3d Cir. 1970)], however, we apparently set forth a different rule, as we found an intoxication instruction required in a felony murder case when the only evidence of intoxication was that the defendant had a large amount to drink. . . .
>
> It may be that our rule is not substantially different than that of other circuits, in that it is often difficult to determine what might qualify as evidence of interference with ability to form intent. *Carmona* endorses the conclusion, justified by much human experience, that heavy drinking may interfere with a person's ability to form a specific intent.

**Specific Intent and General Intent.** Whether an offense is a "general intent offense" or a "specific intent offense" is determined by the meaning of the mental state requirement. Generally, where the mental state element requires the government to prove that the defendant actually or specifically wanted, desired, or meant to engage in the prohibited conduct or to cause the required result, it is called "specific intent." On the other hand, where the mental state

element requires the government to prove simply that the defendant was aware that he or she was committing the prohibited conduct or would cause the result, or consciously disregarded or should have avoided the risk of harm, then it is called "general intent." *See, e.g.,* Instruction 5.03 (Intentionally) and Comment; *United States v. Bailey*, 444 U.S. 394, 405 (1980). (The Supreme Court observed that "specific intent" corresponds loosely to "purposely" under the Model Penal Code and "general intent" is loosely comparable to "knowingly" under the Code. The Court also noted that generally for federal crimes "intent" may be proved by evidence that the defendant acted either purposely or knowingly, but for a narrow class of crimes (e.g., murder, conspiracy, attempt) specific intent or purposely (conscious object) is required.); MODEL PENAL CODE AND COMMENTARIES, § 2.02, at 234 ("[T]his distinction [between purposely and knowingly] is inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient. But there are areas where the discrimination is required and is made under traditional law, which uses the awkward concept of 'specific intent.'"); Joshua Dressler, UNDERSTANDING CRIMINAL LAW, 147 (4th ed. 2006) ("[There is no universally accepted meaning of the terms. Sometimes, courts draw the following distinction: An offense is 'specific intent' if the crime requires proof that the actor's conscious object, or purpose, is to cause the social harm set out in the definition of the offense. In contrast, a crime is 'general intent' in nature if the actor can be convicted upon proof of any lesser state of mind, such as when he causes the harm knowingly, recklessly, or negligently.") The case law has often been confusing with respect to whether offenses are characterized as general or specific intent. *See, e.g., United States v. Bailey*, 444 U.S. at 403-04 (Supreme Court recognized that the Model Penal Code's more precise articulation of state of mind (culpability) elements exemplified the modern movement away from the common law specific and general intent distinction).

# Chapter 9. Supplemental Instructions

**9.01 Retention of Alternate Jurors**

**At this time, the regular jurors will begin their deliberations in the case. Nevertheless, the alternate jurors are not excused. While the jury conducts its deliberations, you** *(describe what is expected of alternate jurors; e.g., you should continue to report to the courtroom at 9 a.m. each morning until I excuse you)***.**

**During this time, you must continue to observe all the restrictions I have instructed you on throughout the trial. That is, you must not discuss this case with anyone, including your fellow alternate jurors, the regular jurors, other people involved in the trial, members of your family, friends, or anyone else. Do not speak at all with any of the parties, the witnesses, or the attorneys. Do not permit anyone to discuss the case with you. Do not even remain in the presence of anyone discussing the case. If anyone approaches you and tries to talk to you about the case, please report that to me, through my courtroom deputy, immediately.**

**While I do not know whether there is any news coverage of this case, do not watch or listen to any news reports concerning this trial on television or radio and do not read any news accounts of this trial in a newspaper or on the Internet. Do not use the Internet to search for information about the parties, witnesses, lawyers, or anything else associated with the trial. Do not visit the scene of the alleged offense or conduct any kind of investigation of your own. Should you be asked to participate in reaching a verdict in this case, the only information you will be**

**allowed to consider in deciding this case is what you learned in this courtroom during the trial.**

**Comment**

A question may arise concerning the role of the alternate jurors once the regular jurors have begun their deliberations. In 1999, Federal Rules of Criminal Procedure, Rule 24(c)(3) was amended to permit the trial court to retain alternate jurors after the regular jurors begin their deliberation. As amended, the rule provides:

> Retaining Alternate Jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

To enable to court to replace a regular juror with an alternate if necessary, the court should consider retaining the alternate jurors. The court must instruct the alternate jurors that they are subject to all the restrictions covered in Instruction 2.01(Recesses). The court must also instruct them that they are not to discuss the case with anyone, including the regular jurors and each other unless and until they replace a regular juror during deliberations.

As the rule reflects, the court may replace a regular juror with an alternate. Even once deliberations have begun, the defendant is not constitutionally entitled to have the original jurors render a verdict. *Claudio v. Snyder*, 68 F.3d 1573 (3d Cir. 1995). The trial court's decision to remove a juror will be reviewed for abuse of discretion. *See United States v. Kemp*, 500 F.3d 257, 301-06 (3d Cir. 2007); see *also United States v. Jimenez*, 513 F.3d 62 (3d Cir. 2008) (upholding refusal to strike juror and reaffirming abuse of discretion standard); *United States v. Boone*, 458 F.3d 321, 327-30 (3d Cir. 2006) (discussing removal of juror for refusal to deliberate or for nullification).

