PATTERN CRIMINAL JURY INSTRUCTIONS

Prepared by
Committee on Pattern Criminal
Jury Instructions
District Judges Association
Sixth Circuit

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Updated as of December 1, 2009

RESOLUTION

Resolved, that the Committee on Pattern Jury Instructions of the District Judges Association of the Sixth Circuit is hereby commended for its work in producing pattern jury instructions for use in criminal cases. The Council expresses its appreciation to the judges and members of the bar who served on the Committee and to the Committee's reporters for their dedicated service.

Resolved, further, that the Committee on Pattern Jury Instructions of the District Judges Association of the Sixth Circuit is authorized to distribute to the District Judges of the Circuit for their aid and assistance the Committee's Pattern Jury Instructions and that the Administrative Office of the United States Courts is requested to publish and reproduce those Instructions for that purpose; provided, however, that this Resolution shall not be construed as an adjudicative approval of the content of such instructions which must await a case-by-case review by the Court of Appeals.

FOR THE JUDICIAL COUNCIL
Gilbert S. Merritt
Chief Judge

October 3, 1990

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Introduction

(current through December 1, 2009)

The Pattern Criminal Jury Instruction Committee of the Sixth Circuit District Judges Association includes district judges, prosecutors, defense attorneys and academics from around the circuit. The members are listed above. The Committee became a standing Committee on April 10, 2003.

The instructions are designed for use at the end of trial. However, this should not be interpreted as a recommendation against using preliminary instructions before the trial begins. To the contrary, the Committee believes that preliminary instructions are helpful. With modifications, these instructions can be used as preliminary instructions. A full set of preliminary instructions appears in § 2.07 of the Benchbook for United States District Judges.

The research includes cases released through December 1, 2009.

The Committee uses simple language, or plain English, whenever possible.

In the text of the instructions, the Committee uses brackets to indicate language that is only appropriate in limited circumstances, and to indicate alternatives. Use Notes following the instructions briefly explain when bracketed language should be used. The Use Notes also highlight other issues relating to the instructions.

A committee commentary is provided with each instruction. The commentaries cite the authority for the instruction and explain the Committee's rationale.

In the commentaries, the Committee occasionally cites unpublished cases. These are widely available now in the electronic databases, Lexis and Westlaw, and in West's publication, the Federal Appendix. The Committee uses unpublished cases only when there is no published case on point or where the unpublished case is helpful. Sixth Circuit Rule 28(g) governs the citation of unpublished decisions by counsel in briefs and oral arguments in the Sixth Circuit and in the district courts. See also Fed.R.App.P. 32.1. Unpublished decisions are not precedentially binding under the doctrine of stare decisis, but they may be of persuasive value. United States v. Villareal, 491 F.3d 605, 610 (6th Cir. 2007); United States v. Sanford, 476 F.3d 391, 396 (6th Cir. 2007).

The instruction include an appendix, which provides some charts diagraming a money laundering crime.

As the Judicial Council indicates in its resolution authorizing the distribution of these instructions, approval of the content of the instructions must await a case-by-case review by the Court of Appeals. Each case is different, and no set of pattern instructions can cover all the variables which may arise. These are suggested instructions only, and should be tailored to fit the facts of each individual case. As the Sixth Circuit has cautioned, although pattern instructions "have their place, they should not be used without careful consideration being given to their applicability to the facts and theories of the specific case being tried." United States v.

Wolak, 923 F.2d 1193, 1198 (6th Cir. 1991).

The instructions continue to use singular pronouns and verbs and to use masculine pronouns only where the use of gender-neutral language was awkward or lacked specificity. The instructions should be modified to fit the case, including using female pronouns where appropriate. Some courts give a preliminary instruction on this issue, for example:

> Any reference to he, his and him within these jury instructions should be construed by you as having equal applicability to any female participant in this trial. The use of the masculine pronouns is only for convenience in reading the instructions and not for the purpose of giving emphasis to, or providing focus upon, any witness or particular aspect of this case.

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The Standard of Appellate Review for Jury Instructions Generally
(current through December 1, 2009)

Generally, jury instructions are reviewed as a whole to determine whether they fairly and adequately submit the issues and applicable law to the jury. United States v. Williams, 952 F.2d 1504, 1512 (6th Cir. 1991). The district court's choice of jury instructions is reviewed according to an abuse of discretion standard. United States v. Beaty, 245 F.3d 617, 621-22 (6th Cir. 2001), *citing* United States v. Prince, 214 F.3d 740, 761 (6th Cir. 2000). If the parties request particular language, "it is not error to fail to use the language requested by the parties if the instruction as given is accurate and sufficient." *Williams*, 952 F.2d at 1512, *quoting* United States v. Horton, 847 F.2d 313, 322 (6th Cir. 1988).

When a district court refuses to give a requested instruction, the Sixth Circuit holds that it is "reversible only if that instruction is (1) a correct statement of the law, (2) not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense." *Williams*, 952 F.2d at 1512, *citing* United States v. Parrish, 736 F.2d 152, 156 (5th Cir. 1984). *See also* United States v. Sassak, 881 F.2d 276, 279 (6th Cir. 1989), *citing Parrish*, 736 F.2d at 156.

When a defendant fails to object to a jury instruction at trial, the appellate court reviews only for plain error. Federal Rule of Criminal Procedure 52(b); United States v. Olano, 507 U.S. 725, 732 (1993). "[B]efore an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" Johnson v. United States, 520 U.S. 461, 466-67 (1997), *quoting Olano*, 507 U.S. at 732. "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Johnson,* 520 U.S. at 467, *quoting Olano*, 507 U.S. at 732. In *Olano*, the Supreme Court discussed but did not adopt the miscarriage of justice standard, noting that the miscarriage of justice standard in the collateral review jurisprudence of the Supreme Court meant actual innocence and that it had never held that the Rule 52(b) remedy was limited to cases of actual innocence. *Olano,* 507 U.S. at 736; *see also* United States v. Thomas, 11 F.3d 620, 630 (6th Cir. 1993)("While the Court [in *Olano*] referred to the 'miscarriage of justice standard,' it remarked that it had never held a Rule 52(b) remedy was warranted only in cases of actual innocence."). Although the Court did not adopt the miscarriage of justice standard, the Sixth Circuit has occasionally cited this standard. *See, e.g.*, United States v. King, 169 F.3d 1035, 1040 (6th Cir. 1999)("An instruction is not plainly erroneous unless there was an egregious error, one that directly leads to a miscarriage of justice."); United States v. Wilkinson, 26 F.3d 623, 625 (6th Cir. 1994).

In reviewing the substance of given instructions for plain error, the Sixth Circuit held that, "In determining the adequacy of a jury instruction, 'the instruction must be viewed in its entirety, and a misstatement in one part of the charge does not require reversal if elsewhere in the instruction the correct information is conveyed to the jury in a clear and concise manner....'" United States v. Nelson, 27 F.3d 199, 202 (6th Cir. 1994), *quoting* United States v. Pope, 561 F.2d 663, 670 (6th Cir. 1977).

In reviewing the omission of an instruction for plain error, the court has stated that "'[A]n omitted or incomplete instruction is even less likely to justify reversal, since such an instruction is not as prejudicial as a misstatement of the law.'" United States v. Sanderson, 966 F.3d 184, 187 (6th Cir.1992), *quoting* United States v. Hook, 781 F.2d 1166, 1172-73 (6th Cir. 1986).

The standard for review of jury instructions may be affected if the defendant jointly submitted the instruction or stipulated to it. In United States v. Sharpe, 996 F.2d 125 (6th Cir. 1993), the defendant and the government jointly submitted an instruction that the defendant sought to challenge on appeal. The court declined to review the instruction, citing the fact that the defendant did not object to the instructions and in fact jointly submitted them. *Id.* at 128-29, *citing* United States v. Young, 745 F.2d 733, 752 (2d Cir. 1984) and United States v. Thurman, 417 F.2d 752, 753 (D.C. Cir. 1959). In United States v. Barrow, 118 F.3d 482 (6th Cir. 1997), the defendant stipulated to an instruction that he sought to challenge on appeal. The court recounted the *Sharpe* holding but concluded that the invited error doctrine did not foreclose relief when the interests of justice demand otherwise. *Id.* at 491. The analysis of the interests of justice is left to the appellate court's discretion. Here, the court decided that the interests of justice supported review of the defendant's challenge to the instructions for two reasons: the government was as much at fault as the defendant for the stipulated instruction, and the defendant was claiming not just that the instruction was wrong but that it deprived him of his constitutional rights. *Id.* The court cited this latter factor as the distinction between this case and the *Sharpe* case. After concluding that review was warranted, the court stated that, "This does not mean however, that the fact that the parties stipulated to the instruction will not play a role in our analysis of some of defendant's claims." *Id.* The court decided to treat the stipulated instructions the same as it would treat instructions that were not objected to, by applying the plain-error standard. *Id.*

Finally, in reviewing denial of a collateral attack under 28 U.S.C. § 2255, the Sixth Circuit held that "to obtain post-conviction relief for an erroneous jury instruction to which no objection was made at trial, a defendant must show both cause excusing his procedural default and actual prejudice from the alleged error." United States v. Rattigan, 151 F.3d 551, 554 (6th Cir. 1998).

PATTERN CRIMINAL JURY INSTRUCTIONS

Chapter 1.00

GENERAL PRINCIPLES

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1.01 INTRODUCTION

(1) Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case.

(2) I will start by explaining your duties and the general rules that apply in every criminal case.

(3) Then I will explain the elements, or parts, of the crime that the defendant is accused of committing.

[(4) Then I will explain the defendant's position.]

(5) Then I will explain some rules that you must use in evaluating particular testimony and evidence.

(6) And last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.

(7) Please listen very carefully to everything I say.

Use Note

Bracketed paragraph (4) should be included only when the defendant has raised a defense that requires some explanation, like alibi, entrapment, insanity, duress or self-defense, or when a defense theory instruction will be given.

Committee Commentary 1.01
(current through December 1, 2009)

This instruction is designed to give the jurors an outline of the instructions that follow. The Committee believes that the jurors will follow the instructions better if they are provided with explanatory introductions and transitions.

The general organization of the jury instructions is a matter within the trial court's discretion. United States v. Dunn, 805 F.2d 1275, 1283 (6th Cir. 1986). The Committee suggests that instructions about case specific evidentiary matters such as impeachment by prior convictions, expert testimony and the like should be given after the instructions defining the elements of the crime, not before as other circuits have suggested. The Committee's rationale is that the jurors should be told what the government must prove before they are told how special evidentiary rules may affect their determination. This is the approach suggested by Devitt and Blackmar, Federal Jury Practice and Instructions (3d ed). By suggesting this approach, the Committee does not intend to foreclose other approaches, or to suggest that the choice of one approach over the other should give rise to an appellate issue.

Paragraph (4) of this instruction is bracketed to indicate that it should not be used in

every case. It should be included only when the defendant has raised a defense that requires some explanation, like alibi, entrapment, insanity, duress or self-defense, or when a defense theory instruction will be given.

1.02 JURORS' DUTIES

(1) You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

(2) Your second duty is to take the law that I give you, apply it to the facts, and decide if the government has proved the defendant guilty beyond a reasonable doubt. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

[(3) The lawyers have talked about the law during their arguments. But if what they said is different from what I say, you must follow what I say. What I say about the law controls.]

(4) Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

Use Note

Bracketed paragraph (3) should be included only when the lawyers have talked about the law during their arguments. If the instructions are given before closing arguments, the language of this paragraph should be modified accordingly.

Committee Commentary 1.02

(current through December 1, 2009)

A panel of the Sixth Circuit quoted paragraph (4) of this instruction and stated that it cured any confusing statements made by the district court during voir dire. United States v. Okeezie, 1993 WL 20997 at 4, 1993 U.S. App. LEXIS 1968 at 4 (6th Cir. 1993) (unpublished).

The jurors have two main duties. First, they must determine from the evidence what the facts are. Second, they must take the law stated in the court's instructions, apply it to the facts and decide whether the facts prove the charge beyond a reasonable doubt. See Sparf v. United States, 156 U.S. 51, 102-07 (1895); Starr v. United States, 153 U.S. 614, 625 (1894).

The jurors have the power to ignore the court's instructions and bring in a not guilty verdict contrary to the law and the facts. Horning v. District of Columbia, 254 U.S. 135, 138 (1920). But they should not be told by the court that they have this power. United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988); United States v. Avery, 717 F.2d 1020, 1027 (6th Cir. 1983); United States v. Burkhart, 501 F.2d 993, 996-97 (6th Cir. 1974). They should instead be told that it is their duty to accept and apply the law as given to them by the court. United States v. Avery, *supra* at 1027.

The language in paragraph (3) regarding what the lawyers may have said about the law is bracketed to indicate that it should not be used in every case. It should be included only when the lawyers have talked about the law during the trial. When the instructions are given before closing arguments, the language of this paragraph should be modified accordingly.

In United States v. Lawson, 780 F.2d 535, 545 (6th Cir.1985), the Sixth Circuit reviewed an instruction which provided that the jurors' duty was to ascertain the truth, and rejected the defendant's argument that it required reversal of his conviction. However, other circuits have condemned instructions telling jurors that their basic job is to determine which witnesses are telling the truth. See for example United States v. Pine, 609 F.2d 106, 107-08 (3d Cir. 1979), and cases collected therein. Such instructions improperly invite the jury to simply choose between competing versions of the facts, rather than to decide whether the government has carried its burden of proving guilt beyond a reasonable doubt.

1.03 PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT

(1) As you know, the defendant has pleaded not guilty to the crime charged in the indictment. The indictment is not any evidence at all of guilt. It is just the formal way that the government tells the defendant what crime he is accused of committing. It does not even raise any suspicion of guilt.

(2) Instead, the defendant starts the trial with a clean slate, with no evidence at all against him, and the law presumes that he is innocent. This presumption of innocence stays with him unless the government presents evidence here in court that overcomes the presumption, and convinces you beyond a reasonable doubt that he is guilty.

(3) This means that the defendant has no obligation to present any evidence at all, or to prove to you in any way that he is innocent. It is up to the government to prove that he is guilty, and this burden stays on the government from start to finish. You must find the defendant not guilty unless the government convinces you beyond a reasonable doubt that he is guilty.

(4) The government must prove every element of the crime charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence.

(5) Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives. If you are convinced that the government has proved the defendant guilty beyond a reasonable doubt, say so by returning a guilty verdict. If you are not convinced, say so by returning a not guilty verdict.

Use Note

Paragraph (3) should be modified when an affirmative defense is raised which the defendant has the burden of proving, for example, insanity and justification. In these circumstances, paragraph (3) should be changed to explain that while the government has the burden of proving the elements of the crime, the defendant has the burden of proving the defense.

Committee Commentary 1.03

(current through December 1, 2009)

The Sixth Circuit has approved the entire 1.03 instruction as "correct." United States v. Hynes, 467 F.3d 951, 957 (6th Cir. 2006).

As to paragraph (1), instructions stating that "the purpose of an indictment is only to cause the person named therein to be brought to trial and to advise him of the nature of the

charge or charges against him" have been characterized as "desirable" and "customary." United States v. Baker, 418 F.2d 851, 853 (6th Cir. 1969). If the indictment is furnished in writing to the jury, a limiting instruction such as Instruction 1.03(1) must be given. United States v. Smith, 419 F.3d 521, 531 (6th Cir. 2005) (omission of limiting instruction was error but not plain error). *See also* United States v. Lawson, 535 F.3d 434, 441 (6th Cir. 2008) (reading indictment to prospective jurors was not an abuse of discretion because appropriate limiting instructions to the effect that the indictment was not evidence of guilt were given).

Paragraph (5) of the instruction has been quoted and approved by the Sixth Circuit. United States v. Stewart, 306 F.3d 295, 306-07 (6th Cir. 2002); United States v. Goodlett, 3 F.3d 976, 979 (6th Cir. 1993). *Accord*, United States v. Bond, 22 F.3d 662, 669 n.1 (6th Cir. 1994).

Although the Due Process Clause does not necessarily require an instruction on the presumption in state criminal trials, Kentucky v. Whorton, 441 U.S. 786, 789 (1979), in federal trials the Supreme Court appears to have exercised its supervisory authority to require an instruction, at least upon request.

In Coffin v. United States, *supra*, the defendant appealed his federal conviction on the ground that the trial court had refused to give any instruction on the presumption of innocence. The government countered that no instruction was necessary because the trial court gave a complete instruction on the necessity of proof beyond a reasonable doubt. *Id.* at 452-53. The Supreme Court reversed, holding that "the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime." *Id.* at 460. *Accord*, Cochran v. United States, 157 U.S. 286, 298-300 (1895) ("[C]ounsel asked for a specific instruction upon the defendant's presumption of innocence, and we think it should have been given . . . . The Coffin case is conclusive . . . and [requires] that the judgment . . . be [r]eversed.").

More recently, in Taylor v. Kentucky, 436 U.S. 478 (1978), Justice Stevens, joined by Justice Rehnquist, dissented from the Court's holding that the failure of a state court to instruct on the presumption violated due process. In doing so, however, Justice Stevens carefully distinguished between state and federal trials, and unequivocally stated: "In a federal court it is reversible error to refuse a request for a proper instruction on the presumption of innocence." *Id.* at 491.

The Sixth Circuit has not directly addressed this question. But in strong dictum the court has said: "Jury instructions concerning the presumption of innocence and proof beyond a reasonable doubt are fundamental rights possessed by every citizen charged with a crime in these United States." United States v. Hill, 738 F.2d 152, 153 (6th Cir. 1984).

The Supreme Court has provided some general guidance about what an instruction on the presumption of innocence should say, but without mandating any particular language. The Court has said that the presumption of innocence is not evidence. Nor is it a true presumption in the sense of an inference drawn from other facts in evidence. Instead, it is "an 'assumption' that is indulged in the absence of contrary evidence." Taylor v. Kentucky, *supra*, 436 U.S. at 483-84 n. 12. It is a "shorthand description of the right of the accused to remain inactive and secure, until

the prosecution has taken up its burden and produced evidence and effected persuasion." *Id.* Its main purpose is to "purge" any suspicions the jurors may have arising from "official suspicion, indictment (or) continued custody," and to emphasize to the jurors that their decision must be based "solely on the . . . evidence introduced at trial." *Id.* at 484-86.

Although not necessarily approving the particular language of the defendant's requested instruction in *Taylor*, the Supreme Court did quote language from that instruction which told the jurors that although accused, the defendant began the trial with "a clean slate," and that the jurors could consider "nothing but legal evidence" in support of the charge. The Court then said that this language appeared "well suited to forestalling the jury's consideration of extraneous matters, that is, to perform the purging function described . . . above." *Id.* at 488 n.16.

Subsequent Supreme Court cases have repeated that the purpose of the presumption is to purge jurors' suspicions arising from extraneous matters, and to admonish them to decide the case solely on the evidence produced at trial. Carter v. Kentucky, 450 U.S. 288, 302 n.19 (1981); Bell v. Wolfish, 441 U.S. 520, 533 (1979). Sixth Circuit decisions echo this general view. *See* Whiteside v. Parke, 705 F.2d 869, 871 (6th Cir. 1983) ("the presumption . . . protect(s) a defendant's constitutional right . . . to be judged solely on the evidence presented at trial"). Instruction 1.04 defines what is and is not evidence, and contains a strong admonition that the jurors must base their decision only on the evidence produced at trial.

With regard to the indictment, instructions telling the jury that "the indictment itself is not evidence of guilt" have been characterized by the Sixth Circuit as "a correct principle of criminal law." Garner v. United States, 244 F.2d 575, 576 (6th Cir. 1957). Similarly, instructions stating that "the purpose of an indictment is only to cause the person named therein to be brought to trial and to advise him of the nature of the charge or charges against him" have been characterized as "desirable" and "customary." United States v. Baker, 418 F.2d 851, 853 (6th Cir. 1969). And in Hammond v. Brown, 323 F.Supp. 326, 342 (N.D.Ohio 1971), *aff'd*, 450 F.2d 480 (6th Cir. 1971), the district court characterized as "the law" the principle that "an indictment is merely an accusation of crime, and . . . is neither evidence of guilt nor does it permit an inference of guilt."

With regard to the presumption itself, several Sixth Circuit cases dealing with the extent to which a district judge must voir dire prospective jurors shed some further light on what the instructions should say. In United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973), the court reversed the conviction based on the district court's refusal to ask whether the jurors could accept the legal principle that "a defendant is presumed to be innocent, has no burden to establish his innocence, and is clothed throughout the trial with the presumption." Similarly, in United States v. Hill, 738 F.2d 152, 154 (6th Cir. 1984), the Sixth Circuit said that a challenge for cause would have to be sustained if a juror indicated that he could not accept the proposition that "a defendant is presumed to be innocent despite the fact that he has been accused in an indictment." And in Hammond v. Brown, *supra*, 323 F.Supp. at 342, the district court characterized as an "essential (voir dire) question" whether the jurors could accept the principle that "a man is presumed innocent unless and until he is proved guilty by evidence beyond a reasonable doubt."