The only requirement if the court replaces a juror with an alternate is that the court instruct the jury to begin its deliberations anew.

(revised 12/09)

## 9.02 Response to Jury Questions

**Members of the jury, I have received a note from you that says** *(read note from jury)***.**

**Let me respond by instructing you as follows:** *(response to note determined after consultation with counsel)***.**

**Keep in mind that you should consider what I have just said together with all the other instructions that I gave you earlier. All these instructions are important, and you should consider them together as a whole.**

**You should now return to the jury room and resume your deliberations.**

### Comment

*See* Sixth Circuit § 9.01.

In some cases, the jury will have a question while it is deliberating. The trial court has discretion concerning the appropriate procedure and response. *United States v. Sriyuth*, 98 F.3d 739, 751 (3d Cir. 1996). In *United States v. Ulloa*, 882 F.2d 41, 45 (2d Cir. 1989), the Second Circuit suggested a four-step response to jury questions:

> (1) The jury's question should be submitted in writing, (2) the question should be marked as a court exhibit and read into the record, (3) counsel should be afforded an opportunity to suggest appropriate responses, and (4) once the jurors are recalled, the question, if substantive, should be read into the record in their presence.

The court should then read its response to the question. The Committee recommends this approach. *See United States v. Sriyuth*, 98 F.3d 739, 751 (3d Cir. 1996) (noting that the court should read the response to the jury's question, but finding no error where the court responded with written instructions).

A jury question signals that at least some of the jurors are uncertain or confused, and the trial court's response should address and seek to clear up the jurors' uncertainty. *See United States v. Combs*, 33 F.3d 667, 669-70 (6th Cir. 1994). As a result, a supplemental instruction

generally should neither provide just a yes or no answer nor merely reiterate earlier instructions. *Combs*, 33 F.3d at 669-70. Instead, the court must "tak[e] pains adequately to explain the point that obviously is troubling the jury." *Combs*, 33 F.3d at 670. At the same time, "the court must ensure that, in responding, it does not stray beyond the purpose of jury instructions." *Combs*, 33 F.3d at 670. In *United States v. Tsai*, 954 F.2d 155, 161 (3d Cir. 1992), the court noted that it would have been better had the trial court been "linguistically consistent in the original and supplemental instructions," but also remarked that "[r]esponses to a juror's question are generally extemporaneous and ad hoc, and cannot be expected to be delivered in polished prose."

## 9. 03 Reading of Testimony

**Members of the jury, you have requested that** *(describe what will be read; e.g., that a portion of (name of witness') testimony)* **be read. The court reporter will now read that to you.**

**Keep in mind that you should consider this testimony together with all the other evidence. Do not consider it by itself, out of context. Do not give it undue weight just because it is being read to you. Consider all the evidence together as a whole.**

### Comment

*See* Sixth Circuit § 9.02.

This instruction may be given if the court decides to permit testimony to be read to the jury.

In *United States v. Zarintash*, 736 F.2d 66, 69-70 (3d Cir. 1984) (citations omitted), the Third Circuit discussed the reading of testimony for the jury:

> A trial court has broad discretion in deciding whether to accede to a jury's request for a reading of testimony. But this discretion is based upon a limited, twofold rationale: first, that requests to read testimony may slow the trial where the requested testimony is lengthy; second, that reading only a portion of the testimony may cause the jury to give that portion undue emphasis. Thus, . . . a trial judge abuses his discretion where the refusal to read requested testimony is not supported by one of these reasons.

In *Zarintash*, the court held that the trial court had committed reversible error by refusing the jury's request to read the testimony of two witnesses. 736 F.2d at 71. In *United States v. Bertoli*, 40 F.3d 1384, 1400-01 (3d Cir. 1994), while expressing some concern that giving the jury the written transcript rather than reading the testimony would cause the jury to give it undue weight, the Third Circuit upheld the trial court's decision to provide the jury with transcripts of the testimony of twelve witnesses. When responding to a request that portions of the testimony be

read to the jury, the court should also consider three general concerns:

> (1) any transcript provided to a jury should be accurate; (2) transcription of side bar conferences, and any other matters not meant for jury consumption, must be redacted; and (3) as a purely practical matter, a district court "should take into consideration the reasonableness of the jury's request and the difficulty of complying therewith."

*United States v. Rodgers*, 109 F.3d 1138, 1143 (6th Cir. 1997) (citations omitted). *See also United States v. Shabazz*, 564 F.3d 280, 285-86 (3d Cir. 2009) (holding that trial court committed error by refusing to allow requested testimony to be read to jury but that the court cured the error by later giving the jury access to the transcript).

In *Bertoli*, the court noted that the trial court "should accompany the transcripts with a cautionary instruction to focus on the entire testimony and evidence." 40 F.3d at 1401. This instruction cautions the jury to consider the testimony read to the jury along with all the other evidence. However, if the defendant does not request an instruction, failure to give an instruction is not plain error. *See United States v. Harper*, 314 F. App'x. 478 (3d Cir. 2008) (non-precedential).