Two decisions have identified language that should not be used. In Williams v. Abshire,

544 F.Supp. 315, 319 (E.D.Mich.1982), *aff'd*, 709 F.2d 1512 (6th Cir.1983), a state court included in its instructions language that the presumption "doesn't mean necessarily that he is innocent, but you are duty bound to give him that presumption," and language that "[n]ow we know that some defendants are not innocent of course." Although the district court denied the defendant's habeas petition, it characterized this language as "open to criticism." In Lurding v. United States, 179 F.2d 419, 422 (6th Cir. 1950), the Sixth Circuit characterized as "inept phrasing" language that a defendant is presumed innocent "until such time as the proof produced by the government establishes . . . guilt." The court expressed the fear that such language might be misinterpreted to mean that guilt is established at the conclusion of the government's proofs, unless the defendant proves otherwise.

The Due Process Clause requires that the government bear the burden of proving every element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). This means that the prosecution must present evidence sufficient to overcome the presumption of innocence and convince the jurors of the defendant's guilt. Agnew v. United States, 165 U.S. 36, 50-51 (1896); Coffin v. United States, 156 U.S. 432, 458-59. "The defendant is presumed to be innocent . . . until he is proven guilty by the evidence . . . . This presumption remains with the defendant until (the jurors) are satisfied of (his) guilt beyond a reasonable doubt." Agnew v. United States, *supra*, 165 U.S. at 51.

Early Supreme Court cases contained broad statements that the burden of proof rests on the government throughout the trial, and that the burden is never on the accused to prove his innocence. *See, e.g.*, Davis v. United States, 160 U.S. 469, 487 (1895). Later cases have tempered these statements to the extent of recognizing that the Due Process Clause does not forbid placing the burden of proving an affirmative defense on the defendant. Martin v. Ohio, 480 U.S. 228 (1987); Patterson v. New York, 432 U.S. 197 (1977); Rivera v. Delaware, 429 U.S. 877 (1976). See for example 18 U.S.C. § 17(b) ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence.") When a true affirmative defense like insanity is raised, paragraph (3) must be modified to explain that while the prosecution has the burden of proving the elements of the crime, the defendant has the burden of proving the affirmative defense.

Some instructions recommended by Sixth Circuit decisions include language that the burden of proof "never shifts" to the defendant. *See, e.g.*, United States v. Hart, 640 F.2d 856, 860 n.3 (6th Cir. 1981). Paragraph (3) articulates this concept by simply stating that the burden is on the prosecution "from start to finish."

Some early United States Supreme Court cases appeared to indicate that the government's burden of proof included the burden of negating every reasonable theory consistent with the defendant's innocence. For example, in Hopt v. Utah, 120 U.S. 430 (1887), the Court rejected the defendant's argument that the district court's instructions failed to adequately define the term reasonable doubt, in part on the ground that the district court had told the jurors that if they could reconcile the evidence with any reasonable hypothesis consistent with innocence, they should do so and find the defendant not guilty. The Court then added that "[t]he evidence must satisfy the judgment of the jurors as to the guilt of the defendant, so as to exclude any other reasonable conclusion." *Id.* at 441.

Subsequently, however, even in cases based largely on circumstantial evidence, the Supreme Court has specifically rejected the argument that the government's burden includes the affirmative duty to exclude every reasonable hypothesis except that of the defendant's guilt. Holland v. United States, 348 U.S. 121, 139-140 (1954). *Accord*, Jackson v. Virginia, 443 U.S. 307, 326 (1979) ("[T]he Court has rejected [this theory] in the past (citing Holland) [and] [w]e decline to adopt it today.") The "better rule" is that "where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." *Holland, supra*, at 139-140. "If the jury is convinced beyond a reasonable doubt, we can require no more." *Id.* at 140.

Although some earlier Sixth Circuit cases appeared to require the government to disprove every reasonable hypothesis except that of guilt, *see, e.g.*, United States v. Campion, 560 F.2d 751, 754 (6th Cir. 1977); United States v. Wages, 458 F.2d 1270, 1271 (6th Cir. 1972), a long line of more recent cases has consistently rejected any such requirement. *See, e.g.*, United States v. Reed, 821 F.2d 322, 325 (6th Cir.1987); United States v. Townsend, 796 F.2d 158, 161 (6th Cir. 1986); United States v. Vannerson, 786 F.2d 221, 225 (6th Cir. 1986); Maupin v. Smith, 785 F.2d 135, 140 (6th Cir. 1986); United States v. Stone, 748 F.2d 361, 362-63 (6th Cir. 1984).

In United States v. Cooper, 577 F.2d 1079, 1085 (6th Cir. 1978), the Sixth Circuit reviewed an instruction stating:

> [I]n order to justify a verdict of guilty based upon circumstantial evidence you must find from the circumstantial evidence offered, that it is consistent with guilt and inconsistent with innocence and where the evidence as to the element of a crime is equally consistent with the theory of innocence as with the theory of guilt then that evidence necessarily fails to establish guilt beyond a reasonable doubt and you should find the defendant not guilty.

The court stated that such an instruction "poses a likelihood of needless confusion and . . . closely resembles [the] one expressly rejected by the Supreme Court [in *Holland*]." Based on this case, Instruction 1.03 omits this concept altogether.

One other Sixth Circuit decision has identified some potentially troublesome language. In United States v. Buffa, 527 F.2d 1164 (6th Cir. 1975), the district court instructed, without objection, that although it was necessary for the government to prove every element of the crime charged beyond a reasonable doubt, it was not necessary that each "subsidiary fact" be proved beyond a reasonable doubt. The district court did not define the term "subsidiary fact." Although affirming on the ground that this was not plain error, the Sixth Circuit characterized this as "opening up the possibility that the jury (would be) misled or confused." *Id.* at 1165.

The reasonable doubt standard represents "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, *supra*, 397 U.S. at 372 (Harlan, J., concurring). *Accord*, Francis v. Franklin, 471 U.S. 307, 313 (1985). The purpose of the reasonable doubt standard is to reduce the risk of an erroneous conviction:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value--as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden of ... persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

In re Winship, *supra* at 364.

Despite repeated characterizations of the reasonable doubt standard as "vital," "indispensable," and "fundamental," see *Winship, supra* at 363-64 and Jackson v. Virginia, *supra* 443 U.S. at 317, the Supreme Court has been ambivalent about whether and to what extent the term "reasonable doubt" should be defined. On the one hand, the Court has stated on three occasions that "attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." Holland v. United States, *supra*, 348 U.S. at 140; Dunbar v. United States, 156 U.S. 185, 199 (1894); Miles v. United States, 103 U.S. (13 Otto) 304, 312 (1880). On the other hand, the Court has said that "in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension." Hopt v. Utah, *supra*, 120 U.S. at 440. And in several other cases, the Court has quoted some rather lengthy explanations of the term without criticism. *See, e.g.*, Wilson v. United States, 232 U.S. 563, 569-70 (1913); Holt v. United States, 218 U.S. 245, 254 (1910); Agnew v. United States, *supra*, 165 U.S. at 51.

Some Sixth Circuit decisions have sustained state criminal convictions against constitutional attacks based on the trial court's failure to define the term reasonable doubt. See Whiteside v. Parke, supra, 705 F.2d at 870-873. Other Sixth Circuit decisions have noted in dicta the Supreme Court's statement that attempts to define reasonable doubt do not usually make the term more understandable. See United States v. Releford, 352 F.2d 36, 41 (6th Cir. 1965). But no Sixth Circuit decisions reviewing federal criminal convictions have explicitly discouraged or condemned instructions defining reasonable doubt, as some other circuits have done. See United States v. Ricks, 882 F.2d 885, 894 (4th Cir. 1989), United States v. Marquardt, 786 F.2d 771, 784 (7th Cir. 1986). See also United States v. Nolasco, 926 F.2d 869 (9th Cir. 1991) (en banc) (the decision whether to define reasonable doubt should be left to the trial court's sound discretion), and United States v. Olmstead, 832 F.2d 642, 646 (1st Cir. 1987) (an instruction that uses the words reasonable doubt without further defining them is adequate).

Instead, Sixth Circuit decisions have rather consistently proceeded on the assumption that some definition should be given, with the only real question being what the definition should say. *See, e.g.*, United States v. Mars, 551 F.2d 711, 716 (6th Cir. 1977); United States v. Christy, 444 F.2d 448, 450 (6th Cir. 1971); Ashe v. United States, 288 F.2d 725, 730 (6th Cir. 1961). And in United States v. Hart, *supra*, 640 F.2d at 860-61 (6th Cir. 1981), the Sixth Circuit recommended two rather lengthy definitions as "much better" than the shorter instruction given by the district court.

Supreme Court decisions provide a substantial amount of guidance on what instructions on reasonable doubt should say, some of it rather detailed. The Court has said that proof beyond a reasonable doubt does not mean proof to an "absolute certainty" or proof beyond all "possible"

doubt. Hopt v. Utah, *supra*, 120 U.S. at 439-40. "[S]peculative minds may in almost every . . . case suggest possibilities of the truth being different from that established by the most convincing proof . . . [but] [t]he jurors are not to be led away by speculative notions as to such possibilities." *Id.* at 440.

In dictum, the Supreme Court has described the state of mind the jurors must reach as "a subjective state of near certitude." Jackson v. Virginia, *supra*, 443 U.S. at 315. *Accord* Johnson v. Louisiana, 406 U.S. 356, 360 (1972); In re Winship, *supra*, 397 U.S. at 364.

The Supreme Court has approved the concept that a reasonable doubt is "one based on reason," Jackson v. Virginia, *supra*, 443 U.S. at 317, and has noted with apparent approval that numerous cases have defined a reasonable doubt as one "based on reason which arises from the evidence or lack of evidence." Johnson v. Louisiana, *supra*, 406 U.S. at 360. The Court has also approved the analogy that a reasonable doubt is one that would cause reasonable persons to "hesitate to act" in matters of importance in their personal lives. Holland v. United States, *supra*, 348 U.S. at 140, *citing* Bishop v. United States, 107 F.2d 297, 303 (D.C.Cir. 1939). *Accord* Hopt v. Utah, *supra*, 120 U.S. at 441.

The Supreme Court has also disapproved or cast doubt on several concepts. In Hopt v. Utah, *supra* at 440, the Court said that "the words 'to a reasonable and moral certainty' add nothing to the words 'beyond a reasonable doubt' [and] may require explanation as much as the other." In Victor v. Nebraska, 511 U.S. 1 (1994), the Supreme Court held that use of the term moral certainty did not, of itself, make the reasonable doubt instruction unconstitutional. *Id*. at 14. This instruction does not use and never has used any moral certainty language. In Cage v. Louisiana, 498 U.S. 39 (1990), disapproved of on other grounds, Estelle v. McGuire, 502 U.S. 62, 73 n.4 (1991), the Court held that instructions defining a reasonable doubt as "an actual substantial doubt" and as one that would give rise to a "grave uncertainty" were reversibly erroneous. *See also* Taylor v. Kentucky, *supra*, 436 U.S. at 488, where the Court quoted the trial court's instruction defining a reasonable doubt as "a substantial doubt, a real doubt," and then said "[t]his definition, though perhaps not in itself reversible error, often has been criticized as confusing." In Holland v. United States, *supra*, 348 U.S. at 140 the Court said that the language "hesitate to act" should be used instead of the language "willing to act upon." In Harris v. Rivera, 454 U.S. 339, 347 (1981), the Court indicated that a reasonable doubt may exist even if the factfinder cannot articulate the reasons on which the doubt is based.

Sixth Circuit decisions provide further guidance. Although not necessarily condemning the "willing to act" language as reversible error, Sixth Circuit cases have expressed a preference for the "hesitate to act" language, *see* United States v. Mars, *supra*, 551 F.2d at 716, or for equivalent language combining the two concepts to state that proof beyond a reasonable doubt is "proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs." United States v. Hart, *supra*, 640 F.2d at 860 n. 3.

In the context of reviewing state court convictions, the Sixth Circuit has upheld against constitutional attacks instructions like those criticized by the Supreme Court in Taylor v. Kentucky, *supra*, 436 U.S. at 488, which define a reasonable doubt as "a substantial doubt, a real

doubt." Payne v. Smith, 667 F.2d 541, 547 (6th Cir. 1981); Hudson v. Sowders, 510 F.Supp. 124, 128 (W.D.Ky.1981), *aff'd*, 698 F.2d 1220 (6th Cir. 1982). But in the context of reviewing federal convictions, use of the term "substantial doubt" has been characterized as "unfortunate" and as potentially presenting "an issue of some magnitude." United States v. Christy, *supra*, 444 F.2d at 450.

The Sixth Circuit has also criticized language suggesting that the jurors must be "convinced" that a reasonable doubt exists in order to acquit, Cutshall v. United States, 252 F.2d 677, 679 (6th Cir. 1958) (potentially burden shifting), and language stating that if the jurors believe the government's evidence, then the defendant is guilty, Lurding v. United States, 179 F.2d 419, 422 (6th Cir. 1950) ("unfortunate phrasing").

In United States v. Hawkins, 822 F.2d 1089 (6th Cir. 1987), the district court instructed that proof beyond a reasonable doubt is proof that leaves the jurors "firmly convinced" of the defendant's guilt. The Sixth Circuit held that this was not plain error, and stated that two other circuits had upheld use of this language as "a valid reasonable doubt instruction," *citing* United States v. Hunt, 794 F.2d 1095, 1100-01 (5th Cir. 1986), and United States v. Bustillo, 789 F.2d 1364, 1368 (9th Cir. 1986) in support. But these two cases are much more limited than this statement implies. In *Hunt*, all the Fifth Circuit said was that the "firmly convinced" language seemed little different than "a real doubt," a definition which earlier Fifth Circuit decisions had approved. And in *Bustillo*, all the Ninth Circuit did was to hold that the "firmly convinced" language was not plain error.

With regard to the concept that a reasonable doubt may be based on either the evidence or a lack of evidence, *see* Johnson v. Louisiana, supra, 406 U.S. at 360, the Sixth Circuit has refused to reverse based on the failure to specifically include the words "want of evidence" in a reasonable doubt definition, noting that when read as a whole, the instructions made clear that a reasonable doubt could arise from a lack of evidence. Ashe v. United States, 288 F.2d 725, 730 (6th Cir. 1961).

In United States v. Hart, *supra*, 640 F.2d at 859-61, the Sixth Circuit reviewed the following instruction:

> You have heard a lot about reasonable doubt. Reasonable doubt is a doubt founded in reason, and arising from the evidence. Not a mere hesitation of the mind to pronounce guilt because of the punishment that may follow. The punishment, if any, is for the Court. Not a mere capricious doubt or hesitancy of the mind to say this man did so and so, but it must be a doubt founded in reason and arising from the evidence, and you can't go outside the evidence that you have heard and seen in this case to make any kind of determination.

Id. at 859. Although the Sixth Circuit ultimately decided that this instruction did not require reversal, it said that "we think . . . it would have been much better if the district judge had given the charge offered by either the defense or the government." *Id*. at 860. The Sixth Circuit then went on to say that "[b]oth of those instructions (which are similar) provide a much better definition of reasonable doubt than the instruction actually given and also define more clearly the

government's burden of proving absence of reasonable doubt." *Id*. at 860-861. The instruction offered by the defense in *Hart* stated:

> The indictment or formal charge against a defendant is not evidence of guilt. The defendant is at present presumed innocent. The government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so you must acquit him. It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is doubt based upon a reason and common sense--the kind of doubt that would make a reasonable person hesitate to act. It exists as a real doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence. So if the jury, after careful and impartial consideration of all the evidence in the case, is left with a reasonable doubt that a defendant is guilty of the charge, it must acquit.

Id. at 860 n. 3. The instruction offered by the government in *Hart* stated:

> The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins trial with a "clean slate"--with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case. It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense--the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. So, if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. 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.

Id.

See generally Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 Tenn. L. Rev. 45 (1999).

As previously explained in the Commentary to Instruction 1.02, even though jurors have the power to acquit despite the existence of evidence proving guilt beyond a reasonable doubt, Sixth Circuit decisions clearly hold that the court's instructions should not tell the jurors about this. See United States v. Avery, 717 F.2d 1020, 1027 (6th Cir. 1983); United States v. Burkhart, 501 F.2d 993, 996-997 (6th Cir. 1974). "The law of jury nullification . . . seems not to require or permit a judge to tell the jury that it has the right to ignore the law." *Burkhart, supra* at 997 n.3. Thus Instruction 1.03(5) avoids stating that the jury "should" convict and instead contains the "say so" language.

1.04 EVIDENCE DEFINED

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

(2) The evidence in this case includes only what the witnesses said while they were testifying under oath; the exhibits that I allowed into evidence; [the stipulations that the lawyers agreed to]; [and the facts that I have judicially noticed].

(3) Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.

(4) During the trial I did not let you hear the answers to some of the questions that the lawyers asked. I also ruled that you could not see some of the exhibits that the lawyers wanted you to see. And sometimes I ordered you to disregard things that you saw or heard, or I struck things from the record. You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

(5) Make your decision based only on the evidence, as I have defined it here, and nothing else.

Use Note

In paragraph (2), provisions on stipulations and judicial notice are bracketed and should be used only if relevant. If the court has taken judicial notice of a fact, Instruction 7.19 should be given later in the instructions.

Paragraph (4) should also be tailored depending on what has happened during the trial.

Committee Commentary 1.04

(current through December 1, 2009)

The Sixth Circuit cited paragraph (3) of this instruction as a good reminder that attorneys' closing arguments are not evidence. United States v. Wilson, 168 F.3d 916, 924 n.6 (6th Cir. 1999).

In United States v. Griffith, 1993 WL 492299, 1993 U.S. App. LEXIS 31194 (6th Cir.1993) (unpublished), a panel of the Sixth Circuit reversed a conviction due to erroneous jury instructions on stipulations. The trial court instructed the jury to give the stipulation "such weight as you believe it deserves . . . ." 1993 WL at 2, 1993 LEXIS at 4. The panel stated, "The law in the Sixth Circuit on the effect of a stipulation of fact is clear: 'Stipulations voluntarily entered by the parties are binding, both on the district court and on [the appeals court].'" *Griffith*,

1993 WL at 2, 1993 LEXIS at 4, *quoting* FDIC v. St. Paul Fire and Marine Ins. Co., 942 F.2d 1032, 1038 (6th Cir. 1991).

The strongly worded admonition in paragraph (4) regarding proffered evidence that was rejected or stricken is based in part on Federal Judicial Center Instructions 1 and 9, and in part on the idea that a strongly worded admonition is necessary to counteract the jurors' natural curiosity and inclination to speculate about these matters. This paragraph should be tailored to fit the particular facts of the case. If, for example, there was no occasion during the course of the trial to order that things the jurors saw or heard be stricken from the record, the language in this paragraph dealing with such matters should be omitted.

1.05 CONSIDERATION OF EVIDENCE

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 tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

Committee Commentary 1.05

(current through December 1, 2009)

Supreme Court and Sixth Circuit cases indicate that jurors should consider the evidence in light of their own experiences, may give it whatever weight they believe it deserves and may draw inferences from the evidence. See Turner v. United States, 396 U.S. 398, 406-407 (1970) (the jury may consider its own store of knowledge, must assess for itself the probative force and the weight, if any, to be accorded the evidence, and is the sole judge of the facts and the inferences to be drawn therefrom); Holland v. United States, 348 U.S. 121, 140 (1954) (the jury must use its experience with people and events in weighing the probabilities); United States v. Jones, 580 F.2d 219, 222 (6th Cir. 1978) (the jury may properly rely upon its own knowledge and experience in evaluating evidence and drawing inferences).

1.06 DIRECT AND CIRCUMSTANTIAL EVIDENCE

(1) Now, some of you may have heard the terms "direct evidence" and "circumstantial evidence."

(2) Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.

(3) Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

(4) It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one, or say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

Committee Commentary 1.06

(current through December 1, 2009)

In Holland v. United States, 348 U.S. 121, 139-40 (1954), the Supreme Court held that circumstantial evidence is no different intrinsically than direct evidence. *Accord* United States v. Frost, 914 F.2d 756, 762 (6th Cir. 1990). *See also* Jackson v. Virginia, 443 U.S. 307, 326 (1979) (no special cautionary instruction should be given on the government's burden of proof in circumstantial cases).

The purpose of this instruction is to define direct and circumstantial evidence, to make clear that the jury should consider both kinds of evidence, and to dispel the television notion that circumstantial evidence is inherently unreliable.

Federal Judicial Center Instructions 1 and 9 take the position that there is no need to define direct and circumstantial evidence because there is no difference legally in the weight to be given the two. The Committee rejected this approach on the ground that jurors need to be told that they can rely on circumstantial evidence, and that to intelligently convey this concept, some definition of circumstantial evidence is required.

Some Sixth Circuit decisions indicate that upon request, a defendant is entitled to an instruction that the jury may acquit him on the basis of circumstantial evidence. See United States v. Eddings, 478 F.2d 67, 72-73 (6th Cir.1973).

1.07 CREDIBILITY OF WITNESSES

(1) Another part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness's testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.

(2) Let me suggest some things for you to consider in evaluating each witness's testimony.

(A) Ask yourself if the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.

(B) Ask yourself how good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened?

(C) Ask yourself if there was anything else that may have interfered with the witness's ability to perceive or remember the events.

(D) Ask yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?

(E) Ask yourself if the witness had any relationship to the government or the defendant, or anything to gain or lose from the case, that might influence the witness's testimony. Ask yourself if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.

[(F) Ask yourself if the witness testified inconsistently while on the witness stand, or if the witness said or did something (or failed to say or do something) at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important, or about some unimportant detail. Ask yourself if it seemed like an innocent mistake, or if it seemed deliberate.]

(G) And ask yourself how believable the witness's testimony was in light of all the other evidence. Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

(3) These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with other people. And then decide what testimony you believe, and how much weight you think it

deserves.

Use Note

Bracketed paragraph (2)(F) should be included when a witness has testified inconsistently, or has said or done something at some other time that is inconsistent with the witness's testimony. It should be tailored to the particular kind of inconsistency (i.e. either inconsistent testimony on the stand, or inconsistent out-of-court statements or conduct, or both). The bracketed failure-to-act language should be included when appropriate.

Committee Commentary 1.07
(current through December 1, 2009)

The Sixth Circuit has described this instruction as "a correct statement of the law." United States v. Chesney, 86 F.3d 564, 573 (6th Cir. 1996). *See also* United States v. Franklin, 415 F.3d 537, 554 (6th Cir. 2005) (approving Instruction 1.07(2)(G) as "properly la[ying] out the considerations relevant to evaluating credibility. . .").

So-called "presumption of truthfulness" instructions, which tell the jurors that each witness is presumed to speak the truth unless the evidence indicates otherwise, are reversibly erroneous. *See, e.g.*, United States v. Maselli, 534 F.2d 1197, 1202-03 (6th Cir. 1976).

The "Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses." United States v. Bailey, 444 U.S. 394, 414 (1980). "It is for them, generally, and not for . . . (the) courts, to say (whether) a particular witness spoke the truth." *Id.* at 414-15.

1.08 NUMBER OF WITNESSES

(1) One more point about the witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.

(2) Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

Use Note

Use caution in giving this instruction when the defense has not presented any testimony. It may draw potentially prejudicial attention to the absence of defense witnesses.

Committee Commentary 1.08

(current through December 1, 2009)

In United States v. Moss, 756 F.2d 329, 334-335 (4th Cir. 1985), the defendant objected to the district court's number of witnesses instruction on the ground that it drew unnecessary and potentially prejudicial attention to the fact that the defense had not presented any witnesses during the trial. On appeal, the Fourth Circuit held that there was no error, but stated that district courts should refrain from giving such an instruction when the defendant has not presented any witnesses. *Cf.* Barnes v. United States, 313 A.2d 106, 110 (D.C.App.1973) (such an instruction is not required, even upon request by the defense, when the defense has elected not to present any witnesses).

1.09 LAWYERS' OBJECTIONS

(1) There is one more general subject that I want to talk to you about before I begin explaining the elements of the crime charged.

(2) The lawyers for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.

(3) And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in court.

Committee Commentary 1.09

(current through December 1, 2009)

This instruction covers several concepts related to lawyers' objections that are commonly included somewhere in the court's instructions.

Chapter 2.00

DEFINING THE CRIME AND RELATED MATTERS

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2.01 INTRODUCTION

(1) That concludes the part of my instructions explaining your duties and the general rules that apply in every criminal case. In a moment, I will explain the elements of the crime that the defendant is accused of committing.

(2) But before I do that, I want to emphasize that the defendant is only on trial for the particular crime charged in the indictment (and the lesser charges that I will explain to you). Your job is limited to deciding whether the government has proved the crime charged (or one of those lesser charges).

[(3) Also keep in mind that whether anyone else should be prosecuted and convicted for this crime is not a proper matter for you to consider. The possible guilt of others is no defense to a criminal charge. Your job is to decide if the government has proved this defendant guilty. Do not let the possible guilt of others influence your decision in any way.]

Use Note

Any changes made in paragraphs (2) and (3) should be made in paragraphs (1) and (2) of Instruction 8.08 as well.

Bracketed paragraph (3) should be included only if the possible guilt of others has been raised during the trial. Modifications of this paragraph may be necessary in conspiracy, aiding and abetting, alibi or mistaken identification cases, where the possible guilt of others may be a legitimate issue.

Committee Commentary 2.01

(current through December 1, 2009)

In United States v. Ballentine, 1999 WL 1073653, 1999 U.S. App. LEXIS 30164 (6th Cir. 1999) (unpublished), a panel of the Sixth Circuit held that it was not error to give Pattern Instruction 2.01(3) without modification even though the defendant argued someone else had committed the crime.

Paragraph (3) of this instruction is bracketed to indicate that it should not be given in every case. If the possible guilt of others has not been raised during trial, this paragraph is unnecessary and should be omitted to avoid confusion. Note also that this paragraph may require modification in cases where vicarious criminal liability is alleged, such as conspiracy or aiding and abetting cases. In such cases, the jury may legitimately be required to decide the guilt of other persons not charged in the indictment.

Paragraph (3) may also require modification in cases where the defendant has raised an alibi defense, or has argued mistaken identification. Where the defendant claims that someone else committed the crime, it may be confusing to instruct the jurors that they should not be concerned with anyone else's guilt.

The concepts covered in paragraphs (2) and (3) are covered again for emphasis in Instruction 8.08. Any deletions or modifications made in this instruction should be made in paragraphs (1) and (2) of Instruction 8.08 as well.

2.01A SEPARATE CONSIDERATION--SINGLE DEFENDANT CHARGED WITH MULTIPLE CRIMES

(1) The defendant has been charged with several crimes. The number of charges is no evidence of guilt, and this should not influence your decision in any way. It is your duty to separately consider the evidence that relates to each charge, and to return a separate verdict for each one. For each charge, you must decide whether the government has presented proof beyond a reasonable doubt that the defendant is guilty of that particular charge.

(2) Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on any of the other charges.

Use Note

Paragraph (2) should be modified when guilt of one charge is a prerequisite for conviction of another charge, as in RICO cases involving predicate offenses.

Committee Commentary 2.01A

(current through December 1, 2009)

This instruction is modeled after Federal Judicial Center Instruction 46A.

The last sentence of this instruction should be modified when guilt of one charge is a prerequisite for conviction of another charge. See for example 18 U.S.C. § 1961 (RICO conviction requires proof of two predicate offenses).

2.01B SEPARATE CONSIDERATION--MULTIPLE DEFENDANTS CHARGED WITH A SINGLE CRIME

(1) The defendants have all been charged with one crime. But in our system of justice, guilt or innocence is personal and individual. It is your duty to separately consider the evidence against each defendant, and to return a separate verdict for each one of them. For each defendant, you must decide whether the government has presented evidence proving that particular defendant guilty beyond a reasonable doubt.

(2) Your decision on one defendant, whether it is guilty or not guilty, should not influence your decision on any of the other defendants.

Committee Commentary 2.01B

(current through December 1, 2009)

In United States v. Mayes, 512 F.2d 637, 641 (6th Cir. 1975), the Sixth Circuit quoted with approval Justice Rutledge's admonition in Kotteakos v. United States, 328 U.S. 750, 772 (1946):

> Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation.

The proposed instruction is based on these principles, and on the instructions given by the district court in United States v. United States Gypsum Co., 550 F.2d 115, 127-128 n.12 (3d Cir. 1977), which were affirmed by the Supreme Court in United States v. United States Gypsum Co., 438 U.S. 422, 462-63 (1978).

2.01C SEPARATE CONSIDERATION--MULTIPLE DEFENDANTS CHARGED WITH THE SAME CRIMES

(1) The defendants have all been charged with several crimes. The number of charges is no evidence of guilt, and this should not influence your decision in any way. And in our system of justice, guilt or innocence is personal and individual. It is your duty to separately consider the evidence against each defendant on each charge, and to return a separate verdict for each one of them. For each one, you must decide whether the government has presented proof beyond a reasonable doubt that a particular defendant is guilty of a particular charge.

(2) Your decision on any one defendant or charge, whether it is guilty or not guilty, should not influence your decision on any of the other defendants or charges.

Use Note

Paragraph (2) should be modified when guilt of one charge is a prerequisite for conviction of another charge, as in R.I.C.O. cases involving predicate offenses.

Committee Commentary 2.01C

(current through December 1, 2009)

In United States v. Gibbs, 182 F.3d 408, 438 (6th Cir. 1999), the court affirmed convictions where the trial judge gave an instruction the same as 2.01C except for insignificant word changes and omission of the first two sentences of the instruction.

This instruction combines the concepts contained in Instructions 2.01A and 2.01B. See the Committee Commentaries for those instructions for further explanation. It is designed for use in cases where the indictment charges multiple defendants with the same crimes.

The last sentence of paragraph (2) should be modified when guilt of one charge is a prerequisite for conviction of another charge. See for example 18 U.S.C. § 1961 (RICO conviction requires proof of two predicate offenses).

2.01D SEPARATE CONSIDERATION--MULTIPLE DEFENDANTS CHARGED WITH DIFFERENT CRIMES

(1) The defendants have been charged with different crimes. I will explain to you in more detail shortly which defendants have been charged with which crimes. But before I do that, I want to emphasize several things.

(2) The number of charges is no evidence of guilt, and this should not influence your decision in any way. And in our system of justice, guilt or innocence is personal and individual. It is your duty to separately consider the evidence against each defendant on each charge, and to return a separate verdict for each one of them. For each one, you must decide whether the government has presented proof beyond a reasonable doubt that a particular defendant is guilty of a particular charge.

(3) Your decision on any one defendant or one charge, whether it is guilty or not guilty, should not influence your decision on any of the other defendants or charges.

Use Note

Paragraph (3) should be modified when guilt of one charge is a prerequisite for conviction of another charge, as in RICO cases involving predicate offenses.

Committee Commentary 2.01D

(current through December 1, 2009)

This instruction combines the various concepts contained in Instructions 2.01A and 2.01B. See the Committee Commentaries for those instructions for further explanation. It is designed for use in cases where the indictment charges multiple defendants with different crimes.

The last sentence of paragraph (3) should be modified when guilt of one charge is a prerequisite for conviction of another charge. See for example 18 U.S.C. § 1961 (RICO conviction requires proof of two predicate offenses).

2.02 DEFINITION OF THE CRIME

(1) Count ___ of the indictment accuses the defendant of _____ in violation of federal law. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant (fully define the prohibited acts and/or results required to convict).

(B) Second, that the defendant did so (fully define the precise mental state required to convict).

[(C) Third, that (fully define any other elements required to convict).]

[(2) Insert applicable definitions of terms used here.]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

[(4) Insert applicable explanations of any matters not required to convict here.]

Use Note

Definitions of the precise mental state required for various federal offenses are provided in the elements instructions in Chapters 10 *et seq*.

Bracketed paragraph (1)(C) should be included when the crime cannot be broken down neatly into two elements. Additional paragraphs should be added as needed to cover all the elements.

Bracketed paragraph (2) should be included when terms used in paragraphs (1)(A-C) require further explanation.

Bracketed paragraph (4) should be included when it would be helpful to explain matters that need not be proved in order to convict. When used, a final sentence should be included for balance emphasizing what it is that the government must prove to convict.

Committee Commentary 2.02

(current through December 1, 2009)

This instruction recommends a format for defining the elements of crimes not covered by elements instructions in Chapters 10 *et seq*. The format here breaks the definition down into two basic parts -- the prohibited acts and/or results required to convict; and the required mental state. It is impossible to break every federal crime down into two neatly separate elements, and this instruction should not be viewed as a rigid formula that can or should be followed in every case. A bracketed catch-all paragraph (1)(C) is included to illustrate that other elements may be

required to convict.

In addition to defining these concepts, the instruction must make clear that the defendant had the required mental state at the time he committed the prohibited acts or achieved the prohibited results, not afterwards. In cases where this is a contested issue, the court may wish to expand on the "did so" language in paragraph (1)(B).

Many crimes are defined by reference to legal terms that may require further explanation. This instruction suggests that applicable definitions of any such terms be inserted in bracketed paragraph (2).

For some crimes, it may be helpful to explain that there are certain matters that the government need not prove in order to convict. For example, counterfeiting requires an intent to defraud, but does not require proof that anyone was actually defrauded. This instruction suggests that any such explanation be inserted in bracketed paragraph (4). When used, a final sentence should be included for balance emphasizing what it is that the government must prove in order to convict.

In Neder v. United States, 527 U.S. 1, 15 (1999), the Supreme Court held that omission of an element in the jury instructions is subject to harmless error analysis. To decide whether the error was harmless, the Court used the test for determining whether a constitutional error is harmless from Chapman v. California, 386 U.S. 18 (1967).

In United States v. Baird, 134 F.3d 1276 (6th Cir. 1998), the Sixth Circuit held that the district court committed plain error when it failed to define an essential element of the crime. "Ordinarily, it will not suffice merely to read to the jury the statute defining the crime. Even though the language of a statute may expressly contain all the elements of the offense, common English words often will have peculiar legal significance." *Id*. at 1283, *quoting* United States v. Bryant, 461 F.2d 912, 920 (6th Cir. 1972).

In Apprendi v. New Jersey, 530 U.S. 466, 476 (2000), the Court stated: "[In Jones v. United States, we noted] that 'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' (*quoting* Jones v. United States, 526 U.S. 227, 243 n.6 (1999))." *See also* Ring v. Arizona, 536 U.S. 584, 602-03 (2002).

Apprendi requirements apply only to facts which increase the penalty beyond the prescribed statutory maximum; if a fact increases only the statutory minimum sentence, it need not be alleged in an indictment and proved to a jury beyond a reasonable doubt. Harris v. United States, 536 U.S. 545 (2002). *See also* United States v. Copeland, 304 F.3d 533, 553-54 (6th Cir. 2002) (discussing impact of Harris v. United States, *supra* on Sixth Circuit case law).

When the indictment alleges facts which increase the prescribed statutory maximum penalty for the charged offense, these facts should not be included in bracketed paragraph (1)(C) of the instruction because these additional facts are not "required to convict." Rather, in this

situation, special verdict forms and an additional instruction may be necessary for the jury to make findings. An example of a prosecution raising this issue is a controlled substances prosecution in which the amount of the controlled substance increases the statutory maximum penalty. *See* Instruction 8.03C Unanimity Required: Statutory Maximum Penalty Increased (Controlled Substances: 21 U.S.C. § 841).

Reading the indictment to the jury is generally within the discretion of the district court. United States v. Smith, 419 F.3d 521, 530 (6th Cir. 2005), *citing* United States v. Maselli, 534 F.2d 1197, 1202 (6th Cir. 1976). Instructions stating that "the purpose of an indictment is only to cause the person named therein to be brought to trial and to advise him of the nature of the charge or charges against him" have been characterized as "desirable" and "customary." United States v. Baker, 418 F.2d 851, 853 (6th Cir. 1969). Earlier versions of this commentary did not recommend that the trial judge read the indictment to the jury, and also recommended that the trial judge not paraphrase the indictment. The Committee recognizes that district court practices on reading or summarizing the indictment vary widely, and takes no position on the best practice. However, jury confusion can arise, particularly in complex cases, if the indictment is not read, accurately summarized or sent to the jury room. *See, e.g.,* United States v. Bustamante, 1992 WL 126630, 1992 U.S. App LEXIS 13407 (6th Cir. 1992) (unpublished). As the Eighth Circuit states in Note 2 to its Model Criminal Instruction 1.01 (2003 ed.), "Depending on the length and complexity of the indictment and the individual practices of each district judge, the indictment may be read, summarized by the court, summarized by the prosecution or not read or summarized depending on what is necessary to assist the jury in understanding the issues before it." If the indictment is furnished in writing to the jury, a limiting instruction such as Instruction 1.03(1) must be given. United States v. Smith, 419 F.3d 521, 531 (6th Cir. 2005) (omission of limiting instruction was error but not plain error). The Committee takes no position on the practice in some districts of providing the jury with a copy of the indictment.

Reading the indictment to prospective jurors is not an abuse of discretion if appropriate limiting instructions are given to the effect that the indictment is not to be considered as evidence of guilt. United States v. Lawson, 535 F.3d 434, 441 (6th Cir. 2008). Such a limiting instruction is found in Instruction 1.03(1).

2.03 DEFINITION OF LESSER OFFENSE

(1) If you find the defendant not guilty of _____ [or if after making every reasonable effort to reach a unanimous verdict on that charge, you find that you cannot agree], then you must go on to consider whether the government has proved the lesser charge of _____.

(2) The difference between these two crimes is that to convict the defendant of the lesser charge of _____ , the government does not have to prove _____. This is an element of the greater charge, but not the lesser charge.

(3) For you to find the defendant guilty of the lesser charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant (fully define the prohibited acts and/or results required to convict).

(B) Second, that he did so (fully define the mental state required to convict).

[(C) Third, that (fully define any other elements required to convict).]

[(4) Insert applicable definitions of terms used here.]

(5) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

[(6) Insert applicable explanations of any matters not required to convict here.]

Use Note

The bracketed language in paragraph (1) should be added if the court believes that the jurors should be permitted to consider a lesser offense even though they have not unanimously acquitted the defendant of the charged offense.

See the Committee Commentaries to Instructions 2.05 and 2.06 for definitions of the precise mental state required for various federal criminal offenses.

Bracketed paragraph (3)(C) should be included when the crime cannot be broken down neatly into two elements. Additional paragraphs should be added as needed to cover all the elements.

Bracketed paragraph (4) should be included when terms used in paragraphs (3)(A-C) require further explanation.

Bracketed paragraph (6) should be included when it would be helpful to explain matters that need not be proved in order to convict. When used, a final sentence should be included for balance emphasizing what it is that the government must prove to convict.

Committee Commentary 2.03
(current through December 1, 2009)

Federal Rule of Criminal Procedure 31(c) provides:

> (c) 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.

The Supreme Court identified the test for defining lesser included offenses under Rule 31(c) in Schmuck v. United States, 489 U.S. 705 (1989). The Court adopted the "elements approach." *Id.* at 716. The Court explained: "Under this test, one offense is not 'necessarily included' in another 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)." *Id*. This elements approach requires a comparison of the statutory elements of the greater and lesser offenses as opposed to a comparison of the conduct proved at trial. *Id*. at 716-17. For an application of this test, *see* Carter v. United States, 530 U.S. 255 (2000).

In United States v. Monger, 185 F.3d 574 (6th Cir. 999), the court stated, "A criminal defendant 'is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" *Id.* at 576, *quoting* Keeble v. United States, 412 U.S. 205 (1973). The *Monger* court stated that a lesser included offense instruction should be given when four criteria are met:

> (1) a proper request is made,
> (2) the elements of the lesser offense are identical to part of the elements of the greater offense,
> (3) the evidence would support a conviction on the lesser offense, and
> (4) the proof on the element or elements differentiating the two crimes is sufficiently disputed so that a jury could consistently acquit on the greater offense and convict on the lesser.

Id. at 576, *citing* United States v. Moore, 917 F.2d 215, 228 (6th Cir.1990).

In *Monger*, the defendant's conviction was reversed on the basis that the judge should have given a lesser included offense instruction for simple possession along with the instruction for possession with intent to distribute.

Instruction 8.07 Lesser Offenses, Order of Deliberations, Verdict Form covers the order of deliberation and verdict form in cases involving lesser included offenses.

2.04 ON OR ABOUT

(1) Next, I want to say a word about the date mentioned in the indictment.

(2) The indictment charges that the crime happened "on or about" _____. The government does not have to prove that the crime happened on that exact date. But the government must prove that the crime happened reasonably close to that date.

Use Note

Use caution in giving this instruction if the defendant has raised an alibi defense dependent on particular dates; or if there is a statute of limitations question; or if the date charged is an essential element of the crime and the defendant may have been misled by the date charged in the indictment; or if giving this instruction would constructively amend the indictment.

Committee Commentary 2.04

(current through December 1, 2009)

In United States v. Dennard, 1993 WL 35172, 1993 U.S. App. LEXIS 23798 (6th Cir. 1993) (unpublished), a panel approved Instruction 2.04 and held that the instruction was supported by the evidence or, alternatively, the error was harmless. 1993 WL at 2, 1993 LEXIS at 6. *See also* United States v. Manning, 142 F.3d 336, 338-39 (6th Cir. 1998) (conviction affirmed where indictment alleged crime occurred "on or about" September 6, 1995 and evidence showed conduct occurred slightly more than one month earlier).

In Ledbetter v. United States, 170 U.S. 606, 612-613 (1898), the Supreme Court rejected the defendant's argument that an indictment charging that the offense occurred "on the ___ day of April, 1896" was insufficient. The Court said that it was not necessary for the government to prove that the offense was committed on a particular day, unless the date is made material by the statute defining the offense. The Court said that ordinarily, proof of any date before the indictment and within the applicable statute of limitations will suffice.

In United States v. Ford, 872 F.2d 1231, 1236 (6th Cir. 1989), the Sixth Circuit held that proof of the exact date of an offense is not required, as long as a date "reasonably near" that named in the indictment is established. Applying this rule to the case before it, the Sixth Circuit reversed the defendant's firearms possession conviction because the district court's "on or about" instruction permitted the jury to convict if it found that the defendant possessed a firearm on any date during an eleven month period preceding the date alleged in the indictment. The Sixth Circuit held that a date eleven months before the date alleged in the indictment did not satisfy the "reasonably near" requirement.

Compare United States v. Arnold, 890 F.2d 825, 829 (6th Cir. 1989), where the Sixth Circuit held that the defendant was not unfairly prejudiced by a one month difference between the date alleged in the indictment and the evidence presented at trial where a prior trial of his co-defendants put him on notice that the alleged conspiracy was a continuing one.

Caution should be used in giving this instruction if the defendant raises an alibi defense. In United States v. Henderson, 434 F.2d 84, 86-89 (6th Cir. 1970), the Sixth Circuit reversed because the district court gave an "on or about" instruction in a case where there was no variance between the specific date charged in the indictment and the proofs presented at trial, and the defendant had presented a strong alibi defense for that date. *See generally* Annotation, Propriety and Prejudicial Effect of "On or About" Instruction Where Alibi Evidence in Federal Criminal Case Purports to Cover Specific Date Shown by Prosecution Evidence, 92 A.L.R.Fed. 313 (1989).