(revised 12/09)

**9.04 Sending Jury Home Overnight**

**We are about to stop for the** *(day)(week)* **and recess** *(until tomorrow)(until next week)***, and I want to remind you of the instructions I gave you earlier about your conduct as jurors.**

**During this recess and all other recesses, do not discuss this case with anyone, including your fellow jurors, other people involved in the trial, members of your family, friends, or anyone else. Do not speak at all with any of the parties, the witnesses, or the attorneys. Do not permit anyone to discuss the case with you. Do not even remain in the presence of anyone discussing the case. If anyone approaches you and tries to talk to you about the case, please report that to me, through my courtroom deputy, immediately.**

**While I do not know whether there is any news coverage of this case, do not watch or listen to any news reports concerning this trial on television or radio and do not read any news accounts of this trial in a newspaper or on the Internet. Do not use the Internet to search for information about the parties, witnesses, lawyers, or anything else associated with the trial. Do not visit the scene of the alleged offense or conduct any kind of investigation of your own. The only information you are to consider in deciding this case is what you learned in this courtroom during the trial.**

**You are being entrusted with a great responsibility in being permitted to return to your homes** *(for the evening)(for the weekend)***. I am sure that each of you**

**will make every effort to ensure that none of the restrictions is violated.**

**You must return to the courtroom at** *(fill in day and time)***. You must not begin your deliberations again until all twelve of you are present.**

**Comment**

*See* Instruction 2.01 (Recesses). This instruction should be given when the jury is permitted to return home overnight or over a weekend during its deliberations.

**9.05 Deadlocked Jury – Return for Deliberations**

**Members of the jury, I am going to ask you to return to the jury room and deliberate further. I realize that you are having some difficulty reaching unanimous agreement, but that is not unusual. And often after further discussion, jurors are able to work out their differences and agree.**

**It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.**

**What I have just said is not meant to rush or pressure you into agreeing on a verdict. Take as much time as you need to discuss things. There is no hurry.**

**With that instruction, I will return you to the jury room. Thank you.**

**Comment**

*See United States v. Brennan*, 326 F.3d 176, 193 (3d Cir. 2003); *United States v. Fioravanti*, 412 F.2d 407, 419-20 (3d Cir. 1969); 6th Circuit § 9.04. *See also United States v. Cocchiola*, 358 F. App'x. 376 (3d Cir. 2009) (non-precedential) (affirming conviction where trial

court gave instruction essentially identical to 9.05).

This instruction may be given if the jurors report that they are deadlocked. *See United States v. Wecht*, 541 F.3d 493 (3d Cir. 2008) (noting that court gave Instruction 9.05). When a jury reports that it is deadlocked or asks whether it must continue deliberating, the court has broad discretion in overseeing the jury's deliberations. *See United States v. Trala*, 386 F.3d 536 (3d Cir. 2004); *Government of Virgin Islands v. Gereau*, 502 F.2d 914, 935-36 (3d Cir. 1974) (noting that "[a]bsent peculiar evidence indicative of coercion, it is proper for a judge to instruct a deadlocked jury to continue deliberations and attempt to arrive at a verdict"). However, the court should approach the decision to instruct in such circumstances with caution. The court must also take steps to insure that no juror reveals either the numerical split on the jury or the position of the majority. *See United States v. Fiorilla*, 850 F.2d 172, 175 (3d Cir. 1988); *Government of Virgin Islands v. Romain*, 600 F.2d 435 (3d Cir. 1979).

The court may give a supplemental charge encouraging the jurors to continue their deliberations, but the charge cannot be used to coerce or "blast" a jury into reaching a verdict. *United States v. Jackson*, 443 F.3d 293 (3d Cir. 2006). The propriety of the supplemental charge will be assessed in the context in which it was given. *Jackson*, 443 F.3d at 297.

The Third Circuit has cautioned courts concerning instructions to a deadlocked jury and prohibits use of the charge approved by the United States Supreme Court in *Allen v. United States*, 164 U.S. 492 (1896), because it is too coercive. In *United States v. Fioravanti*, 412 F.2d 407, 419-20 (3d Cir. 1969), the court cautioned that *Allen* charges are a perennial source of problems and specifically stated:

> Hereafter, in this circuit, trial judges are not to give instructions either in the main body of the charge or in the form of a supplement that direct a juror to distrust his own judgment if he finds a large majority of the jurors taking a view different from his. Such an instruction will be deemed error, normally reversible error.

In *United States v. Eastern Medical Billing, Inc.,* 230 F.3d 600 (3d Cir. 2000), the court reaffirmed *Fioravanti* and stated:

> We recognize that when faced with a deadlocked jury, a district court may, in its discretion, provide further instruction to the jurors. In doing so, however, the court should do no more than encourage the jurors to fulfill their duty, and possibly draw their attention again to the same rules governing their task that were explained to them during the original instruction.