However, even when an alibi defense is raised, the district court retains the discretion to give an "on or about" instruction. United States v. Neuroth, 809 F.2d 339, 341-42 (6th Cir. 1987) (en banc). In exercising this discretion, the district court should look at how specifically the indictment alleges the date on which the offense occurred, and compare that to the proofs at trial regarding the date of the offense. If the indictment or the proofs point exclusively to a particular date, it is preferable for the court not to give an "on or about" instruction. The court should also consider the type of crime charged. An "on or about" instruction may be more appropriate in a case involving a crime like conspiracy, where the proof as to when the crime occurred is more nebulous, than in a case involving a crime like murder, where the proof as to when the crime occurred may be more concrete. These factors are guidelines only, not a rigid formula. *Id.* at 342.

Caution also should be used in giving this instruction when there is a statute of limitations question, *see* Ledbetter v. United States, *supra*, 170 U.S. at 612, or when the date charged is an essential element of the offense and the defendant may have been misled by the date alleged in the indictment. *See* United States v. Bourque, 541 F.2d 290, 293-96 (1st Cir. 1976); United States v. Goldstein, 502 F.2d 526, 528-30 (3d Cir. 1974). *See also* United States v. Pandilidis, 524 F.2d 644, 647 (6th Cir. 1975) (while a mere change of date is not normally considered a substantial variation in an indictment, where the date of the alleged offense affects the determination of whether a crime has been committed, the change is considered material).

Caution also should be used in giving this instruction when the effect would be to constructively amend the indictment. *See* United States v. Ford, *supra*, 872 F.2d at 1236 (where the grand jury alleged that the defendant illegally possessed a firearm during a domestic argument on a particular date, an "on or about" instruction that permitted the jury to convict based on two earlier, unrelated acts of possession not alleged in the indictment constituted a constructive amendment in violation of the Fifth Amendment grand jury indictment guarantee).

2.05 WILLFULLY

(No General Instruction Recommended.)

Committee Commentary 2.05
(current through December 1, 2009)

The Committee does not recommend any general instruction defining the term "willfully" because no single instruction can accurately encompass the different meanings this term has in federal criminal law. This term is "a word 'of many meanings, its construction often being influenced by its context'." Screws v. United States, 325 U.S. 91, 101 (1945), *quoting* Spies v. United States, 317 U.S. 492, 497 (1943).

The Committee instead recommends that the district court define the precise mental state required for the particular offense charged as part of the court's instructions defining the elements of the offense. Chapters 10 *et seq*. include elements instructions which identify specific mental states for those crimes. This approach is consistent with the approach taken by the majority of the circuits that have drafted pattern instructions. See the Introduction to the Federal Judicial Center Instructions ("(W)e have abjured the term ... 'willfully' ... (and instead) have tried our best to make it clear what it is that a defendant must intend or know to be guilty of an offense").

In United States v. Pomponio, 429 U.S. 10, 11-12 (1976), the Supreme Court stated that the term "willfully" does not require proof of any evil motive or bad purpose other than the intention to violate the law.

To determine the precise mental state required for conviction, "each material element of the offense must be examined and the determination made what level of intent Congress intended the Government to prove, taking into account constitutional considerations (citation omitted), as well as the common-law background, if any, of the crime involved." United States v. Renner, 496 F.2d 922, 926 (6th Cir. 1974), *quoting* United States v. Freed, 401 U.S. 601, 613-14 (1971) (Brennan, J., concurring in the judgment).

2.06 KNOWINGLY

(No General Instruction Recommended)

Committee Commentary 2.06
(current through December 1, 2009)

The Committee recommends that the district court give no general instruction defining the term “knowingly” and that instead, the district court define the mental state required for the particular crime charged as part of the court's instructions defining the elements of the offense. Chapters 10 *et seq*. include elements instructions which identify specific mental states for those crimes.

The meaning of the term "knowingly" varies depending on the particular statute in which it appears. For example, in Liparota v. United States, 471 U.S. 419, 433-34 (1985), the Supreme Court held that to convict a defendant of food stamp fraud, the government must prove that the defendant knew that his acquisition or possession of food stamps was unauthorized by statute or regulations. In contrast, in United States v. Elshenawy, 801 F.2d 856, 857-59 (6th Cir. 1986), the Sixth Circuit held that to convict a defendant of possessing contraband cigarettes, the government need only prove that the defendant knew the physical nature of what he possessed. The government need not prove that the defendant also knew that the cigarettes in his possession were required to be taxed, or that the required taxes had not been paid.

Because of these variations in meaning, the Committee does not recommend any general instruction defining the term "knowingly." Instead, the Committee recommends that the district court define the precise mental state required to convict as part of the court's instructions defining the elements of the offense. See for example the Introduction to the Federal Judicial Center Instructions ("(W)e have ... avoided the word 'knowingly,' a term that is a persistent source of ambiguity in statutes as well as jury instructions (and) ... have tried our best to make it clear what it is that a defendant must intend or know to be guilty of an offense.").

2.07 SPECIFIC INTENT

(No General Instruction Recommended)

Committee Commentary 2.07
(current through December 1, 2009)

The Committee recommends that the district court give no general instruction on specific intent and that instead, the district court define the mental state required to convict as part of the instructions defining the elements of the offense. The Supreme Court and Sixth Circuit have both recognized this as the best approach.

In United States v. Bailey, 444 U.S. 394, 403 (1980), the Supreme Court characterized the distinction between general and specific intent as "ambigu(ous)" and as "the source of a good deal of confusion." In Liparota v. United States, 471 U.S. 419, 433 n.16 (1985), the Court noted that Devitt and Blackmar Instruction 14.03 on specific intent had been criticized as "too general and potentially misleading." The Court then said that "[a] more useful instruction might relate specifically to the mental state required (for the particular offense) and eschew use of difficult legal concepts like 'specific intent' and 'general intent'."

In United States v. S & Vee Cartage Co., 704 F.2d 914, 918-20 (6th Cir. 1983), the district court refused to give any general instruction on general and specific intent. Instead, the court just instructed the jury on the precise mental state required to convict. The Sixth Circuit rejected the defendants' argument that an instruction on general and specific intent should have been given and affirmed the defendants' convictions. The Sixth Circuit said that "[a] court may properly instruct the jury about the necessary mens rea without resorting to the words 'specific intent' or 'general intent'," and that "[i]t is sufficient to define the precise mental state required by the statute." *Id.* at 919.

The Sixth Circuit has explained the meaning of specific intent as follows: "In a specific intent crime, '[t]he defendant must act with the purpose of violating the law.' In a general intent crime, the defendant need only 'intend to do the act that the law proscribes.'" United States v. Gibbs, 182 F.3d 408, 433 (6th Cir. 1999)(internal citations omitted).

For some federal crimes, defining the mens rea required to convict will require an instruction that the government must prove that the defendant intentionally violated a known legal duty. *See, e.g.*, Cheek v. United States, 498 U.S. 192 (1991). For other federal crimes, proof that the defendant knew an act was unlawful is not required to convict. *See, e.g.*, United States v. S & Vee Cartage Co., *supra* 704 F.2d at 919.

See also the elements instructions in Chapters 10 *et seq*.

2.08 INFERRING REQUIRED MENTAL STATE

(1) Next, I want to explain something about proving a defendant's state of mind.

(2) Ordinarily, there is no way that a defendant's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking.

(3) But a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted, and any other facts or circumstances in evidence that show what was in the defendant's mind.

(4) You may also consider the natural and probable results of any acts that the defendant knowingly did [or did not do], and whether it is reasonable to conclude that the defendant intended those results. This, of course, is all for you to decide.

Use Note

The bracketed language in paragraph (4) should be used only when there is some evidence of a potentially probative failure to act.

Committee Commentary 2.08

(current through December 1, 2009)

In United States v. Reeves, 594 F.2d 536, 541 (6th Cir. 1979), the Sixth Circuit characterized Devitt and Blackmar Instruction 14.13 on proof of intent as a "wholly appropriate charge," and said that in future cases where such a charge is appropriate, "this Circuit will approve language similar to [this instruction]." Subsequent Sixth Circuit cases also have approved this instruction. *See, e.g.*, United States v. Thomas, 728 F.2d 313, 320-21 (6th Cir. 1984); United States v. Guyon, 717 F.2d 1536, 1539 (6th Cir. 1983); United States v. Bohlmann, 625 F.2d 751, 752-53 (6th Cir. 1980).

In United States v. Gaines, 594 F.2d 541, 544 (6th Cir. 1979), the court appeared to question whether any such instruction should be given at all, stating, that "[i]f district judges in the Sixth Circuit charge at all on inferred intent, it is suggested that they do so in the language of . . . Devitt and Blackmar § 14.13." The Committee believes that some instruction on inferred intent is appropriate, particularly in cases where the requisite intent is disputed, in order to provide the jury with some guidance on this subject.

Devitt and Blackmar Instruction 14.13 is quoted below. The brackets indicate deletions suggested by the Sixth Circuit decisions cited above:

> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made [and done or omitted] by the defendant, and all other facts and circumstances in

evidence which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.

2.09 DELIBERATE IGNORANCE

(1) Next, I want to explain something about proving a defendant's knowledge.

(2) No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that _____, then you may find that he knew _____.

(3) But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that _____, and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part is not the same as knowledge, and is not enough to convict. This, of course, is all for you to decide.

Use Note

This instruction should be used only when there is some evidence of deliberate ignorance.

Committee Commentary 2.09
(current through December 1, 2009)

The Sixth Circuit has repeatedly approved the language of this instruction. The first case to do so was United States v. Lee, 991 F.2d 343, 349 (6th Cir. 1993). The district judge gave paragraphs (2) and (3) of the instruction with two variations in paragraph (3). First, the judge omitted the words "beyond a reasonable doubt," and second, the judge omitted the last sentence to the effect that the questions were all for the jury to decide. The Sixth Circuit approved the instruction overall, citing United States v. Lawson, 780 F.2d 535, 542 (6th Cir. 1985) and United States v. Gullett, 713 F.2d 1203, 1212 (6th Cir. 1983). As to the omission of the phrase "beyond a reasonable doubt," the court noted that although another instruction on reasonable doubt was given, and although the defendant did not challenge the omission of the phrase, "Nonetheless, we wish to express our concern that the judges of the district courts may invite error if they depart too significantly from the language in the pattern instructions." *Lee*, 991 F.2d at 350 n.2.

The next case to address the instruction was Mari v. United States, 47 F.3d 782 (6th Cir. 1995). The district judge used the instruction verbatim, and the Sixth Circuit stated, "We have specifically approved the language of the instruction, concluding that it is an accurate statement of the law." *Mari*, 47 F.3d 782, 785 (6th Cir. 1995), *citing Lee*, 991 F.2d at 351. *Accord,* United States v. Prince, 214 F.3d 740, 760 n.13 (6th Cir. 2000) ("We have upheld an instruction derived from this pattern instruction," *citing Mari*, 47 F.3d at 785); United States v. Beaty, 245 F.3d 617, 622 (6th Cir. 2001) (Pattern Instruction 2.09 "accurately states the law of this Circuit.").

In United States v. Prince, *supra*, the trial court gave an instruction on "willful blindness" which the court of appeals referred to as a deliberate ignorance instruction. 214 F.3d 740, 760. The trial court's instruction was as follows:

You may infer that the defendant had knowledge from circumstantial evidence or

> from evidence showing willful blindness by the defendant. Willful blindness exists when a defendant, whose suspicion has been aroused, deliberately fails to make further inquiry. If you find that the defendant had a strong suspicion that someone withheld important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly.

The defendant contended that the trial court erred in not including the language in Pattern Instruction 2.09 that the jury must find " 'beyond a reasonable doubt that the defendant was aware of a high probability' of criminal activity." *Prince*, 214 F.3d at 761. The court of appeals held that the instructions as a whole required the government to prove the element of knowledge beyond a reasonable doubt, and the omission of the "high probability" language was not fatal, *citing* United States v. Holloway, 731 F.2d 378, 380-81 (6th Cir. 1984), in which the instructions did not contain the "high probability" language. Also, the failure to use the exact words in Instruction 2.09 concerning "carelessness or negligence or foolishness" was not fatal, because the instructions given did not authorize a finding of knowledge based only on negligence, *citing* United States v. Gullett, *supra* and United States v. Thomas, 484 F.2d 909 (6th Cir. 1973).

Aside from the content of the instruction, a question often arises on whether a deliberate ignorance instruction should be given at all. In Mari v. United States, *supra*, the court held that giving the pattern deliberate ignorance instruction was harmless as a matter of law because sufficient evidence of actual knowledge was presented, but cautioned district courts not to give the deliberate ignorance instruction "indiscriminately." *Mari*, 47 F.3d at 787. In United States v. Monus, 128 F.3d 376 (6th Cir.1997), the Sixth Circuit reaffirmed *Mari*, holding that the deliberate ignorance instruction was "at worst harmless error." *Monus,* 128 F.3d at 390-91. "[E]ven if there had been insufficient evidence to support a deliberate ignorance instruction, we must assume that the jury followed the jury charge and did not convict on the grounds of deliberate ignorance." *Id., citing Mari* at 785-87. *See also* United States v. Beaty, *supra* at 622 ("In *Mari*, this Court held that when a district court gives a deliberate ignorance instruction that does not misstate the law but is unsupported by sufficient evidence, it is, at most, harmless error [citiation omitted]. In subsequent cases we have reaffirmed [this thinking].") (quoting *Monus*). In United States v. Ramos, 1994 WL 560870, 1994 U.S. App. LEXIS 28711 (6th Cir. 1994) (unpublished), a panel of the Sixth Circuit stated that the instruction should be used with caution and is only rarely appropriate. Specifically the panel held that the deliberate ignorance instruction should be limited to situations "where the evidence shows that: (1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct." 1994 WL at 3-4, 1994 LEXIS at 9, *citing* United States v. Lara-Velasquez, 919 F.2d 946, 951 (5th Cir. 1990).

In United States v. Jackson, 1995 WL 313726, 1995 U.S. App. LEXIS 12598 (6th Cir. 1995) (unpublished), the district judge gave a deliberate ignorance instruction which was not quoted but which the court described as "based on" Pattern Instruction 2.09. A panel of the Sixth Circuit stated that the value of this instruction was that it cautioned the jurors against convicting on a negligence standard. 1995 WL 313726 at 3, 1995 LEXIS at 8, *citing Lee*, 991 F.2d at 350. The panel further stated that the instruction may not be properly given if no evidence supports a deliberate ignorance theory of guilt, but the error is harmless if sufficient evidence exists to support an actual knowledge theory of guilt. *Jackson, id., citing* United States

v. Mari, *supra*.

The Sixth Circuit discussed Pattern Instruction 2.09 in United States v. Williams, 195 F.3d 823, 826 (6th Cir. 1999). The district judge gave an instruction including the first sentence of paragraph (3) of Instruction 2.09. The issue was whether there was sufficient evidence to support a deliberate ignorance instruction; the court held the instruction proper.

The Sixth Circuit has discussed deliberate ignorance instructions in another case since Instruction 2.09 was published, but it is not directly relevant to Instruction 2.09. In United States v. Warshawsky, 20 F.3d 204 (6th Cir. 1994), the court rejected the argument that it is impermissible to give a deliberate ignorance instruction in a conspiracy trial because a conspiracy conviction requires proof that the co-conspirators intended to break the law together. The Sixth Circuit held the instruction proper since deliberate ignorance is sufficient to prove a conspirator's knowledge of the unlawful aims of a conspiracy, although not to prove the existence of an agreement.

2.10 ACTUAL AND CONSTRUCTIVE POSSESSION

(1) Next, I want to explain something about possession. The government does not necessarily have to prove that the defendant physically possessed the _____ for you to find him guilty of this crime. The law recognizes two kinds of possession--actual possession and constructive possession. Either one of these, if proved by the government, is enough to convict.

(2) To establish actual possession, the government must prove that the defendant had direct, physical control over the _____, and knew that he had control of it.

(3) To establish constructive possession, the government must prove that the defendant had the right to exercise physical control over the _____, and knew that he had this right, and that he intended to exercise physical control over _____ at some time, either directly or through other persons.

(4) For example, if you left something with a friend intending to come back later and pick it up, or intending to send someone else to pick it up for you, you would have constructive possession of it while it was in the actual possession of your friend.

(5) But understand that just being present where something is located does not equal possession. The government must prove that the defendant had actual or constructive possession of the _____, and knew that he did, for you to find him guilty of this crime. This, of course, is all for you to decide.

Use Note

If the government's theory of possession is that it was actual or constructive, give all paragraphs of this instruction. If the government's only theory of possession is that it was constructive, modify this instruction to delete references to actual possession.

If the government's only theory of possession is that it was actual, do not give this instruction; instead, give Instruction 2.10A. This instruction (Instruction 2.10) should be given only when there is some evidence of constructive possession.

Committee Commentary 2.10

(current through December 1, 2009)

If the government uses only a theory of actual possession, it is error to give an instruction on constructive possession. *See* United States v. James, 819 F.2d 674 (6th Cir. 1987) (reversible error to give constructive possession instruction where no evidence of constructive possession was presented). *See also* United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir. 1991) (cautioning against use of boilerplate possession instruction including concepts of joint and constructive possession when neither concept was at issue given the facts of the case). Conversely, if the government's only theory of possession is that it was constructive, the trial judge should omit the portions of the instruction defining actual possession.

Panels of the Sixth Circuit have reviewed Pattern Instruction 2.10 and found it proper. In United States v. Edmondson, 1994 WL 264240, 1994 U.S.App. LEXIS 14973 (6th Cir. 1994) (unpublished), a panel of the Sixth Circuit stated that a constructive possession instruction which was identical to Instruction 2.10 "accurately stated the law and substantially covered the charge that [defendant] proposed." 1994 WL at 4, 1994 LEXIS at 10.

The Sixth Circuit has long approved the concept that a defendant can be convicted of a possessory offense based on constructive possession. *See, e.g.*, United States v. Craven, 478 F.2d 1329, 1333 (6th Cir. 1973); United States v. Wolfenbarger, 426 F.2d 992, 994-95 (6th Cir. 1970); United States v. Burch, 313 F.2d 628, 629 (6th Cir. 1963). In *Craven*, the Sixth Circuit outlined the general principles governing this subject as follows:

> Possession may be either actual or constructive and it need not be exclusive but may be joint [citations omitted]. Actual possession exists when a tangible object is in the immediate possession or control of the party. Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.

478 F.2d at 1333.

The Sixth Circuit continues to define constructive possession by reference to *Craven. See* United States v. Bailey, 553 F.3d 940, 944 (6th Cir. 2009); United States v. Reed, 141 F.3d 644, 651 (6th Cir. 1998). Later case law is consistent with this definition of constructive possession. *See* United States v. Gibbs, 182 F.3d 408, 424 (6th Cir. 1999) (finding sufficient evidence for the jury to conclude that the defendant had constructive possession and stating that "Constructive possession requires that a person knowingly have power and intention to exercise control over an object."), *quoting* United States v. Critton, 43 F.3d 1089, 1096 (6th Cir. 1995) and *citing* United States v. Kincaide, 145 F.3d 771 at 782 (6th Cir. 1998).

In United States v. Hill, 142 F.3d 305, 312 (6th Cir. 1998), the court found sufficient evidence for the jury to infer that defendant had constructive possession where the area where the drugs were found was occupied by defendant, secured by a padlock with a key in defendant's possession, and the area contained male clothing and personal papers with defendant's name and address.

In United States v. Ashley, 587 F.2d 841, 845 (6th Cir. 1978), the Sixth Circuit cited an instruction on the inference to be drawn from unexplained possession of recently stolen property approved in United States v. Prujansky, 415 F.2d 1045, 1049 (6th Cir. 1969), and said that this instruction "properly set forth the difference between actual and constructive possession." The *Prujansky* instruction stated:

> The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is in actual possession. What is constructive possession? A person not being in actual possession but having the right to exercise dominion and control over a thing is

> deemed to be in constructive possession.
> * * *
> The mere presence at the situs of property does not constitute possession; that is, a man innocently at the situs of a property does not mean that he is in possession of it. If he is innocently at the situs--I say innocently--he isn't deemed to be in possession of it. And that is logical to you members of the jury, I am sure.

Id. at 1049.

In United States v. Williams, 526 F.2d 1000, 1003-04 (6th Cir. 1975), the defendant argued that the district court erred in refusing his requested instruction that the "mere presence of a short-barreled shotgun under the driver's seat of the car, without some evidence that the driver exercised some dominion over it, is not sufficient for you to find that it was in the possession of the driver." The Sixth Circuit rejected this argument on the ground that the defendant's requested instruction would only have permitted conviction based on a finding of actual possession. The Sixth Circuit stressed that in addition to correctly defining actual and constructive possession, the district court had also instructed the jury that the word "knowingly" was added to the definition of constructive possession to ensure "that no one would be convicted . . . because of mistake, or accident, or innocent reason."

This instruction restates in plain English the general principles governing this subject stated by the Sixth Circuit in United States v. Craven, *supra*, 478 F.2d at 1333. It also includes the concept that mere presence at the place where the property is located is not enough to establish possession. *See* United States v. Prujansky, *supra*, 415 F.2d at 1049.