230 F.3d at 615. In *United States v. Burley*, 460 F.2d 998, 999 (3d Cir.1972), the court condemned the supplemental charge as unduly coercive because it stressed the importance of considering the burdens and expense to the government if the case had to be retried. In *Government of the Virgin Islands v. Hernandez*, 476 F.2d 791 (3d Cir. 1973), the court held that

it was plain error to instruct the jury during the charge in chief that the minority jurors should give special consideration to the views of the majority in order to reach a verdict. *But see United States v. Graham*, 758 F.2d 879 (3d Cir. 1985) (agreeing that instruction constitutes error, but disagreeing with plain error analysis). In *United States v. Brennan*, 326 F.3d 176, 193 (3d Cir. 2003), the court stated that telling the jury that it has to reach a decision is coercive and discussed the possible coercive effect of emphasizing the likelihood that continued deliberations would extend into a weekend or holiday.

The Third Circuit has made specific suggestions concerning the supplemental charge to the jury that claims to be deadlocked. In *Fioravanti*, the court noted that if a trial court was inclined to instruct the jury, the court should give the following instruction, found at Mathes and Devitt, 1965, § 79.01.[1]

> It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

412 F.2d at 420 n.32. The court has also encouraged the use of language "urging the jurors to re-examine their own view but not to 'surrender [their] honest conviction as to the weight or effect of evidence solely because of the opinion of [their] fellow jurors, or for the mere purpose of returning a verdict.'" *Brennan*, 326 F.3d at 193-93. In *Trala*, 386 F.3d at 542, the court held that an instruction informing the jurors that they may fail to reach a verdict is necessary only when there is "some evidence of coercion." The model instruction is based on the recommendations of the Third Circuit in these cases. It does not differentiate between majority and minority jurors, nor does it address the necessity of retrying the case if the jurors fail to reach a verdict. Further, it incorporates the language specifically suggested in *Brennan* and *Fioravanti*.

In addition to providing this guidance, the Third Circuit has rejected challenges to the supplemental charges given in specific cases. *See, e.g., Jackson*, 443 F.3d 293; *Brennan*, 326 F.3d 176. In *Brennan*, the court emphasized specific language in reaching its conclusion that the

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[1]O'Malley's current instruction includes this language in a much longer instruction, which, in part, advises the minority jurors to reassess their views, a position specifically rejected by the Third Circuit. *See* Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions [hereinafter O'Malley et al., supra] § 20.08.

supplemental instruction was not error:[2]

> The Court's charge did express a belief to the jury that it had not deliberated for a sufficient period of time, but this was not affirmative coercive conduct . . . . In addition, while the Court emphasized the desirability of a verdict, this instruction was tempered by the caution that "[u]nder no circumstances must any juror yield his conscientious judgment." The Court also warned the jurors: "[d]o not ever change your mind just because the other jurors see something different or just to get the case over with." Perhaps most importantly, the Court reminded the jury:

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[2]In *Brennan*, the Third Circuit stated that the following charge was "not error, plain or otherwise":

> All right. Now, in regard to that, as I told you in my original instructions, this case is an important one to the Government. It is equally important to the defendant. It is desirable if a verdict can be reached but your verdict must reflect the consent, conscientious judgment of each juror. Under no circumstances must any juror yield his conscientious judgment.
>
> You have deliberated for only five days in a case that previously took 19 days to try. It is normal for jurors to have differences. This is quite common. Frequently, jurors, after extended discussions may find that a point of view, which originally represented a fair and considered judgment, might well yield on the basis of argument and upon the facts in the evidence.
>
> However, and I emphasize this, no juror must vote for any verdict unless after full discussion or consideration of the issues and exchange of views it does represent his or her considered judgment.
>
> Further consideration may indicate that a change in original attitude is fully justified upon the law and all of the facts. I do want to read to you a statement contained in the Supreme Court Opinion which is well-known to the bench and Bar and it is this. "That although a verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his or her fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinion of each other, that is with their duty to decide the case if they could conscientiously do so."
>
> You're reminded also that the Prosecution bears the burden of proving each element of the offense beyond a reasonable doubt. Do not ever change your mind just because the other jurors see something different or just to get the case over with. As I've told you before, in the end your vote must be exactly that, your vote. And important as it is for you to reach a unanimous agreement, it is just as important that you do so honestly and in good conscience.
>
> With that instruction, I will return you to the jury room. Thank you.

*Brennan,* 326 F.3d at 193.

> "As important as it is for you to reach a unanimous agreement it is just as important that you do so honestly and in good conscience.". . . [T]hese warnings and reminders removed any possibility that the supplemental charge could be considered as coercive. Moreover, the District Court did not suggest that the jury was required to reach a verdict, nor did it emphasize the burdens or costs of a new trial.

*Brennan,* 326 F.3d at 193.

In *Jackson*, the court held that the following supplemental charge was proper even though it mentioned that a new trial would be required if the jury failed to reach a verdict.