2.10A ACTUAL POSSESSION

(1) Next, I want to explain something about possession. To establish actual possession, the government must prove that the defendant had direct, physical control over the _____, and knew that he had control of it.

(2) But understand that just being present where something is located does not equal possession. The government must prove that the defendant had possession of the _____, and knew that he did, for you to find him guilty of this crime. This, of course, is all for you to decide.

Use Note

This instruction should be given if the government's only theory of possession is actual possession.

Committee Commentary 2.10A

(current through December 1, 2009)

This instruction is designed for cases in which the government's only theory of possession is actual. In those cases, there is no reason for the additional complexity injected by defining constructive possession and the difference between it and actual possession.

2.11 JOINT POSSESSION

(1) One more thing about possession. The government does not have to prove that the defendant was the only one who had possession of the _____. Two or more people can together share actual or constructive possession over property. And if they do, both are considered to have possession as far as the law is concerned.

(2) But remember that just being present with others who had possession is not enough to convict. The government must prove that the defendant had either actual or constructive possession of the _____, and knew that he did, for you to find him guilty of this crime. This, again, is all for you to decide.

Use Note

This instruction should be used only when there is some evidence of joint possession.

Committee Commentary 2.11
(current through December 1, 2009)

The Sixth Circuit reviewed this instruction and concluded that it "correctly states the law." In United States v. Chesney, 86 F.3d 564 (6th Cir. 1996), the district judge gave Pattern Instruction 2.11. The Sixth Circuit held that "a joint possession instruction was applicable in this case, given that two people were riding in the car in which the gun was found, and the district court's instruction correctly states the law." *Id.* at 573.

A panel of the Sixth Circuit has cautioned, however, that "A trial judge should not 'always charge joint possession' without considering the facts of the case." United States v. Woodard, 1993 WL 393092 at 4, 1993 U.S. App. LEXIS 26288 at 11-12 (6th Cir.1993) (unpublished). The panel ruled that it was not error for the trial judge to give a joint possession instruction where the jury could find joint possession from the evidence even though both sides argued only sole possession. *Id.*

The Sixth Circuit has long recognized that a defendant need not have exclusive possession of property to be convicted of a possessory offense. Joint possession will suffice. *See* United States v. Craven, 478 F.2d 1329, 1333 (6th Cir. 1973). But this instruction should not be given unless there is some evidence of joint possession. *See* United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir. 1991) (cautioning against use of boilerplate possession instruction including concepts of joint and constructive possession when neither concept was at issue given the facts of the case).

Chapter 3.00

CONSPIRACY

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3.01A CONSPIRACY TO COMMIT AN OFFENSE--BASIC ELEMENTS

(1) Count ___ of the indictment accuses the defendants of a conspiracy to commit the crime of _____ in violation of federal law. It is a crime for two or more persons to conspire, or agree, to commit a criminal act, even if they never actually achieve their goal.

(2) A conspiracy is a kind of criminal partnership. For you to find any one of the defendants guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that two or more persons conspired, or agreed, to commit the crime of _____.

(B) Second, that the defendant knowingly and voluntarily joined the conspiracy.

(C) And third, that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

(3) You must be convinced that the government has proved all of these elements beyond a reasonable doubt in order to find any one of these defendants guilty of the conspiracy charge.

Use Note

This instruction should be followed by Instructions 3.02 through 3.04, plus those of Instructions 3.05 through 3.14 as are appropriate given the facts of the particular case.

Paragraph (2)(C) should be deleted when the statute under which the defendant is charged does not require proof of an overt act. In such cases, all references to overt acts in other instructions should also be deleted.

If the object offense is not charged and defined elsewhere in the instructions, it must be defined at some point in the conspiracy instructions.

Committee Commentary 3.01A
(current through December 1, 2009)

Some statutes contain their own separate conspiracy provisions that do not require an overt act. *See, e.g.,* Salinas v. United States, 522 U.S. 52 (1997) (RICO conspiracy under 18 U.S.C. § 1962(d) does not require an overt act); United States v. Shabani, 513 U.S. 10 (1994) (controlled substances conspiracy under 21 U.S.C. § 846 does not require an overt act); *see also* 18 U.S.C. §§ 1349, 1951, 1956(h). In such cases, paragraph (2)(C) should be deleted, along with all references in other instructions to the subject of overt acts.

The Supreme Court has long recognized that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *See, e.g.*, Pinkerton v. United

States, 328 U.S. 640, 643 (1946). As stated by the Sixth Circuit in United States v. Van Hee, 531 F.2d 352, 357 (6th Cir. 1976), "A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy." An equally well-settled corollary is that to convict a defendant of conspiracy does not require proof that the object of the conspiracy was achieved. *See, e.g.,* United States v. Fruehauf Corp., 577 F.2d 1038, 1071 (6th Cir. 1978). "The gist of the crime of conspiracy is the agreement to commit an illegal act, not the accomplishment of the illegal act." *Id.*

The purpose of this instruction is to briefly outline the basic elements of conspiracy. See generally 18 U.S.C. § 371. It is modeled after Federal Judicial Center Instruction 62. It follows the basic format for defining the crime used in Instruction 2.02. It is meant to be followed by Instructions 3.02 through 3.04, plus those of instructions 3.05 through 3.14 as are appropriate given the facts of the particular case.

Generally speaking, the government need not prove any special mens rea beyond the degree of criminal intent required for the object offense in order to convict a defendant of conspiracy. United States v. Feola, 420 U.S. 671, 686-96 (1975). *See also* Committee Commentary 3.05 (no instruction on bad purpose or corrupt motive recommended). Instruction 3.03, which requires the government to prove that the defendant knew the conspiracy's main purpose, and voluntarily joined it "intending to help advance or achieve its goals," should suffice in most cases, particularly where the object offense is also charged and defined elsewhere in the instructions.

If the object offense is not charged and defined elsewhere, it must be defined at some point in the conspiracy instructions. See United States v. Vaglica, 720 F.2d 388, 391 (5th Cir. 1983) ("serious" error not to do so). In order not to interrupt the continuity of the conspiracy instructions, the Committee suggests that in such cases, the object offense be defined either after the first sentence of this instruction, or following Instruction 3.04.

3.01B CONSPIRACY TO DEFRAUD THE UNITED STATES--BASIC ELEMENTS

(1) Count ___ of the indictment accuses the defendants of a conspiracy to defraud the United States by dishonest means in violation of federal law. It is a crime for two or more persons to conspire, or agree, to defraud the United States, even if they never actually achieve their goal.

(2) A conspiracy is a kind of criminal partnership. For you to find any one of the defendants guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that two or more persons conspired, or agreed, to defraud the United States, or one of its agencies or departments, by dishonest means. The word "defraud" is not limited to its ordinary meaning of cheating the government out of money or property. "Defraud" also means impairing, obstructing or defeating the lawful function of any government agency or department by dishonest means.

(B) Second, the government must prove that the defendant knowingly and voluntarily joined the conspiracy.

(C) And third, the government must prove that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

(3) You must be convinced that the government has proved all of these elements beyond a reasonable doubt in order to find any one of these defendants guilty of the conspiracy charge.

[(4) This crime does not require proof that the defendants intended to directly commit the fraud themselves. Proof that they intended to use a third party as a go-between may be sufficient. But the government must prove that the United States or one of its agencies or departments was the ultimate target of the conspiracy, and that the defendants intended to defraud.]

Use Note

This instruction should be followed by Instructions 3.02 through 3.04, plus those of Instructions 3.05 through 3.14 as are appropriate given the facts of the particular case.

Appropriate "to defraud the United States" language should be substituted in Instructions 3.02 through 3.14 in place of the "to commit the crime of" language that appears in those instructions.

Bracketed paragraph (4) should be included when there is evidence that a third party served as an intermediary between the defendants and the United States.

Committee Commentary 3.01B

(current through December 1, 2009)

The general federal conspiracy statute, 18 U.S.C. § 371, prohibits two distinct types of conspiracies. The first is any conspiracy to "commit any offense" against the United States. The second is any conspiracy to "defraud the United States or any agency thereof." *See generally* United States v. Levinson, 405 F.2d 971, 977 (6th Cir. 1968). This instruction is designed for use in connection with indictments charging a conspiracy to defraud the United States. It should be followed by Instructions 3.02 through 3.04, plus those of instructions 3.05 through 3.14 as are appropriate given the facts of the particular case. Appropriate "to defraud the United States" language should be substituted in Instructions 3.02 through 3.14 in place of the "to commit the crime of" language that appears in those instructions.

The Sixth Circuit distinguishes between conspiracies under the offense clause and conspiracies under the defraud clause of 18 U.S.C. § 371. *See, e.g.,* United States v. Khalife, 106 F.3d 1300 (6th Cir. 1997); United States v. Kraig, 99 F.3d 1361 (6th Cir. 1996). The court has identified some distinctions between a conspiracy to commit an offense and a conspiracy to defraud the U.S. For example, in *Khalife*, the court explained, "there is no 'substantive' offense underlying a § 371 conspiracy to defraud. Thus, it is unnecessary to refer to any substantive offense when charging a § 371 conspiracy to defraud, and it is also unnecessary to prove the elements of a related substantive offense." *Khalife*, 106 F.3d at 1303.

Despite broad dicta to the contrary in United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989), a conspiracy may usually be charged under the defraud clause even if the object of the conspiracy was to commit one or more specific offenses. Cases decided subsequent to *Minarik* have limited the decision to its narrow facts. *See* United States v. Khalife, *supra* at 1303-04 (discussing *Minarik* and subsequent cases). For example, in *Kraig*, the court held that a defraud clause charge was appropriate where the conspiracy alleged violation of more than one statute. *Kraig*, 99 F.3d at 1367. In *Khalife*, the court stated the law "does not require, in circumstances such as these, that the conspiracy be charged only under the 'offense' clause of § 371." 106 F.3d at 1306. Indeed, a conspiracy could be charged under both prongs of § 371 if it had the dual objects of defrauding the United States and committing offenses against the United States, in which case, instructions for both prongs should be given.

In prosecutions under the conspiracy to defraud clause of 18 U.S.C. § 371, the United States must be the target of the conspiracy. Tanner v. United States, 483 U.S. 107 at 128-32 (1987). *Accord* United States v. Minarik, 875 F.2d 1186, 1191 (6th Cir. 1989). In prosecutions brought under the conspiracy to commit an offense clause of § 371, the United States need not be the target. United States v. Gibson, *supra*, 881 F.2d at 321.

The term "defraud" has a broader meaning than simply cheating the government out of property or money. United States v. Minarik, *supra*, 875 F.2d at 1190. It includes "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government," Tanner v. United States, *supra*, 483 U.S. at 128, by "deceit, craft, or trickery, or at least by means that are dishonest." *Minarik, supra* at 1190-91, *quoting* Hammerschmidt v. United States, 265 U.S. 182, 188 (1924). *See also* United States v. Shermetaro, 625 F.2d 104, 109 (6th Cir. 1980); United States v. Levinson, *supra*, 405 F.2d at 977.

Bracketed paragraph (4) should be included when there is evidence that the defendants intended to accomplish the fraud by going through or manipulating a third party. In Tanner v. United States, 483 U.S. 107, 129-32 (1987), the Supreme Court accepted the government's argument that a conspiracy to defraud the United States under § 371 may be committed indirectly by the use of third parties. "The fact that a false claim passes through the hands of a third party on its way . . . to the United States" does not relieve the defendants of criminal liability. *Id.* at 129. The Supreme Court remanded in *Tanner* for consideration of whether the evidence supported the government's theory that the defendants conspired to manipulate a third party in order to cause that third party to make misrepresentations to a federal agency. *Id.* at 132. *See also* United States v. Gibson, 881 F.2d 318, 321 (6th Cir. 1989) ("a conspiracy [to defraud] could be directed at the United States as a target and yet be effected through a third party such as a private business").

3.02 AGREEMENT

(1) With regard to the first element--a criminal agreement--the government must prove that two or more persons conspired, or agreed, to cooperate with each other to commit the crime of _____.

(2) This does not require proof of any formal agreement, written or spoken. Nor does this require proof that everyone involved agreed on all the details. But proof that people simply met together from time to time and talked about common interests, or engaged in similar conduct, is not enough to establish a criminal agreement. These are things that you may consider in deciding whether the government has proved an agreement. But without more they are not enough.

(3) What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people, to cooperate with each other to commit the crime of _____. This is essential.

(4) An agreement can be proved indirectly, by facts and circumstances which lead to a conclusion that an agreement existed. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

[(5) One more point about the agreement. The indictment accuses the defendants of conspiring to commit several federal crimes. The government does not have to prove that the defendants agreed to commit all these crimes. But the government must prove an agreement to commit at least one of them for you to return a guilty verdict on the conspiracy charge.]

Use Note

Bracketed paragraph (5) should be included when the indictment alleges multiple object offenses. It is unclear whether an augmented unanimity instruction specifically requiring unanimous agreement on the same object offense is necessary. See generally Instruction 8.03B and Committee Commentary.

Specific instructions that an agreement between a defendant and a government agent will not support a conspiracy conviction may be required where important given the facts of the particular case.

Committee Commentary 3.02
(current through December 1, 2009)

Title 18 U.S.C. § 371 states that "two or more persons" must conspire in order to establish a conspiracy, and this language has been consistently interpreted to require proof of an agreement between the defendant and at least one other person as "an absolute prerequisite" to a conspiracy conviction. *See, e.g.*, United States v. Bouquett, 820 F.2d 165, 168 (6th Cir. 1987). Sixth Circuit decisions have repeatedly defined the nature of the agreement that the government must prove as "an agreement between two or more persons to act together in committing an offense." *See, e.g.*,

United States v. Reifsteck, 841 F.2d 701, 704 (6th Cir. 1988); *see also* United States v. Bostic, 480 F.2d 965 at 968 (6th Cir. 1973) ("[a])n agreement or understanding between two or more of the defendants whereby they become definitely committed to cooperate for the accomplishment of the [criminal] object . . . .").

The agreement required for conspiracy need not be a formal agreement; rather, a tacit agreement or mutual understanding is sufficient. United States v. Maliszewski, 161 F.3d 992, 1006 (6th Cir. 1998), *quoting* United States v. Lloyd, 10 F.3d 1197, 1210 (6th Cir. 1993). *See also* United States v. Ledezma, 26 F.3d 636, 640 (6th Cir. 1994), *citing* United States v. Pearce, 912 F.2d 159, 161 (6th Cir. 1990) (a tacit or material understanding is sufficient); United States v. Frost, 914 F.2d 756, 762 (6th Cir. 1990). Nor must the government prove that there was agreement on all the details of how the crime would be carried out. *See, e.g.*, United States v. Schultz, 855 F.2d 1217, 1221 (6th Cir. 1988).

It is well-established that the government does not have to present direct evidence of an agreement. *See, e.g.*, United States v. Thompson, 533 F.2d 1006, 1009 (6th Cir. 1976). An agreement "may be inferred from circumstantial evidence that can reasonably be interpreted as participation in a common plan," United States v. Ellzey, 874 F.2d 324 at 328 (6th Cir. 1989) or "from acts done with a common purpose." United States v. Frost, 914 F.2d 756, 762 (6th Cir. 1990).

A defendant cannot be convicted of conspiracy merely because he associated with members of the conspiracy. In United States v. Watkins, 1994 WL 464193, 1994 U.S. App. LEXIS 23886 (6th Cir. 1994) (unpublished), a panel of the court quoted the third sentence of paragraph (2) of the instruction with approval. In that case, the district court gave the pattern instruction, and a panel of the Sixth Circuit found no error in the district court's refusal to give a supplemental instruction stating that mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient. The panel described the pattern instruction as "thorough and adequate." United States v. Watkins, 1994 WL at 3, 1994 LEXIS at 7, *quoting* the third sentence of paragraph (2). *See also* United States v. Ledezma, *supra*, *citing* United States v. Lee, 991 F.2d 343, 348 (6th Cir. 1993); United States v. Davenport, 808 F.2d 1212, 1218 (6th Cir. 1987) (quoting instructions that "mere association . . ., similarity of conduct . . ., assembl[y] . . . and discuss[ion] [of] common aims" do not necessarily establish the existence of a conspiracy).

Bracketed paragraph (5) applies to cases where a single conspiracy count includes multiple objects. A single conspiracy may involve multiple object offenses. Braverman v. United States, 317 U.S. 49, 52-54 (1942). But proof that the defendants conspired to commit only one offense is sufficient to convict. *See* § 371 (prohibiting two or more persons from conspiring to commit "any" offense). Supreme Court cases on unanimity and multiple means of committing a single crime are discussed in the Committee Commentary to Instructions 8.03A and 8.03B.

An issue may arise whether the trial court must give an augmented unanimity instruction specifically telling the jurors that they must unanimously agree on the same object offense in order to convict. The general rule in the Sixth Circuit is that no augmented unanimity instruction is required unless special circumstances are present. See Committee Commentary to Instruction 8.03A--Unanimity of Theory. In United States v. Bouquett, 820 F.2d 165, 169 (6th Cir. 1987),

the court rejected the defendant's argument that his conspiracy conviction should be reversed because the trial court's instructions permitted the jury to convict based on alternate theories of who in particular the defendant conspired with in the context of a single conspiracy. The Sixth Circuit held that these alternate theories did not create "two conceptual groupings requiring an augmented unanimity instruction, and stated that "this court does not require jurors to agree unanimously as to a theory of guilt where a single generic offense may be committed by a variety of acts."

On the question of whether a general verdict of guilty on a multi-object conspiracy count can stand when one of the objects is disqualified as a basis for the conviction, *see* Griffin v. United States, 502 U.S. 46 (1991). In *Griffin*, the Court held that the validity of the general verdict depends on the reason that one of the objects was disqualified. If the object was disqualified as unconstitutional or not legally sufficient (for example, due to a statute of limitations), the verdict had to be set aside. *Griffin*, 502 U.S. at 52-56, *citing inter alia* Yates v. United States, 354 U.S. 298 (1957); Stromberg v. California, 283 U.S. 359 (1931); Williams v. North Carolina, 317 U.S. 287 (1942); and Bachellar v. Maryland, 397 U.S. 564 (1970). On the other hand, if one of the objects in a multi-object conspiracy count was disqualified not because it was held unconstitutional or illegal but merely because it was not supported by sufficient evidence, the verdict can stand (assuming the evidence is sufficient for any one of the objects charged). *Griffin*, 502 U.S. at 56. The Court distinguished between objects disqualified by legal error (a mistake about the law) which require the verdict to be set aside, and objects disqualified by insufficiency of proof (a mistake concerning the weight or factual import of the evidence) which allow the verdict to stand. *Id*. at 56-59.

Indictments charging controlled substance conspiracies under 21 U.S.C. § 846 may include multiple drugs as objects of the agreement. When an augmented unanimity instruction is given and the jury returns a general verdict of guilty to a charge that the conspiratorial agreement covered multiple drugs, the general verdict is ambiguous if it cannot be determined whether jurors agreed as to "one or another of the multiple drugs allegedly involved in a conspiracy." United States v. Neuhausser, 241 F.3d 460, 470 (6th Cir. 2001) (discussing United States v. Dale, 178 F.3d 429 (6th Cir. 1999)). Under these conditions the defendant must be sentenced as if he conspired only as to the drug with the lower penalty. *Id*. at 432-34. Under these circumstances the judge should use a special verdict form. *See Neuhausser*, 241 F.3d at 472 n.8 ("[W]e do not wish to discourage the Government or the trial court from using separate counts, special verdict forms, or more specific instructions in future cases involving multiple-object conspiracies. Plainly, it is appropriate to take any reasonable steps which might ensure that the jury properly understands the task before it, and that its resulting verdict is susceptible of only one interpretation.") On the other hand, if the indictment and the instructions consistently refer to the multiple drugs using the conjunctive "and," the general verdict is not ambiguous and the sentence is not limited to the lesser penalty. *Id*. at 468-70.

In United States v. Schultz, *supra*, 855 F.2d at 1221, the Sixth Circuit approvingly cited United States v. Anello, 765 F.2d 253, 262-263 (1st Cir. 1985), for the proposition that a conditional agreement to purchase controlled substances, if the quality is adequate, is sufficient to support a conspiracy conviction. The Sixth Circuit then went on to hold that a failure to complete the substantive object offense as a result of disagreements among the conspirators over the details

of performance did not preclude the existence of a conspiratorial agreement.

In United States v. S & Vee Cartage Company, Inc., 704 F.2d 914, 920 (6th Cir. 1983), a corporate defendant and two of its officers were convicted of making and conspiring to make false pension and welfare fund statements, in violation of 18 U.S.C. §§ 1027 and 371. On appeal, the three defendants argued that their conspiracy convictions should be reversed on the theory that a criminal conspiracy cannot exist between a corporation and its officers acting as agents of the corporation. The Sixth Circuit rejected this argument, and held that in criminal cases a corporation may be convicted of conspiring with its officers. In doing so, the Sixth Circuit rejected agency principles that treat the acts of corporate officers as the acts of the corporation as a single legal entity. *Accord*, United States v. Ames Sintering Co., 927 F.2d 232 (6th Cir. 1990); United States v. Mahar, 801 F.2d 1477, 1488 (6th Cir. 1986).

It is settled that "proof of an agreement between a defendant and a government agent or informer will not support a conspiracy conviction." United States v. Pennell, 737 F.2d 521, 536 (6th Cir. 1984). Where important given the facts of the particular case, specific instructions on this point may be required. United States v. Nunez, 889 F.2d 1564, 1568-70 (6th Cir. 1989).

Wharton's Rule, which may require proof that more than two persons conspired together, only applies to federal crimes that by definition require voluntary concerted criminal activity by a plurality of agents. *See* Iannelli v. United States, 420 U.S. 770, 777-86 (1975). And it does not apply at all if there is legislative intent to the contrary. *Id.* *See also* United States v. Finazzo, 704 F.2d 300, 305-06 (6th Cir. 1983).

3.03 DEFENDANT'S CONNECTION TO THE CONSPIRACY

(1) If you are convinced that there was a criminal agreement, then you must decide whether the government has proved that the defendants knowingly and voluntarily joined that agreement. You must consider each defendant separately in this regard. To convict any defendant, the government must prove that he knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve its goals.

(2) This does not require proof that a defendant knew everything about the conspiracy, or everyone else involved, or that he was a member of it from the very beginning. Nor does it require proof that a defendant played a major role in the conspiracy, or that his connection to it was substantial. A slight role or connection may be enough.

(3) But proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough, even if he approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. But without more they are not enough.

(4) What the government must prove is that a defendant knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve its goals. This is essential.

(5) A defendant's knowledge can be proved indirectly by facts and circumstances which lead to a conclusion that he knew the conspiracy's main purpose. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

Use Note

Additional instructions may be appropriate in cases involving defendants who were merely purchasers of stolen goods or contraband, or who were merely suppliers of goods or other items used to commit a crime.

Committee Commentary 3.03

(current through December 1, 2009)

The Sixth Circuit has stated that paragraph (2) is the correct legal standard. United States v. Young, 553 F.3d 1035, 1050 (6th Cir. 2009). *See also* United States v. Ross, 190 F.3d 446 (6th Cir. 1999). In *Ross*, the court stated, "The government need not show that a defendant participated in all aspects of the conspiracy; it need only prove that the defendant was a party to the general conspiratorial agreement. Although the connection between the defendant and the conspiracy need only be slight, an agreement must be shown beyond a reasonable doubt." *Id.* at 450, *citing* United States v. Avery, 128 F.3d 966, 971 (6th Cir. 1997). *See also* United States v. Christian, 786 F.2d 203 (6th Cir. 1986); United States v. Stephens, 492 F.2d 1367 (6th Cir. 1974).

A panel of the Sixth Circuit has also endorsed paragraph (3) of this instruction. In United

States v. Chubb, 1993 WL 131922 (6th Cir. 1993) (unpublished), a defendant asked the trial court to instruct that "mere association" with the conspiracy was not enough to convict under 21 U.S.C. § 846, and the court failed to include this proffered instruction. A panel of the Sixth Circuit stated that the proffered instruction was a correct statement of the law and noted that it was similar to Pattern Instruction 3.03(3). *Chubb*, 1993 WL 131922 at 6 n.5. The panel concluded that failure to give the proffered instruction was not reversible error in this case based on the other instructions given and the defendant's theory of defense. *See also* United States v. Christian, 786 F.2d 203, 211 (6th Cir. 1986) ("Although mere presence alone is insufficient to support a guilty verdict, presence is a material and probative factor which the jury may consider in reaching its decision.").

In order to establish a defendant's connection to a conspiracy, the government must prove that he "knew of the conspiracy, and that he knowingly and voluntarily joined it." United States v. Christian, 786 F.2d 203, 211 (6th Cir. 1986). To convict a defendant of 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." United States v. United States Gypsum Co., 438 U.S. 422, 443 n.20 (1978). Knowledge of the existence of a conspiracy cannot be avoided by closing one's eyes "to what (is) going on about him." United States v. Smith, 561 F.2d 8, 13 (6th Cir. 1977). In such cases, a deliberate ignorance instruction may be appropriate. See Instruction 2.09.

Generally, conspiracy law in the Sixth Circuit has not changed significantly in recent years. This conclusion is reflected in the court's discussion of conspiracy law below:

> The judicial iterations in conspiracy cases of the black-letter law concerning the manner in which a conspiracy may be proved are so familiar and have been repeated so often as to have become a virtual mantra. But we hesitate to omit them here, lest some unwritten rule of judicial review be offended. Hence: " . . . Every member of a conspiracy need not be an active participant in every phase of the conspiracy, so long as he is a party to the general conspiratorial agreement. Participation in the conspiracy's common purpose and plan may be inferred from the defendant's actions and reactions to the circumstances. However, mere presence at the crime scene is insufficient to show participation. And the connection of the defendant to the conspiracy need only be slight, if there is sufficient evidence to establish that connection beyond a reasonable doubt."

United States v. Maliszewski, 161 F.3d 992, 1006 (6th Cir. 1998) (citations and internal quotations omitted) (*citing* United States v. Hernandez, 31 F.3d 354, 358 (6th Cir. 1994)).

Occasionally conspiracy instructions have required proof that the defendant "willfully" joined the conspiracy. *See, e.g.*, United States v. Davenport, 808 F.2d 1212, 1218 (6th Cir. 1987); United States v. Piccolo, 723 F.2d 1234, 1240 (6th Cir. 1983). To the extent that the term "willfully" connotes some extra mental state beyond that required for conviction of the substantive offense that is the object of the conspiracy, it is inconsistent with the Supreme Court's decision in United States v. Feola, 420 U.S. 671, 686-696 (1975) (generally speaking, the government need not prove anything more than the degree of criminal intent necessary for the substantive offense in order to convict a defendant of conspiracy). To avoid confusion, the

Committee has substituted the word "voluntarily" for "willfully."

3.04 OVERT ACTS

(1) The third element that the government must prove is that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

(2) The indictment lists overt acts. The government does not have to prove that all these acts were committed, or that any of these acts were themselves illegal.

(3) But the government must prove that at least one of these acts was committed by a member of the conspiracy, and that it was committed for the purpose of advancing or helping the conspiracy. This is essential.

[(4) One more thing about overt acts. There is a limit on how much time the government has to obtain an indictment. This is called the statute of limitations. For you to return a guilty verdict on the conspiracy charge, the government must convince you beyond a reasonable doubt that at least one overt act was committed for the purpose of advancing or helping the conspiracy after.]

Use Note

This instruction should be omitted when the statute under which the defendant is charged does not require proof of an overt act.

It is unclear whether an augmented unanimity instruction specifically requiring unanimous agreement on the same overt act is necessary. See generally Instruction 8.03A and Committee Commentary.

Bracketed paragraph (4) should be included when compliance with the statute of limitations is an issue. Appropriate modifications should be made when evidence has been presented that there were two separate and successive conspiracies, one of which does not fall within the five year statute of limitations period for conspiracy.

Committee Commentary 3.04
(current through December 1, 2009)

Paragraph (3) of this instruction was quoted with approval in United States v. Rashid, 274 F.3d 407, 415 (6th Cir. 2001).

An overt act is an essential element of the general federal conspiracy statute, 18 U.S.C. § 371. *See, e.g.*, United States v. Reifsteck, 841 F.2d 701, 704 (6th Cir. 1988). Other conspiracy statutes contain their own separate conspiracy provisions that do not require an overt act. *See, e.g.,* Salinas v. United States, 522 U.S. 52 (1997) (RICO conspiracy under 18 U.S.C. § 1962(d) does not require an overt act); United States v. Shabani, 513 U.S. 10 (1994) (controlled substances conspiracy under 21 U.S.C. § 846 does not require an overt act); United States v. Whitfield, 543 U.S. 209 (2005) (money laundering conspiracy under 18 U.S.C. § 1956(h) does not require an overt act); *see also* 18 U.S.C. §§ 1349, 1951. In such cases this instruction should

be omitted.

The government is only required to prove one overt act committed in furtherance of the conspiracy in order to convict. *See* United States v. Nowak, 448 F.2d 134, 140 (6th Cir. 1971) (approving instruction requiring that "at least one overt act as set forth in the indictment was committed"); Sandroff v. United States, 174 F.2d 1014 at 1018-19 (6th Cir. 1949) (approving instruction that "there need be but one overt act" established); Wilkes v. United States, 291 Fed. 988, 995 (6th Cir.1923) ("[I]t was not necessary to conviction to prove that more than one of the overt acts charged in the indictment had been committed.").

"[I]t [is] not necessary that any overt act charged in a conspiracy indictment constitute in and of itself a separate criminal offense." United States v. Cooper, 577 F.2d 1079, 1085 (6th Cir. 1978). *See also Sandroff, supra*, 174 F.2d at 1018 ("An overt act . . . need not necessarily be a criminal act, nor a crime that is the object of the conspiracy, but . . . [it] must be done in furtherance of the object of the agreement."); *Reifsteck, supra*, 841 F.2d at 704 ("[E]ach overt act taken to effect the illegal purpose of the conspiracy need not be illegal in itself."). Acts which, when viewed in isolation, are in themselves legal, "lose that character when they become constituent elements of an unlawful scheme." United States v. Van Hee, 531 F.2d 352, 357 (6th Cir. 1976).

An issue may arise whether the trial court must give an augmented unanimity instruction specifically telling the jurors that they must unanimously agree on the same object offense in order to convict. The general rule in the Sixth Circuit is that no augmented unanimity instruction is required unless special circumstances are present. See Committee Commentary to Instruction 8.03A--Unanimity of Theory. In United States v. Bouquett, 820 F.2d 165, 169 (6th Cir. 1987), the court rejected the defendant's argument that his conspiracy conviction should be reversed because the trial court's instructions permitted the jury to convict based on alternate theories of who in particular the defendant conspired with in the context of a single conspiracy. The Sixth Circuit held that these alternate theories did not create "two conceptual groupings requiring an augmented unanimity instruction, and stated that "this court does not require jurors to agree unanimously as to a theory of guilt where a single generic offense may be committed by a variety of acts."

Bracketed paragraph (4) should be included when compliance with the statute of limitations is an issue. The statute of limitations for prosecutions under 18 U.S.C. § 371 is five years from the date of the commission of the last overt act in furtherance of the conspiracy. Fiswick v. United States, 329 U.S. 211, 216 (1946); United States v. Zalman, 870 F.2d 1047, 1057 (6th Cir. 1989). Other circuits have held, or indicated, that overt acts not alleged in the indictment can be used to prove that a conspiracy continued into the statute of limitations period, as long as fair notice principles are satisfied. *See, e.g.*, United States v. Lewis, 759 F.2d 1316, 1344 (8th Cir. 1985); United States v. Read, 658 F.2d 1225, 1239 (7th Cir. 1981); United States v. Elliott, 571 F.2d 880, 911 (5th Cir. 1978). The instruction is based on the Seventh Circuit's decision in United States v. Nowak, 448 F.2d 134, 140 (7th Cir. 1971) (holding that instruction that "one or more of the overt acts occurred after February 6, 1964" was a sufficient instruction on the statute of limitations defense).

When evidence has been presented that there were two separate and successive conspiracies, one of which does not fall within the five year statute of limitations period for conspiracy, appropriate modifications should be made in bracketed paragraph (4). *See* United States v. Zalman, *supra*, 870 F.2d at 1057. *See also* Instructions 3.08 and 3.09.

3.05 BAD PURPOSE OR CORRUPT MOTIVE

(No Instruction Recommended)

Committee Commentary 3.05
(current through December 1, 2009)

The Committee recommends that no instruction on bad purpose or corrupt motive be given.

In United States v. Feola, 420 U.S. 671, 686-96 (1975), the Supreme Court held that generally speaking, the government need not prove anything more than the degree of criminal intent necessary for the substantive offense in order to convict a defendant of conspiracy. The Court noted in passing that requiring some additional degree of criminal intent beyond that required for the substantive offense would come close to embracing the severely criticized "corrupt motive" doctrine, which in some states requires proof of a motive to do wrong to convict a defendant of conspiracy.

Based on *Feola*, the Committee recommends that no instruction be given regarding any bad purpose or corrupt motive beyond the degree of criminal intent required for the substantive offense. *See generally* United States v. Prince, 529 F.2d 1108, 1111-12 (6th Cir. 1976).

3.06 UNINDICTED, UNNAMED OR SEPARATELY TRIED CO-CONSPIRATORS

(1) Now, some of the people who may have been involved in these events are not on trial. This does not matter. There is no requirement that all members of a conspiracy be charged and prosecuted, or tried together in one proceeding.

[(2) Nor is there any requirement that the names of the other conspirators be known. An indictment can charge a defendant with a conspiracy involving people whose names are not known, as long as the government can prove that the defendant conspired with one or more of them. Whether they are named or not does not matter.]

Use Note

This instruction should be used when some of the potential conspirators are not on trial.

Bracketed paragraph (2) should be included when some of the potential conspirators are unnamed.

Instructions 2.01(3) and 8.08(2) further caution the jurors that the possible guilt of others is not a proper matter for their consideration.

Committee Commentary 3.06
(current through December 1, 2009)

It is "immaterial" that all members of a conspiracy are not charged in an indictment. United States v. Sandy, 605 F.2d 210, 216 (6th Cir. 1979). "It is not necessary, to sustain a conviction for a conspiracy, that all co-conspirators be charged." United States v. Sachs, 801 F.2d 839, 845 (6th Cir.1986).

It is also well-settled that "a valid indictment may charge a defendant with conspiring with persons whose names are unknown." *See, e.g.*, United States v. Piccolo, 723 F.2d 1234, 1239 (6th Cir. 1983). *See also* United States v. English, 925 F.2d 154, 159 (6th Cir.1991) (absent a specific showing of surprise or prejudice, there is no requirement that an indictment or a bill of particulars identify the supervisees necessary for a continuing criminal enterprise conviction). A defendant "may be indicted and convicted despite the names of his co-conspirators remaining unknown, as long as the government presents evidence to establish an agreement between two or more persons." United States v. Rey, 923 F.2d 1217, 1222 (6th Cir.1991).

In United States v. Anderson, 76 F.3d 685 (6th Cir. 1996), the court held that “an individual’s conviction for conspiracy may stand, despite acquittal of other alleged coconspirators, when the indictment refers to unknown or unnamed conspirators and there is sufficient evidence to show the existence of a conspiracy between the convicted defendant and these other conspirators.” *Id.* at 688-89, *citing* United States v. Sandy, 605 F.2d 210 (6th Cir. 1979).

3.07 VENUE

(1) Now, some of the events that you have heard about happened in other places. There is no requirement that the entire conspiracy take place here in _____. But for you to return a guilty verdict on the conspiracy charge, the government must convince you that either the agreement, or one of the overt acts, took place here in _____.

(2) Unlike all the other elements that I have described, this is just a fact that the government only has to prove by a preponderance of the evidence. This means the government only has to convince you that it is more likely than not that part of the conspiracy took place here.

(3) Remember that all the other elements I have described must be proved beyond a reasonable doubt.

Use Note

This instruction should be used when venue is an issue.

Committee Commentary 3.07
(current through December 1, 2009)

A conspiracy prosecution may be brought in the district where the agreement was made, or in any district where an overt act in furtherance of the conspiracy was committed. *See, e.g.*, United States v. Miller, 358 F.2d 696, 697 (6th Cir. 1966); Sandroff v. United States, 174 F.2d 1014, 1018-19 (6th Cir. 1949).

In United States v. Turner, 936 F.2d 221 (6th Cir. 1991), a drug conspiracy prosecution under 21 U.S.C. § 846, the court stated:

> Conspiracy and drug importation are "continuous crimes"; that is, they are not completed until the drugs reach their final destination, and venue is proper "in any district along the way." *United States v. Lowery*, 675 F.2d 593, 594 (4th Cir. 1982); *see also United States v. Scaife*, 749 F.2d 338, 346 (6th Cir. 1984) (venue is proper in conspiracy prosecutions in any district where an overt act in furtherance of the conspiracy takes place).

Turner, 936 F.2d at 226. In United States v. Baylis, 1999 WL 993919, 1999 U.S. App. LEXIS 26646 (6th Cir. 1999) (unpublished), a panel of the court stated, "Conspiracy may be prosecuted in any district in which the agreement was formed, or an act in furtherance of the conspiracy occurred." 1999 WL 993919 at 3, 1999 LEXIS 26646 at 9, *citing Turner*, 936 F.2d at 226 and Federal Rule of Criminal Procedure 18. *See also* 18 U.S.C. § 3237(a).

Unlike true elements, venue is merely a fact that only needs to be proved by a preponderance of the evidence. United States v. Charlton, 372 F.2d 663, 665 (6th Cir. 1967). And any objection to venue may be waived if not raised in the district court. United States v. English, 925 F.2d 154, 158 (6th Cir. 1991).

3.08 MULTIPLE CONSPIRACIES--MATERIAL VARIANCE FROM THE INDICTMENT

(1) The indictment charges that the defendants were all members of one single conspiracy to commit the crime of _____.

(2) Some of the defendants have argued that there were really two separate conspiracies--one between _____ to commit the crime of _____; and another one between _____ to commit the crime of _____.

(3) To convict any one of the defendants of the conspiracy charge, the government must convince you beyond a reasonable doubt that the defendant was a member of the conspiracy charged in the indictment. If the government fails to prove this, then you must find that defendant not guilty of the conspiracy charge, even if you find that he was a member of some other conspiracy. Proof that a defendant was a member of some other conspiracy is not enough to convict.

(4) But proof that a defendant was a member of some other conspiracy would not prevent you from returning a guilty verdict, if the government also proved that he was a member of the conspiracy charged in the indictment.

Use Note

This instruction should be used when there is some evidence that multiple conspiracies may have existed, and a finding that multiple conspiracies existed would constitute a material variance from the indictment. It should be followed by Instruction 3.09, which explains the factors the jury should consider in determining whether a single or multiple conspiracies existed.

The possible existence of separate conspiracies may require the drafting of special instructions limiting the jury's consideration of statements made by co-conspirators to members of a particular conspiracy.

Committee Commentary 3.08

(current through December 1, 2009)

The Sixth Circuit has cited Instruction 3.08(3)-(4) approvingly in affirming a conviction based on a similar instruction. *See* United States v. Blackwell, 459 F.3d 739, 765 (6th Cir. 2006) (noting that instruction at issue "mirrors in substance" the pattern instructions and differs as to "only one sentence" in concluding that trial court's instruction was not misleading or erroneous).

The Sixth Circuit has stated that Instruction 3.08 "should [be] given" when "there [is] evidence of multiple conspiracies and a possible variance. . . ." United States v. Maliszewski, 161 F.3d 992, 1014 (6th Cir. 1998). *See also* United States v. Sanchez, 928 F.2d 1450, 1456 (6th Cir. 1991). *See generally* Berger v. United States, 295 U.S. 78, 81-82 (1935) (proof that two or more conspiracies may have existed is not fatal unless there is a material variance that results in substantial prejudice); Kotteakos v. United States, 328 U.S. 750, 773-74 (1946) (there must be

some leeway for conspiracy cases where the evidence differs from the exact specifications in the indictment).

When no evidence is presented warranting an instruction on multiple conspiracies, none need be given. United States v. Levinson, 405 F.2d 971, 989 (6th Cir. 1968). But "when the evidence is such that the jury could within reason find more than one conspiracy, the trial court should give the jury a multiple conspiracy instruction." United States v. Warner, 690 F.2d 545, 551 (6th Cir. 1982). *Accord,* United States v. Davenport, 808 F.2d 1212, 1217 (6th Cir. 1987).

As long as the evidence supports only a single conspiracy, it is not error to refuse a multiple conspiracy instruction. United States v. Lash, 937 F.2d 1077, 1086-87 (6th Cir. 1991), *citing* United States v. Baker, 855 F.2d 1353, 1357 (8th Cir. 1988), United States v. Toro, 840 F.2d 1221, 1236-37 (5th Cir. 1988), and United States v. Martino, 664 F.2d 860, 875 (2d Cir. 1981). *Accord*, United States v. Ghazaleh, 58 F.3d 240, 245 (6th Cir. 1995); United States v. Paulino, 935 F.2d 739, 748 (6th Cir. 1991). When the evidence supports only a single conspiracy, giving a multiple conspiracy instruction containing an erroneous statement of the law has been deemed an "error of no consequence." *Maliszewski*, 161 F.3d at 1014.

Whether single or multiple conspiracies have been proved is usually a question of fact to be resolved by the jury under proper instructions. United States v. Segines, 17 F.3d 847, 856 (6th Cir. 1994); United States v. Grunsfeld, 558 F.2d 1231, 1238 (6th Cir. 1977).

This instruction is patterned after instructions quoted by the Sixth Circuit in United States v. Hughes, 895 F.2d 1135, 1140 n.6 (6th Cir. 1990). Where one single conspiracy is charged, "proof of different and disconnected ones will not sustain a conviction." United States v. Bostic, 480 F.2d 965, 968 (6th Cir. 1973). *See also* United States v. Borelli, 336 F.2d 376, 382 (2d Cir. 1964).

This instruction should be followed by Instruction 3.09, which explains the factors the jury should consider in determining whether a single or multiple conspiracies existed.

The possible existence of separate conspiracies may require the drafting of special instructions limiting the jury's consideration of statements made by co-conspirators to members of a particular conspiracy.

3.09 MULTIPLE CONSPIRACIES--FACTORS IN DETERMINING

(1) In deciding whether there was more than one conspiracy, you should concentrate on the nature of the agreement. To prove a single conspiracy, the government must convince you that each of the members agreed to participate in what he knew was a group activity directed toward a common goal. There must be proof of an agreement on an overall objective.