> All right. In this case, ladies and gentlemen, you've been deliberating less than two hours, and that's included some time to have lunch. I want to re-read to you slightly different words, but the same concept that I said before. I'd like you to go back into the jury room and talk some more about the evidence.
>
> And, remember my entire instructions, that your job is to be the finders of facts, that you should consider the evidence, you should consider my instructions on the law, and that you should render a verdict based on the evidence. And, that should be your guide, what the evidence is in this case and what the instructions were on the law.
>
> Now, it's your duty as jurors to talk with one another and deliberate in the jury room. You should try to reach agreement, if you can, without doing violence to our [sic] individual judgment. Each of you must decide the case for yourself, but only after consideration of the evidence with the other members of the jury. While this is going on, do not hesitate to reexamine your own opinion and change your mind if you are convinced that you are wrong. But, don't give up your honest belief just because the others thing [sic] differently or merely to get the case over with.
>
> Remember that the Government has to prove its case beyond a reasonable doubt. And, if they do not do this, then you must return a verdict of not guilty. If they have done this, then you must return a verdict of guilty.
>
> So, I ask you to remember my instructions on what is reasonable doubt and all the other instructions that I gave you. And, remember that your oath as jurors is to decide the case on the evidence in the courtroom and the instructions of the law, and to render a verdict if you possibly can, on the charge.
>
> Now, if you can't get beyond count one, then you can't go on to counts two and three, because they're all tied together. *And, if that's the case, then the case will have to be retried in front of another jury.* So, go back in front-go back please and continue to deliberate. Thank you very much.

443 F.3d at 296-97 (emphasis added). The Third Circuit stressed that the charge must be evaluated in context and stated "[w]e will only find a charge to be unduly coercive where the supplemental charge caused the jury to be 'influenced by concerns irrelevant to their task' and

'reached its subsequent verdict for reasons other than the evidence presented to it.'" 443 F.3d at 297 (citations omitted). The court distinguished the charges it had disapproved in *Burley*, 460 F.2d 998 (3d Cir. 1972),[3] and *Eastern Medical Billing, Inc*., 230 F.3d 600,[4] explaining the distinction as follows:

> By comparison, the supplemental charge given here merely mentioned that "the case will have to be retried before another jury," and nothing more. Unlike in *Burley* and *Eastern Medical Billing, Inc.*, the District Court did not stress the time, expense or burden of a new trial, and it never hinted at its belief as to Jackson's guilt or innocence. Indeed, it emphasized, much to the advantage of the defendant, that the government had to prove its case beyond a reasonable doubt and that "if they do not do this, then you must return a verdict of not guilty." The Court stressed the government's burden of proof and the jurors' responsibility to consider honestly the evidence. The Court told all the jurors to reexamine their views without hesitation, but not to surrender those beliefs for the sake of expediency. Consequently, any undue coercion created in this case by the brief mention of a new trial was mitigated by these accompanying strong warnings and reminders.
>
> Although our inquiry in these matters is fact-specific, we have generally concluded that a charge is unduly coercive when the trial court not only states that

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[3]In *Burley*, the Third Circuit reversed the conviction where the judge had included the following language in the supplemental charge:

> Another thing you should bear in mind is this: If this jury cannot agree, the case is going to have to be tried again. It took almost a week-did take a week-and all those witnesses are going to have to be called back to testify again. They will be subject to examination, cross-examination, and so forth. So, it is not an insignificant event when a jury does not agree in a case like this. It can produce great additional expense to the government and additional-well, I think I have said enough.

460 F.2d at 999.

[4]In *Eastern Medical Billing,* the Third Circuit reversed the convictions, stating in part:

> The District Court also erred by telling the jury that another trial would be both time-consuming and burdensome to all persons involved, because this portion of the instruction may have been interpreted by the jurors as complaining that if they did not agree upon a dispositive verdict, they would have wasted the Court's time and energy, and imposed upon the Court and the parties by making them endure another trial. Thus, the instruction created the potential that the jurors' deliberation was influenced by concerns irrelevant to their task in the same manner we found impermissible in *Burley*.

> a new trial will result, but goes further and unduly emphasizes the consequences, i.e., time, toil, or expense, that will accompany a failure to arrive at an unanimous verdict. That did not occur here. We are therefore persuaded that the charge did not so prejudice the jury's deliberations such that the jury reached it's verdict upon considerations of matters other than the evidence in the record. Accordingly, the giving of this charge was not beyond the permissible bounds of the District Court's discretion.

443 F.3d at 297 (citations omitted). *Jackson* thus seems to permit the court to inform the jury in the supplemental instruction that failure to reach a verdict will result in retrial of the case.

*See also United States v. Boone*, 458 F.3d 321, 327 (3d Cir. 2006) (explaining that jury instructions, to be coercive, "generally involve substantial and explicit pressure from the court for a verdict or for a particular result," and holding that trial court's instructions to jurors regarding their oath to deliberate and need to attempt to reach a verdict were not coercive). In *Boone*, the Third Circuit considered the trial court's handling of claims of juror misconduct. The court emphasized that "a district court should be more cautious in investigating juror misconduct during deliberations than during trial, and should be exceedingly careful to avoid any disclosure of the content of deliberations." 458 F.3d at 329. The court also commented that it is "manifest" that "a juror who refuses to deliberate or who commits jury nullification violates the sworn jury oath and prevents the jury from fulfilling its constitutional role." 458 F.3d at 329.

The American Bar Association suggests that language concerning the duty to deliberate be included in the final instructions as a prerequisite to giving the supplemental charge. *See American Bar Association, Criminal Justice Trial by Jury Standards*, Standard 15-5.4 (3d ed. 1996). The language in paragraph 2 of the instruction is similar but not identical to the language in Instruction 3.16 (Election Of Foreperson; Unanimous Verdict; Do Not Consider Punishment; Duty To Deliberate; Communication With Court) informing the jury concerning its duty to deliberate. If the court prefers to track the language of Instruction 3.16 more closely, the court may give the following instruction:

> It is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong. But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that – your own vote. It is important for you to reach unanimous agreement, but it is just as important that you do so honestly and in good conscience. Under no circumstances must any juror yield his or her conscientious judgment. Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

(revised 11/10)

## 9.06 Deadlocked Jury – Discharge

### Comment

*See United States v. Crosley*, 634 F. Supp. 28 (E.D. Pa. 1985); Ninth Circuit, § 7.8.

If the jury indicates that it is still deadlocked after the court has given instruction 9.05 (Deadlocked Jury – Return for Deliberations), the Committee recommends the procedure set out below be followed and recorded. In *United States v. Wecht*, 541 F.3d 493, 501 (3d Cir. 2008), the Third Circuit held that courts should follow this procedure before declaring a mistrial, describing the procedures set out in this Comment as the ideal. The Third Circuit stressed the importance of following the procedures set out here immediately before declaring a mistrial to ensure that the court's decision takes all the jury's deliberations into account. *Wecht*, 541 F.3d at 501-502. However, the court also held that this procedure is not mandatory.

The recommended procedure is as follows:

*First*, to determine whether a supplemental charge is necessary, the court should question the foreperson, but must take steps to ensure that the foreperson does not reveal either the numerical split on the jury or the position of the majority. *See United States v. Fiorilla*, 850 F.2d 172, 175 (3d Cir. 1988); *Government of Virgin Islands v. Romain*, 600 F.2d 435 (3d Cir. 1979). For example, the court may address the foreperson as follows:

> Advise me of the status of deliberations. If the jury is divided, I do not want to know the numbers or the direction. I only want to know whether in your judgment there is a reasonable probability that the jury can arrive at a unanimous verdict in this case if sent back for further deliberations.

*Second*, if the foreperson indicates that the jury is deadlocked, the court should question each juror, asking "Do you agree that there is a hopeless deadlock which cannot be resolved by further deliberations?"

*Third*, if jurors' answers reflect that they are deadlocked, the court should excuse the jury and hold a hearing with counsel and the defendant. The court should elicit the positions of all the parties, taking particular care to get a record of the position of the defendant(s) and defense counsel on whether to declare a mistrial. In *Wecht*, the Third Circuit emphasized that the trial court must comply with the mandate of Federal Rule of Criminal Procedure 26.3 and elicit the position of the parties "at an opportune moment."[5] The court held that consultation with counsel five days before the declaration of the mistrial did not comply with the Rule. *Wecht*, 541 F.3d at

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[5]Rule 26.3 provides:
Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

502.

If the court declares a mistrial that is not required by manifest necessity, the Double Jeopardy Clause will bar a retrial of the case unless the defendant consented to the mistrial. *See United States v. Dinitz*, 424 U.S. 600 (1976); *Wecht*, 541 F.3d at 504-11; *United States v. Rivera*, 384 F.3d 49 (3d Cir. 2004). When the defendant does not consent to the mistrial, the courts consider a number of factors to determine whether the mistrial represents an abuse of discretion and whether it bars further prosecution:

1. a timely objection by the defendant;
2. the jury's collective opinion that it cannot agree;
3. the length of jury deliberations;
4. the length of the trial;
5. the complexity of the issues presented to the jury;
6. any proper communications between the judge and jury;
7. the effects of exhaustion and the impact of coercion of further deliberations on the jury.

*See Crosley*, 634 F. Supp. at 30 (citing *Arnold v. McCarthy*, 566 F.2d 1377, 1387 (9th Cir.1978)); *see also Wecht*, 541 F.3d at 504-11 (discussing assessment of manifest necessity in absence of finding by trial court).

If the court concludes that a mistrial is necessary, the court should make an explicit finding of manifest necessity. For example, the court may state:

> Based on an evaluation of the following factors *(state factors relevant to case)*, I find that the jury is unable to reach a verdict, that further deliberations would be futile, and that there is no alternative but to declare a mistrial for reasons of manifest necessity and to dismiss the jury.

*Fourth*, the court should call the jury back into the courtroom and discharge the jurors.