(2) But 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 played. And a single conspiracy may exist even if different members joined at different times, or the membership of the group changed. These are all things that you may consider in deciding whether there was more than one conspiracy, but they are not necessarily controlling.

(3) Similarly, just because there were different sub-groups operating in different places, or many different criminal acts committed over a long period of time, does not necessarily mean that there was more than one conspiracy. Again, you may consider these things, but they are not necessarily controlling.

(4) What is controlling is whether the government has proved that there was an overall agreement on a common goal. That is the key.

Use Note

This instruction should be used with Instruction 3.08. Paragraphs (2) and (3) should be tailored to the facts of the particular case. For example, when there is no evidence that the membership of the group may have changed, that language should be deleted.

Committee Commentary 3.09
(current through December 1, 2009)

The leading Sixth Circuit case on the factors to be considered in determining whether single or multiple conspiracies existed is United States v. Warner, 690 F.2d 545 (6th Cir. 1982). *See, e.g.,* United States v. Wilson, 168 F.3d 916, 923-24 (6th Cir. 1999); United States v. Paulino, 935 F.2d 739, 748 (6th Cir. 1991); and United States v. Sanchez, 928 F.2d 1450, 1456 (6th Cir. 1991).

In *Warner*, the Sixth Circuit generally described the principles governing the resolution of whether single or multiple conspiracies existed as follows:

> In determining whether the evidence showed single or multiple conspiracies, we must bear in mind that the essence of the crime of conspiracy is agreement. In order to prove a single conspiracy, the government must show that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal.

690 F.2d at 548-49 (interior quote marks omitted).

The government need not prove an actual agreement to establish a single conspiracy. United States v. Segines, 17 F.3d 847, 856 (6th Cir. 1994), *citing* United States v. Davenport, 808 F.2d 1212, 1215-16 (6th Cir.1987); United States v. Paulino, *supra* at 748, *citing Warner,* 690 F.2d 545 (6th Cir.1982). *Accord*, United States v. Maliszewski, 161 F.3d 992, 1015 (6th Cir. 1998), *citing Segines*, 17 F.3d at 856. The conspirators need not have direct association to establish a single conspiracy. United States v. Rugerio, 20 F.3d 1387, 1391 (6th Cir. 1994), *citing Sanchez*, 928 F.2d at 1457 (6th Cir. 1991). A single conspiracy may be proved although the defendants did not know every other member of the conspiracy, *see Paulino*, 935 F.2d 739, 748 (6th Cir. 1991), and although each member did not know of or become involved in all of the activities in furtherance of the conspiracy, *see* United States v. Maliszewski, *supra* at 1014 *citing* United States v. Moss, 9 F.3d 543 at 551 (6th Cir. 1993). In other words, to establish a single conspiracy, "It is not necessary for each conspirator to participate in every phase of the criminal venture, provided there is assent to contribute to a common enterprise." United States v. Ghazaleh, 58 F.3d 240, 245 (6th Cir. 1995), *quoting* United States v. Hughes, 895 F.2d 1135, 1140 (6th Cir. 1990). A single conspiracy can be proved regardless of changes in conspiracy membership. *See Wilson* at 924, *citing Warner,* 690 F.2d 545; United States v. Rugerio, *supra*, *citing* United States v. Rios, 842 F.2d 868, 872 (6th Cir. 1988).

In United States v. Sanchez, *supra*, the court stated, "[A] single conspiracy is not transposed into a multiple one simply by lapse of time, change in membership, or a shifting emphasis on its locale of operations." 928 F.2d at 1456, *quoting* United States v. Heinemann, 801 F.2d 86, 92 (2d Cir. 1986). This articulation has been repeated with approval several times. *See Segines*, 17 F.3d at 856, *citing Sanchez*, 928 F.2d at 1456; *Maliszewski*, 161 F.3d at 1014-15, *citing Segines*, 17 F.3d at 856. More recently the court summarized the law in these words: "In short, case law makes plain that evidence of multiple players and multiple locales does not equate with evidence of multiple conspiracies." *Maliszewski*, 161 F.3d at 1015 (6th Cir. 1998).

The existence of distinct sub-groups within a conspiracy does not necessarily mean there are multiple conspiracies. *See, e.g., Wilson*, *supra* at 924, *citing Warner,* 690 F.2d at 550 n.8 and *Rugerio*, 20 F.3d at 1392.

The Sixth Circuit also relies on *Warner*, 690 F.2d 545 (6th Cir.1982), in discussing chain conspiracies in drug cases. *See, e.g.,* United States v. Paulino, *supra* at 748, *citing Warner,* 690 F.2d at 548-49.

In Kotteakos v. United States, 328 U.S. 750, 754-55 (1946), the Supreme Court held that the commission of similar crimes by the alleged conspirators and their connection to a common "hub" was not sufficient to establish a single conspiracy. Where none of the alleged conspirators benefit from the others' participation, like "separate spokes meeting in a common center," but "without the rim of the wheel to enclose the spokes," there are multiple, not single conspiracies, even if the "spokes" and the "hub" commit similar criminal acts. The government must show that there was a "single enterprise," not "several, though similar . . . separate adventures of like character." *Id*. at 768-69. *See also* United States v. Sutherland, 656 F.2d 1181, 1190 (5th Cir. 1981) (absent evidence that the spokes were dependent on or benefitted from each others' participation, or that there was some interaction between them, government's proofs were insufficient to establish a single conspiracy).

The Committee believes that the concepts of mutual dependence and "chain" vs. "hub" conspiracies are more appropriate for arguments by counsel than for instructions by the court.

3.10 PINKERTON LIABILITY FOR SUBSTANTIVE OFFENSES COMMITTED BY OTHERS

(1) Count ___ of the indictment accuses the defendants of committing the crime of _____.

(2) There are two ways that the government can prove the defendants guilty of this crime. The first is by convincing you that they personally committed or participated in this crime. The second is based on the legal rule that all members of a conspiracy are responsible for acts committed by the other members, as long as those acts are committed to help advance the conspiracy, and are within the reasonably foreseeable scope of the agreement.

(3) 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 only one of them, even though they did not all personally participate in that crime themselves.

(4) But for you to find any one of the defendants guilty of _____ based on this legal rule, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant was a member of the conspiracy charged in Count ___ of the indictment.

(B) Second, that after he joined the conspiracy, and while he was still a member of it, one or more of the other members committed the crime of _____.

(C) Third, that this crime was committed to help advance the conspiracy.

(D) And fourth, that this crime was within the reasonably foreseeable scope of the unlawful project. The crime must have been one that the defendant could have reasonably anticipated as a necessary or natural consequence of the agreement.

(5) This does not require proof that each defendant specifically agreed or knew that the crime would be committed. But the government must prove that the crime was within the reasonable contemplation of the persons who participated in the conspiracy. No defendant is responsible for the acts of others that go beyond the fair scope of the agreement as the defendant understood it.

(6) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of them, then the legal rule that the act of one conspirator is the act of all would not apply.

Use Note

This instruction is designed for use when there is some evidence that would support a conviction based on a co-conspirator liability theory.

The language in paragraph (2) should be modified to delete all references to personal

commission or participation when only one defendant is on trial and there is no evidence that he personally committed or participated in the commission of the substantive offense.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

In the rare case where no conspiracy is charged but one is proved, the instruction should be modified to include language discussing the uncharged conspiracy.

Committee Commentary 3.10
(current through December 1, 2009)

In Pinkerton v. United States, 328 U.S. 640, 645-48 (1946), the Supreme Court held that even though there was no evidence that one of two conspirators participated directly in the commission of the substantive offenses charged in the indictment, that conspirator could still be convicted of the substantive offenses based on the principle that the "act of one partner (committed in furtherance of the conspiracy) may be the act of all." *Accord,* United States v. Odom, 13 F.3d 949, 959 (6th Cir. 1994) ("Once a conspiracy is shown to exist, the Pinkerton doctrine permits the conviction of one conspirator for the substantive offense of other conspirators committed during and in furtherance of the conspiracy, even if the offense is not an object of the conspiracy.") (*citing* United States v. Christian, 942 F.2d 363, 367 (6th Cir. 1991)); United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990) ("The Pinkerton doctrine permits conviction of a conspirator for the substantive offenses of other conspirators committed during and in furtherance of the conspiracy.")

The instruction requires the prosecution to prove that the substantive offense was committed after the defendant joined the conspiracy, and while he was still a member of it. Although there is some authority for the proposition that a person who joins a conspiracy may be held responsible for acts committed before he joined it, *see, e.g.*, United States v. Cimini, 427 F.2d 129, 130 (6th Cir. 1970), that authority is questionable in light of the United States Supreme Court's decision in Levine v. United States, 383 U.S. 265, 266-67 (1966). In *Levine*, the Supreme Court accepted the Solicitor General's concession that an individual "cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy."

The Supreme Court has indicated that it would not hold co-conspirators liable for a substantive offense committed by other members of the conspiracy if the substantive offense "was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of . . . the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Pinkerton, supra*, 328 U.S. at 647-48. In United States v. Etheridge, 424 F.2d 951, 965 (6th Cir. 1970), the Sixth Circuit treated this statement from *Pinkerton* as creating three separate limitations on the rule that the act of one co-conspirator is the act of all, and Instruction 3.10 does the same. *Cf.* United States v. Frost, 914

F.2d 756, 762 (6th Cir. 1990) ("[A] court need not inquire into the individual culpability of a particular conspirator, so long as the substantive crime was a reasonably foreseeable consequence of the conspiracy.")

In *Pinkerton*, the Supreme Court stated that the act of one co-conspirator may be the act of all "without any new agreement specifically directed to that act." *Id.*, 328 U.S. at 646-47. And in *Etheridge*, the Sixth Circuit held that even though a defendant had no knowledge of a particular substantive offense, he could still be convicted of that offense if it was "within the reasonable contemplation of those who formulated and participated" in the conspiracy. *Id.*, 424 F.2d at 965.

In United States v. Borelli, 336 F.2d 376, 385-386 (2d Cir. 1964), the Second Circuit held that when the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance to the case, a special instruction should be given focusing the jury's attention on this issue. Quoting from United States v. Peoni, 100 F.2d 401, 403 (2d Cir. 1938), the Second Circuit stated that "[n]obody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it." *See also* United States v. United States Gypsum Co., 438 U.S. 422, 463 n.36 (1978) (quoting a similar requested instruction, and stating that the district court's actual instructions differed in only "minor and immaterial" respects).

When only a single defendant is on trial and there is no evidence that he personally committed or participated in the commission of the substantive offense, the language in paragraph (2) should be modified to delete all references to personal commission or participation.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

In the rare case where the indictment includes no conspiracy count but a conspiracy is proved, the instruction should be modified to include language discussing the uncharged conspiracy. In United States v. Budd, 496 F.3d 517 (6th Cir. 2007), the court held that "a district court may properly provide a *Pinkerton* instruction regarding a substantive offense, even when the defendant is not charged with the offense of conspiracy." *Id.* at 528. In *Budd*, the defendant had in fact been convicted of conspiracy in a previous trial, and the court emphasized that a conspiracy must be proved before a *Pinkerton* instruction regarding a substantive offense is proper.

In contrast, in United States v. Henning, 286 F.3d 914 (6th Cir. 2002), the district court gave Pattern Instruction 3.10, and the defendant was convicted on one § 371 conspiracy count and five counts of substantive bank crimes. *Id.* at 919. The district court granted a post-trial motion to acquit the defendant on the conspiracy charge due to insufficient evidence. The Sixth Circuit held that the district court should automatically have considered the viability of the substantive bank crime convictions because of the close relationship between the substantive and conspiracy crimes created by the *Pinkerton* instruction. *Id.* at 920. The failure to consider the substantive convictions was plain error and the convictions were reversed. *Id.* at 923. The court limited its

holding to the unique facts of the case. *Id.* at 922 n.11. In *Budd*, the court distinguished *Henning* and explained, "It was not the absence of a conspiracy *charge* that led this court to reverse in *Henning*; it was the absence of a conspiracy." *Budd, supra* at 528.

3.11A WITHDRAWAL AS A DEFENSE TO CONSPIRACY

(1) One of the defendants, _____, has raised the defense that he withdrew from the agreement before any overt act was committed. Withdrawal can be a defense to a conspiracy charge. But _____ has the burden of proving to you that he did in fact withdraw.

(2) To prove this defense, _____ must prove each and every one of the following things:

(A) First, that he completely withdrew from the agreement. A partial or temporary withdrawal is not enough.

(B) Second, that he took some affirmative step to renounce or defeat the purpose of the conspiracy. An affirmative step would include an act that is inconsistent with the purpose of the conspiracy and is communicated in a way that is reasonably likely to reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding the other members of the group, would not be enough.

(C) The third thing that _____ must prove is that he withdrew before any member of the group committed one of the overt acts described in the indictment. Once an overt act is committed, the crime of conspiracy is complete. And any withdrawal after that point is no defense to the conspiracy charge.

(3) If _____ proves these three elements, then you must find him not guilty.

(4) The fact that _____ has raised this defense does not relieve the government of its burden of proving that there was an agreement, that he knowingly and voluntarily joined it, and that an overt act was committed. Those are still things that the government must prove in order for you to find _____ guilty of the conspiracy charge.

Use Note

This instruction should be used when there is some evidence that a defendant withdrew before any overt act was committed, and withdrawal has been raised as a defense to the conspiracy charge itself.

This instruction does not appear to be appropriate when the conspiracy charged does not require proof of an overt act.

Committee Commentary 3.11A

(current through December 1, 2009)

This instruction should be used when there is some evidence that a defendant withdrew before any overt act was committed, and withdrawal has been raised as a defense to the conspiracy charge itself. Some conspiracies do not require the commission of an overt act in order for the conspiracy to be complete. *See e.g.*, 21 U.S.C. § 846. In such cases, once a defendant joins the conspiracy, the concept of withdrawal as a defense to the conspiracy charge

"would appear to be inapplicable." *See* the Committee Commentary to Federal Judicial Center Instruction 63.

The defendant must prove some affirmative action to withdraw from the conspiracy; mere cessation of activity is not sufficient. United States v. True, 250 F.3d 410, 425 (6th Cir. 2001); United States v. Lash, 937 F.2d 1077 at 1083 (6th Cir. 1991), *citing* United States v. Battista, 646 F.2d 237, 246 (6th Cir. 1981); United States v. United States Gypsum Co., 438 U.S. 422, 464-65 (1978) and Hyde v. United States, 225 U.S. 347, 369 (1912). If there is evidence that the defendant acquiesced in the conspiracy after the affirmative act to withdraw, it remains a jury question whether there was withdrawal. *Lash*, 937 F.2d at 1084, *citing Hyde*, 225 U.S. at 371. In *Lash* the court explained that the defendant's "subsequent acts neutralized his withdrawal and indicated his continued acquiescence. Continued acquiescence negates withdrawal, leaving [the defendant] liable. . . ." *Lash*, 937 F.2d at 1084, *citing Hyde*, 225 U.S. at 371-72.

Jury instructions quoted or approved in the decided cases commonly include examples of the kinds of affirmative steps considered sufficient to constitute a withdrawal. *See, e.g.*, United States v. United States Gypsum Co, 438 U.S. 422, 463-64 (1978); United States v. Battista, *supra*, 646 F.2d at 246. These examples include such things as notifying the authorities, or effectively communicating the withdrawal to the other members of the conspiracy. *See Battista, supra* at 246 (quoted instruction containing these two examples "was in accord with the law of this circuit"). But in *United States Gypsum Co.*, the Supreme Court held that jury instructions which limited the ways in which a defendant could withdraw to either informing the authorities, or notifying the other members of the conspiracy of an intention to withdraw, constituted reversible error. The Court stated that other affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach the other co- conspirators have generally been regarded as sufficient to establish withdrawal. *Id.* at 463-64.

Paragraph (2)(B) continues to provide that withdrawal includes an affirmative act that is inconsistent with the purpose of the conspiracy "and" that is communicated in a way likely to reach the other members. However, the defense is not limited to situations where communication of withdrawal to other members of the conspiracy occurs. For example, withdrawal may be established by notifying the authorities. The instruction should be tailored to fit the facts of the case.

Withdrawal is an affirmative defense which the defendant has the burden of proving. *See Lash*, 937 F.2d at 1083, *citing* United States v. Battista, *supra*. In United States v. Dents, 1992 WL 317151 at 4, 1992 U.S. App. LEXIS 28982 at 11 (6th Cir. 1992) (unpublished), the panel specifically rejected the Seventh Circuit's conclusion in United States v. Read, 658 F.2d 1225 (7th Cir. 1981), that the burden of disproving withdrawal was on the government. As to the standard of proof, in In re Winship, it was identified as a preponderance. 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring). The Sixth Circuit has also identified the standard as a preponderance of the evidence but only in an unpublished case. *See* United States v. Eck, 2001 WL 630057 at 5, 2001 U.S. App. LEXIS 11408 at 16 (6th Cir. 2001) (unpublished). A partial withdrawal is not sufficient to establish this defense. *See* United States v. Battista, *supra*, 646 F.2d at 246 (quoting instruction that the defendant must "completely" disassociate himself from the conspiracy).

The final paragraph of this instruction reminds the jury that the government retains the burden of proving the basic elements of conspiracy even though the defendant has raised withdrawal as an affirmative defense.

3.11B WITHDRAWAL AS A DEFENSE TO SUBSTANTIVE OFFENSES COMMITTED BY OTHERS

(1) One of the defendants, _____, has raised the defense that he withdrew from the conspiracy before the crime of _____ was committed. Withdrawal can be a defense to a crime committed after the withdrawal. But _____ has the burden of proving to you that he did in fact withdraw.

(2) To prove this defense, _____ must prove each and every one of the following things:

(A) First, that he completely withdrew from the conspiracy. A partial or temporary withdrawal is not sufficient.

(B) Second, that he took some affirmative step to renounce or defeat the purpose of the conspiracy. An affirmative step would include an act that is inconsistent with the purpose of the conspiracy and is communicated in a way that is reasonably likely to reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding the other members, would not be enough.

(C) The third thing that _____ must prove is that he withdrew before the crime of _____ was committed. Once that crime was committed, any withdrawal after that point would not be a defense.

(3) Withdrawal is not a defense to the conspiracy charge itself. But the fact that _____ has raised this defense does not relieve the government of proving that there was an agreement, that he knowingly and voluntarily joined it, that an overt act was committed, that the crime of _____ was committed to help advance the conspiracy and that this crime was within the reasonably foreseeable scope of the unlawful project. Those are still things that the government must prove in order for you to find _____ guilty of _____.

Use Note

This instruction should be used when the evidence shows that any withdrawal came after an overt act was committed, and withdrawal has been raised as a defense to a substantive offense committed by another member of the conspiracy.

Committee Commentary 3.11B

(current through December 1, 2009)

This instruction should be used when the evidence shows that any withdrawal came after the conspiracy was completed by the commission of an overt act, and a defendant is raising withdrawal as a defense to a substantive offense committed by a fellow co-conspirator. See Instruction 3.10 on Pinkerton liability.

As long as a defendant has not taken some affirmative action to withdraw from the conspiracy, the defendant remains liable for all co-conspirators' actions in furtherance of the conspiracy. *See* United States v. Hayter Oil Co., Inc., 51 F.3d 1265, 1271 (6th Cir. 1995), *citing*

Pinkerton v. United States, 328 U.S. 640, 646-47 (1946); United States v. Lash, 937 F.2d 1077, 1083-84 (6th Cir. 1991).

See the Committee Commentary to Instruction 3.11A for a complete discussion of the law of withdrawal.

3.11C WITHDRAWAL AS A DEFENSE TO CONSPIRACY BASED ON THE STATUTE OF LIMITATIONS

(1) One of the defendants, _____, has raised the defense that he withdrew from the conspiracy before _____, and that the statute of limitations ran out before the government obtained an indictment charging him with the conspiracy.

(2) The statute of limitations is a law that puts a limit on how much time the government has to obtain an indictment. This can be a defense, but _____ has the burden of proving to you that he did in fact withdraw, and that he did so before _____.

(3) To prove this defense, _____ must establish each and every one of the following things:

(A) First, that he completely withdrew from the conspiracy. A partial or temporary withdrawal is not sufficient.

(B) Second, that he took some affirmative step to renounce or defeat the purpose of the conspiracy. An affirmative step would include an act that is inconsistent with the purpose of the conspiracy and is communicated in a way that is reasonably likely to reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding contact with the other members, would not be enough.

(C) The third thing that _____ must prove is that he withdrew before _____.

(4) If _____ proves these three elements, then you must find him not guilty.

(5) The fact that _____ has raised this defense does not relieve the government of its burden of proving that there was an agreement, that he knowingly and voluntarily joined it, and that an overt act was committed. Those are still things that the government must prove in order for you to find _____ guilty of the conspiracy charge.

Use Note

This instruction should be used when there is some evidence that a defendant withdrew from a conspiracy before the limiting date.

Committee Commentary 3.11C
(current through December 1, 2009)

In United States v. Lash, 937 F.2d 1077, 1083 (6th Cir. 1991), the court noted that withdrawal from a conspiracy prior to the relevant statute of limitations date would be a complete defense.