(revised 12/09)

## 9.07 Taking the Verdict

### Comment

Different judges adopt different procedures for taking the verdict. We have included three approaches to taking the verdict and two approaches to polling the jury. In addition, a slightly different approach is found in § 2.09 of the *Benchbook for U.S. District Court Judges* (March 2000 rev.). Regardless of the variation adopted, it is clear that the defendant must be present when the verdict is taken. *See* F.R. Crim. P., Rule 43(a)(2).

Alternative One:

(1) The judge should tell the jury, "I have been informed that the jury is ready to return its verdict. Has the jury unanimously agreed upon its verdict?"

( 2) If the foreperson's answer is yes, the judge should ask the foreperson to please give the verdict form to the courtroom deputy, who will in turn give the verdict form to the judge.

(3) The judge should then give the jury the following instruction:

> I will now return your verdict to the courtroom deputy for publication. Please pay careful attention as the verdicts are read because following publication you may be polled; that is, I may ask each individual juror whether the verdict as published constitutes his or her individual verdict in all respects.

(4) The courtroom deputy then publishes the verdict:

> **Deputy:**
>
> Will the foreperson please rise.
>
> In the case of The United States of America against *(name of defendant)* how say you on Count 1 of the indictment, guilty or not guilty?
>
> Count 2 of the indictment?
>
> (Ask for each defendant and each count. Follow verdict sheet given to jury.)
>
> Members of the jury, hearken to your verdict as the court has understood and recorded it. In the case of The United States of America against *(name of defendant)*, you find the defendant *(guilty)(not guilty)* on Count 1, *(guilty)(not guilty)* on Count 2, etc. in the manner and form as he stands indicted and so say you all.
>
> (State for each defendant and each count.)

(5) Judge: “Does either party request a poll of the jury?”

(6) If either party asks the court to poll the jury, follow the procedure for polling below.

(7) If polling is not requested or, if requested, once polling is complete, the judge should direct the courtroom deputy to file and record the verdict announced.

(8) The judge may then wish to thank the jurors before discharging them. The judge may wish to express the following thoughts:

(i) Thank you for your service. I understand the sacrifice required of you and hope that you understand that jury service is a necessary aspect of our justice system.

(ii) Now that you have returned your verdict, you may discuss the case with whomever you choose, although I suggest that you not talk about the view of your fellow jurors.

(iii) I will not comment on the verdict; that is not my role. This was a difficult case. It was well presented by the parties. The jury system offers the best way to resolve criminal cases.

(iv) Let me remind you one last time that the jury is the keystone of our judicial system. You represent the conscience of the community. The jury is an important aspect of citizen control over government.

Alternative Two:

(1) The judges asks the foreperson: “Has the jury reached a verdict?”

(2) If the answer is yes, the judge then asks, “Is the verdict unanimous; that is, have all twelve of the jurors agreed to the verdict which you are about to state?”

(3) If the answer is yes, the judge then informs the foreperson, “You may read the jury’s verdict from the verdict slip.”

(4) After the verdict has been read, the court asks, “Do counsel require polling?”

Alternative Three:

(1) When the jury returns to the courtroom, the judge has them all stand.

(2) The courtroom deputy then asks the foreperson of the jury if the jury has reached a unanimous verdict.

(3) If the answer is yes, the courtroom deputy asks for the verdict envelope.

(4) The courtroom deputy gives the envelope with the verdict form to the judge. The judge reviews the verdict form.

(5) The judge then returns the verdict form to the courtroom deputy who then returns the form to the foreperson.

(6) The courtroom deputy then asks the foreperson, "On Count I, what is the verdict?"

After the foreperson responds, the courtroom deputy then asks the entire panel, "Is that your verdict, so say you all?"

The courtroom deputy then proceeds as above with respect to each of the remaining counts and with respect to each defendant.

**Polling the Jury**

While the defendant has a right to have the jury polled, the trial court has discretion to determine the manner in which the jurors will be polled. *Government of the Virgin Islands v. Hercules*, 875 F.2d 414 (3d Cir. 1989); *see also Felix v. Government of Virgin Islands*, 290 F.Supp. 2d 625 (D.C.V.I. 2002). Polling the jury eliminates uncertainty concerning the verdict and assures both that the verdict is unanimous and that no juror's vote has been coerced. *Hercules*, 875 F.2d at 418. As a result, polling should entail individual questioning of the jurors and not mere reliance on the signatures on the verdict form. *Hercules*, 875 F.2d at 419. In *United States v. Miller*, 59 F.3d 417, 421 (3d Cir. 1995), the Third Circuit adopted a supervisory rule governing polling:

> In the future, whenever a party timely requests that the jury be polled, the procedure shall be conducted by inquiry of each juror individually, rather than collectively. Recognizing that circumstances in each case may vary widely, we leave to the discretion of the district courts--keeping in mind the purposes of the polling rule--whether a separate inquiry should be conducted for each count of an indictment or complaint, for each of a number of defendants, or for a variety of issues.

If any defendant requests that the jury be polled, each juror must be asked to affirm the verdict as to each defendant. If no defendant objects, the court may ask each juror whether the verdict reflects that juror's verdict on all the counts, as in Alternative One, below, rather than questioning each juror as to each count, as in Alternative Two.

<u>Alternative One:</u>

Counsel for the defense has asked the court to poll the jury.

When I call your number, please answer this question yes or no. Did the jury foreperson correctly state the verdict which you found with respect to each count of the indictment?

Juror Number 1 . . . .
(Repeat for each juror and each defendant.)

If the jurors all answer in the affirmative, the court then states:

Having polled the jury as requested, and receiving affirmative response to the question, the court directs that the verdict be recorded as announced.

Alternative Two:

Counsel for the defense has asked the court to poll the jury. My deputy will ask each of you in turn whether you find the defendant *(name of the defendant)* guilty or not guilty on each count of the indictment? Please answer yes or no to each question my deputy asks you.

**Deputy:** Juror Number 1, please rise.

Do you find the defendant *(name of defendant)* guilty or not guilty on Count 1 of the indictment? Count 2 of the indictment?

(Repeat for each defendant and each count.)

If any juror repudiates the verdict, *see* Instruction 9.09 (Return to Deliberations After Polling).

## 9.08 Partial Verdict

**Members of the jury, you do not have to reach unanimous agreement on all the charges before returning a verdict on some of them. If you have reached unanimous agreement on some of the charges, you may return a verdict on those charges, and then continue deliberating on the others. You do not have to do this, but you can if you wish.**

**You should understand that if you choose to return a verdict on some of the charges now, that verdict will be final. You will not be able to change your minds about it later on.**

**Your other option is to wait until the end of your deliberations, and return all your verdicts then. The choice is yours.**

**I would ask that you now return to the jury room and resume your deliberations.**

### Comment

*See* Sixth Circuit § 9.03

This instruction should not be included in the final charge to the jury and should not be given absent special circumstances. Instead, the jury should be encouraged to return verdicts on all the charges and defendants in the case. It may become appropriate, however, if the jurors indicate that they want to return a partial verdict and are deadlocked on the other counts. In some cases, this instruction may be appropriate after the jury has deliberated for an extensive period of time without reaching a verdict; the length of the deliberations that may persuade the court to give this instruction will depend on various factors including the following: any prior communications with the jury, the nature and complexity of the charges, the length of the trial, the amount of evidence the jury must evaluate and the position of the parties.

Federal Rules of Criminal Procedure, Rule 31(b) provides:

> Partial Verdicts, Mistrial, and Retrial.
>
> (1) Multiple Defendants. If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed.
>
> (2) Multiple Counts. If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed.
>
> (3) Mistrial and Retrial. If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree.

In *United States v. Fiorilla*, 850 F.2d 172, 177 (3d Cir. 1988), the Third Circuit recognized that the trial court's discretion extends to taking partial verdicts. *See also United States v. Fermin*, 32 F.3d 674, 680 (2d Cir. 1994) (approving practice of instructing jury that it could return partial verdict).

The court must exercise caution in its handling of partial verdicts. In *United States v. Rivas*, 99 F.3d 170, 173 (5th Cir. 1996), the Fifth Circuit held that the trial court committed error when it instructed the jury to cease deliberations on the count as to which it had reached a verdict. As this instruction explains, until the jury returns the verdict to the court, it is free to continue deliberating on all charges.

## 9.09 Return to Deliberations After Polling

**When I polled the jury one of your members gave an answer which indicates that you may not have reached a unanimous verdict. For this reason I am asking you to return to the jury room to consider your verdict further. Whenever you have reached a unanimous verdict, you may return it in court. If you are not unanimous in your verdict, then you should continue your deliberations.**

**After you return to the jury room, please try to reach a unanimous verdict. Each of you is free to change your vote on any issue submitted to the jury for decision. You may change your vote at any time until I discharge the jury.**

### Comment

*See* 1A O'Malley et al., *supra,* § 20.09.

Federal Rule of Criminal Procedure 31(d) provides:

> Jury Poll. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

The Third Circuit has held that if the polling reveals a lack of unanimity, the trial court has discretion regarding how to proceed. *United States v. Fiorilla*, 850 F.2d 172 (3d Cir. 1988); *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983). The court may continue the polling, provided the court does not coerce the dissenting juror(s) into agreement. *United States v. Fiorilla*, 850 F.2d 172 (3d Cir. 1988). Conversely, the court may stop the polling process and instruct the jury to continue its deliberations. *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983). *See also United States v. Carraway*, 108 F.3d 745, 751-52 (7th Cir. 1997) (holding that the trial court had not abused its discretion by directing the jury to deliberate further after a jury poll revealed that one juror did not support the guilty verdict); *United States v. Chigbo*, 38 F.3d 543 (11th Cir. 1994) (rejecting challenge to manner in which trial court addressed lack of

unanimity revealed in polling); *United States v. Gambino*, 951 F.2d 498 (2d Cir. 1991) (stating that the "weight of authority suggests that when the trial judge continues to poll the jury after one juror disagrees with the verdict, reversible error occurs only when it is apparent that the judge coerced the jurors into prematurely rendering a decision, and not merely because the judge continued to poll the jury").