The statute of limitations for prosecutions under 18 U.S.C. § 371 is five years from the

date of the last overt act committed in furtherance of the conspiracy. *See* United States v. Zalman, 870 F.2d 1047, 1057 (6th Cir. 1989). But a defendant's withdrawal from a conspiracy starts the statute of limitations running as to him. *See* Chiropractic Cooperative Association of Michigan v. American Medical Association, 867 F.2d 270, 272-75 (6th Cir. 1989) (a claimed withdrawal before the applicable statute of limitations period presents a question of fact that should not be resolved by way of summary judgment). *See also* Hyde v. United States, 225 U.S. 347, 368-70 (1912) (implicitly recognizing that the statute of limitations begins to run as soon as there has been an affirmative act of withdrawal).

See the Committee Commentary to Instruction 3.11A for a complete discussion of the law relating to withdrawal.

3.12 DURATION OF A CONSPIRACY

(1) One of the questions in this case is whether _____. This raises the related question of when a conspiracy comes to an end.

(2) A conspiracy ends when its goals have been achieved. But sometimes a conspiracy may have a continuing purpose, and may be treated as an ongoing, or continuing, conspiracy. This depends on the scope of the agreement.

(3) If the agreement includes an understanding that the conspiracy will continue over time, then the conspiracy may be a continuing one. And if it is, it lasts until there is some affirmative showing that it has ended. On the other hand, if the agreement does not include any understanding that the conspiracy will continue, then it comes to an end when its goals have been achieved. This, of course, is all for you to decide.

Use Note

This instruction should be used when an issue relating to the duration of a conspiracy has been raised.

Committee Commentary 3.12
(current through December 1, 2009)

The language of this instruction is based on United States v. Hamilton, 689 F.2d 1262, 1268 (6th Cir. 1982); United States v. Mayes, 512 F.2d 637, 642 (6th Cir. 1975); and United States v. Etheridge, 424 F.2d 951, 964 (6th Cir. 1970).

The duration of a conspiracy may be relevant to various issues that a jury may have to decide. These include: statute of limitations issues, see Instruction 3.04(4); single vs. multiple conspiracy issues, see Instructions 3.08 and 3.09; and whether co-conspirators are responsible for substantive offenses committed by other members of the conspiracy, see Instruction 3.10(4)(B). Conspiracy is a continuing crime which is not completed at the conclusion of the agreement. United States v. Edgecomb, 910 F.2d 1309, 1312 (6th Cir. 1990).

Generally, a separate agreement to conceal a conspiracy will not extend the duration of a conspiracy for purposes of the statute of limitations. United States v. Lash, 937 F.2d 1077, 1082 (6th Cir. 1991), *citing* Grunewald v. United States, 353 U.S. 391 at 401-05 (1957). However, if the acts of concealment occur as an integral part of the conspiracy before its objectives have been finally attained, such acts may extend the life of the conspiracy. *Lash*, 937 F.2d at 1082, *citing* United States v. Howard, 770 F.2d 57, 60-61 (6th Cir. 1985) (en banc).

For conspiracies under § 1 of the Sherman Act, 15 U.S.C. § 1, which do not require an overt act, the government need only show that the agreement existed within the statute of limitations. United States v. Hayter Oil Co., Inc., 51 F.3d 1265, 1270 (6th Cir. 1995), *citing* United States v. Socony-Vaccuum Oil Co., 310 U.S. 150, 223-24 n.59 (1940) and United States v. Cooperative Theatres of Ohio, Inc., 845 F.2d 1367, 1373 (6th Cir. 1988).

3.13 IMPOSSIBILITY OF SUCCESS

(1) 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.

Use Note

This instruction should be used when impossibility of success has been raised as an issue.

Committee Commentary 3.13
(current through December 1, 2009)

In United States v. Hamilton, 689 F.2d 1262, 1269 (6th Cir. 1982), the Sixth Circuit rejected the defendants' argument that statements made to a co-conspirator who had become a government agent were not made in furtherance of the conspiracy. The court held that such statements are admissible even when the conspirator to whom the statements were made was acting under the direction and surveillance of government agents. The Sixth Circuit then buttressed this holding by reference to "the principle that 'it is no defense that success was impossible because of unknown circumstances'." *But cf.* United States v. Howard, 752 F.2d 220, 229 (6th Cir. 1985) ("A conspiracy is deemed to have ended when . . . achievement of the objective has . . . been rendered impossible.").

When conspirators do not know the government has intervened, and the conspiracy is bound to fail, the conspiracy does not automatically terminate simply because the government has defeated its object. United States v. Jimenez Recio, 537 U.S. 270, 274 (2003).

3.14 STATEMENTS BY CO-CONSPIRATORS

(No Instruction Recommended)

Committee Commentary 3.14
(current through December 1, 2009)

The Committee recommends that no instruction be given.

The rule in the Sixth Circuit is that the trial judge alone is responsible for deciding whether statements by co-conspirators are admissible, and that the question of admissibility should not be submitted to the jury. See, e.g., United States v. Mitchell, 556 F.2d 371, 377 (6th Cir. 1977). Instructions that the jury may only consider a co-conspirator's statement if the jury first finds that a conspiracy existed and that the defendant was a member of it have repeatedly been held to be "altogether unnecessary." *See, e.g.,* United States v. Enright, 579 F.2d 980, 986-87 (6th Cir. 1978). *Accord,* United States v. Swidan, 888 F.2d 1076, 1081 (6th Cir. 1989). The judge should not advise the jury of the government's burden of proof on the preliminary question of admissibility, or the judge's determination that the government has met its burden. United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979). Instead, the judge should admit the statements, subject only to instructions on the government's ultimate burden of proof beyond a reasonable doubt, and on the weight and credibility to be given statements by co-conspirators. *Id.*

In United States v. Wilson, 168 F.3d 916 (6th Cir. 1999), the court elaborated on the district judge's responsibility for deciding whether co-conspirators' statements are admissible. "Before a district court may admit statements of a co-conspirator, three factors must be established: (1) that the conspiracy existed; (2) that the defendant was a member of the conspiracy; and (3) that the co-conspirator's statements were made in furtherance of the conspiracy. This three-part test is often referred to as an Enright finding." *Id.* at 920, *citing* United States v. Monus, 128 F.3d 376, 392 (6th Cir. 1997) *and* United States v. Enright, 579 F.2d 980, 986-87 (6th Cir. 1978). The party offering the statement carries the burden of proof on these factors by a preponderance. *Wilson*, 168 F.3d at 921, *citing* Bourjaily v. United States, 483 U.S. 171, 176 (1987). The district court may consider the hearsay statements themselves in deciding whether a conspiracy existed. *Wilson*, 168 F.3d at 921, *citing Bourjaily*, 483 U.S. at 181 and Fed. R. Evid. 801 (advisory committee note on 1997 amendment to Rule 801). The district judge's ruling on the statements' admissibility under Fed. R. Evid. 801(d)(2)(E) is generally reviewed for clear error, but if an evidentiary objection is not made at the time of the testimony, the ruling is reviewed for plain error. *Wilson*, 168 F.3d at 920, *citing* United States v. Gessa, 971 F.2d 1257, 1261 (6th Cir. 1992) (en banc) *and* United States v. Cowart, 90 F.3d 154, 157 (6th Cir. 1996).

Special instructions limiting the consideration of statements made by co-conspirators may be required when the evidence would support a finding that multiple conspiracies existed. See Use Note and Committee Commentary to Instruction 3.08.

Chapter 4.00

AIDING AND ABETTING

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4.01A Causing an Act
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4.01 AIDING AND ABETTING

(1) For you to find _____ guilty of _____, it is not necessary for you to find that he personally committed the crime. You may also find him guilty if he intentionally helped [or encouraged] someone else to commit the crime. A person who does this is called an aider and abettor.

(2) But for you to find _____ guilty of _____ as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime of _____ was committed.

(B) Second, that the defendant helped to commit the crime [or encouraged someone else to commit the crime].

(C) And third, that the defendant intended to help commit [or encourage] the crime.

(3) Proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You can consider this in deciding whether the government has proved that he was an aider and abettor, but without more it is not enough.

(4) What the government must prove is that the defendant did something to help [or encourage] the crime with the intent that the crime be committed.

(5) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of _____ as an aider and abettor.

Use Note

The bracketed language in paragraphs (1), (2)(B), (2)(C) and (4) should be included when there is evidence that the defendant counseled, commanded, induced or procured the commission of the crime.

Committee Commentary 4.01

(current through December 1, 2009)

In United States v. Katuramu, 2006 WL 773038, 2006 U.S. App. LEXIS 7640 (6th Cir. 2006) (unpublished), a panel approved Instruction 4.01(3) and (4).

The standard for accomplice liability is set out in 18 U.S.C. § 2:

> (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) 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.

A defendant need not be specifically charged with aiding and abetting to be convicted under 18 U.S.C. § 2, but can be charged as a principal and convicted as an aider and abettor. Standefer v. United States, 447 U.S. 10 (1980)**.** The district court may give an instruction on aiding and abetting as an alternative theory even if the indictment does not include aiding and abetting language and does not refer to the aiding and abetting statute, 18 U.S.C. § 2. United States v. McGee, 529 F.3d 691, 695-96 (6th Cir. 2008).

In United States v. Brown, 151 F.3d 476 (6th Cir. 1998), the court reversed convictions for aiding and abetting a violation of 18 U.S.C. § 1001 (making false statements to a federal agency) for two reasons. First, the court found the evidence of mens rea insufficient because the defendant lacked the "specific intent" required for aiding and abetting. *Id.* at 487. The government's theory was that the defendant aided and abetted the making of false statements in vouchers for Section 8 housing eligibility because the vouchers were given to persons other than those on the waiting list. Because there was no evidence the defendant knew the function of the waiting list for Section 8 housing, the court held the mens rea evidence did not meet the standard for aiding and abetting. In addition, the court held that the evidence of conduct was insufficient because the defendant failed to engage in the sort of active role necessary to an aiding and abetting conviction. *Id*. There was no evidence the defendant helped in the preparation or submission of the documents to HUD; overall, her participation was too limited to establish that she did any act to bring about filing false documents with HUD.

The Sixth Circuit has discussed 18 U.S.C. § 2 in the context of three offenses which raise unique issues. The first is using or carrying a firearm under 18 U.S.C. § 924(c). In Wright v. United States, 182 F.3d 458 (6th Cir.1999), the court sustained a conviction under 18 U.S.C. § 2, holding that a defendant could be convicted of using or carrying a firearm even though he never personally used or carried any weapon. The court concluded that the holding in Bailey v. United States, 516 U.S. 137 (1995), did not preclude this result. In *Bailey*, the Supreme Court held that in order to show "use" under § 924(c), the government must show that the defendant actively employed the firearm during and in relation to the predicate crime. In *Wright*, the Sixth Circuit stated that *Bailey* did not affect aiding and abetting liability under § 924(c). Wright v. United States, *supra* at 464. Relying on Rattigan v. United States, 151 F.3d 551 (6th Cir. 1998), the court held that for aiding and abetting liability under § 924(c), the government must prove more than that the defendant knew others were armed; the defendant must know others were armed and must perform some act with the intent to assist or influence the commission of the underlying predicate crime. *Wright,* 182 F.3d at 465. This standard was met in the case by the defendant's activity of cutting cocaine in the back room of another defendant's apartment. The court quoted the district court's statement that " 'this division of labor does not eliminate Mr. Wright's liability for using a firearm under the principles of aiding and abetting.'" *Id.* at 466.

The second offense raising unique questions on the application of § 2 is the Illegal Gambling Business Statute, 18 U.S.C. § 1955. In United States v. Hill, 55 F.3d 1197, 1199 (6th Cir.1995), the court held that aiding and abetting liability for § 1955 offenses required particular knowledge of the predicate offense. The court stated that § 1955 offenses required what it called

a "refined theory" of accomplice liability under § 2, *id.* at 1201, and explained that § 2 is applicable to § 1955, but only "when the aider and abettor has knowledge of the general nature and scope of the illegal gambling enterprise and takes actions that demonstrate an intent to make the illegal gambling enterprise succeed by assisting the principals in the conduct of the business." *Id.* at 1199. The point of this standard is to insure that the defendant knew he was an accomplice to an illegal gambling business which met the size, scope and duration requirements to be a federal crime under § 1955. *Id.* at 1202.

Finally, the court has resolved specific accomplice liability questions for the offense of felon-in-possession-of-a-firearm under 18 U.S.C. § 922(g)(1). In United States v. Gardner, 488 F.3d 700 (6th Cir. 2007), the court reversed the defendant's conviction for aiding and abetting a felon in possession on the basis that the evidence was insufficient. Accomplice liability requires the government to prove that the defendant intended to aid the commission of the crime. The court held that to meet this element in the context of a felon-in-possession charge, "the government must show that the defendant knew or had cause to know that the principal was a convicted felon." *Id*. at 715, *citing* United States v. Xavier, 2 F.3d 1281, 1286 (3d Cir. 1993). Because the government presented no such evidence, the court reversed the conviction.

In order to aid and abet, one must do more than merely be present at the scene of the crime and have knowledge of its commission. The Supreme Court set out the standard for the offense in Nye & Nissen v. United States, 336 U.S. 613, 619 (1949), when it quoted Judge Learned Hand's statement from United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938):

> 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 wishes to bring about, that he seek by his action to make it succeed'.

Accord, United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990); United States v. Quinn, 901 F.2d 522, 530 n.6 (6th Cir. 1990).

This requires proof of something more than mere association with a criminal venture. United States v. Morrow, 923 F.2d 427, 436 (6th Cir. 1991). The government must prove "some active participation or encouragement, or some affirmative act by (the defendant) designed to further the (crime)." *Id.*

The defendant must act or fail to act with the intent to help the commission of a crime by another. Simple knowledge that a crime is being committed, even when coupled with presence at the scene, is usually not enough to constitute aiding and abetting. United States v. Luxenberg, 374 F.2d 241, 249-50 (6th Cir. 1967). Because of its importance in determining whether the accused is an accomplice, the jury must be charged fully and accurately as to intent. The failure to instruct on intent constitutes plain error. United States v. Bryant, 461 F.2d 912 (6th Cir. 1972).

Although the defendant must be a participant rather than merely a knowing spectator before he can be convicted as an aider and abettor, it is not necessary for the governments to prove that he had an interest or stake in the transaction. United States v. Winston, 687 F.2d 832,

834 (6th Cir. 1982).

4.01A CAUSING AN ACT

(1) For you to find _____ guilty of _____, it is not necessary for you to find that he personally committed the act(s) charged in the indictment. You may also find him guilty if he willfully caused an act to be done which would be a federal crime if directly performed by him or another.

(2) But for you to find _____ guilty of _____, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant caused _____ to commit the act of _____.

(B) Second, if the defendant or another person had committed the act it would have been the crime of _____.

(C) And third, that the defendant willfully caused the act to be done.

(3) Proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You may consider this in deciding whether the government has proved that he caused the act to be done, but without more it is not enough.

(4) What the government must prove is that the defendant willfully did something to cause the act(s) to be committed.

(5) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of _____.

Committee Commentary
(current through December 1, 2009)

This instruction is based on 18 U.S.C. § 2(b). Section 2 provides:

> (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.
> (b) 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.

In United States v. Hourani, 1999 WL 16472, 1999 U.S. App. LEXIS 431 (6th Cir. 1999) (unpublished), a panel of the Sixth Circuit stated that § 2(b) was added "to clarify the implicit meaning of § 2(a)" and then quoted the Historical and Statutory Notes accompanying the statute:

> Section 2(b) is added to permit the deletion from many sections throughout the revision of such phrases as "causes or procures." The section as revised makes clear the

> legislative intent to punish as a principal not only one who directly commits an offense and one who "aids, abets, counsels, commands, induces or procures" another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States. It removes all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.

Hourani, 1999 WL at 3-4, 1999 LEXIS at 9-10.

In United States v. Maselli, 534 F.2d 1197, 1200 (6th Cir. 1976), the court stated that § 2(b) deals with a class of activities which do not involve direct violations of the law, but which contribute to the commission of the offense and are punishable in the same manner as direct violations. *Maselli* also noted that subsections 2(a) and 2(b) are not mutually exclusive. "They are . . . two statements of indirect illegal actions which carry the same consequences for the actor as direct violation of criminal statutes." *Id.* The court noted that it is proper to instruct on both subsection 2(a) and 2(b) if the evidence justifies it. *Id.*

"[I]t has long been held that an indictment need not specifically charge 'aiding and abetting' or 'causing' the commission of an offense against the United States, in order to support a jury verdict based upon a finding of either." United States v. Lester, 363 F.2d 68, 72 (6th Cir. 1966).

The difference between "inducing" in § 2(a) and "causing" in 2(b) has been described by the Sixth Circuit as "somewhat unclear." United States v. Brown, 151 F.3d 476, 486 (6th Cir. 1998). However, the Sixth Circuit recognized that § 2 has two parts. *See id.* (describing § 2 as having "two components"). The court also stated that the two subsections are alternatives, explaining that a defendant can be guilty as an accomplice "so long as the evidence shows that she aided, abetted, counseled, induced, or procured the commission of the fraud, or, alternatively, caused the false statements to be made." *Id., citing* United States v. Twitty, 107 F.3d 1482, 1491 n.10 (11th Cir. 1997).

Paragraph (1) of the instruction is based on the language of the statute and United States v. Keefer, 799 F.2d 1115, 1124 (6th Cir. 1986). *Keefer* held that under § 2(b) one can be punished as a principal even though the agent who committed the act lacks criminal intent. *See also* United States v. Norton, 700 F.2d 1072, 1077 (6th Cir. 1983) (defendants treated as principals even though they may not have physically done the criminal act).

Paragraph (2) sets forth the elements that must be proved beyond a reasonable doubt by the government. The elements are based upon the language of the statute. *See also* United States v. Murph, 707 F.2d 895, 896 (6th Cir.1983), which held that the further act done by the agent was foreseen by the defendant and thus the defendant "caused" the act to be done.

The word "willfully" in paragraph 2(C) is taken from the statute, and there is no case law in the Sixth Circuit to guide the Committee further on defining this mens rea in the context of §

2(b). The Committee recommends that the term "willfully" be defined by reference to the particular underlying act involved in the case. *Cf.* Instruction 2.05 Willfully (recommending no general instruction on the meaning of willfully and suggesting in commentary that the term be defined based on the particular offense involved).

Paragraph (3) is based upon United States v. Elkins, 732 F.2d 1280, 1287 (6th Cir. 1984) (knowledge of the criminal conduct is insufficient).

Paragraph (4) of the instruction is based on the instruction quoted with approval in *Hourani*, 1999 WL at 4, 1999 LEXIS at 10-11. The panel approved the instruction on accomplice liability under § 2(b) although the instructions did not specify either §§ 2(a) or 2(b).

4.02 ACCESSORY AFTER THE FACT

(1) _____ is not charged with actually committing the crime of _____. Instead, he is charged with helping someone else try to avoid being arrested, prosecuted or punished for that crime. A person who does this is called an accessory after the fact.

(2) For you to find _____ guilty of being an accessory after the fact, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant knew someone else had already committed the crime of _____.

(B) Second, that the defendant then helped that person try to avoid being arrested, prosecuted or punished.

(C) And third, that the defendant did so with the intent to help that person avoid being arrested, prosecuted or punished.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Committee Commentary 4.02
(current through December 1, 2009)

Title 18 U.S.C. § 3 provides:

> 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.
>
> Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than ten years.

A defendant is guilty under Section 3 where he knowingly assists an offender in order to hinder the offender's apprehension, trial or punishment. He is distinguished from an aider and abettor by not being entangled in the commission of the crime itself. For example, the driver of a getaway car in a bank robbery may be treated as a principal, while a defendant who learns about a crime afterwards and then supplies a place of refuge would be an accessory after the fact. It is important that the felony not be in progress when assistance is rendered in order for the person to be treated as an accessory after the fact, rather than as a principal.

The gist of being an accessory after the fact lies essentially in obstructing justice by

> rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime . . . . The very definition of the crime also requires that the felony not be in progress when the assistance is rendered because then he who renders assistance would aid in the commission of the offense and be guilty as a principal.

United States v. Barlow, 470 F.2d 1245, 1252-53 (D.C.Cir.1972).

The line between an aider and abettor and an accessory after the fact is sometimes difficult to draw, particularly when dealing with the escape immediately following the crime. The defendant in United States v. Martin, 749 F.2d 1514, 1518 (11th Cir. 1985), was convicted of aiding and abetting in a bank robbery under an instruction in which the jury was told that the robbery was not complete as long as the money was being "asported or transported." The Eleventh Circuit held that the instructions extended the crime too far since "the money could be transported long after the possibility of hot pursuit had ended."

Chapter 5.00

ATTEMPTS

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5.01 ATTEMPT – BASIC ELEMENTS

(1) Count ___ of the indictment accuses the defendant of attempting to commit the crime of _____ in violation of federal law. For you to find the defendant guilty of this crime, you must be convinced that the government has proved both of the following elements beyond a reasonable doubt:

(A) First, that the defendant intended to commit the crime of _____.

(B) And second, that the defendant did some overt act that was a substantial step towards committing the crime of _____.

(C) Merely preparing to commit a crime is not a substantial step. The defendant's conduct must go beyond mere preparation, and must strongly confirm that he intended to _____. But the government does not have to prove that the defendant did everything except the last act necessary to complete the crime. A substantial step beyond mere preparation is enough.

(2) If you are convinced that the government has proved both of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about either one of these elements, then you must find the defendant not guilty.

Committee Commentary 5.01
(current through December 1, 2009)

There is no general federal statute prohibiting attempts. United States v. Rovetuso, 768 F.2d 809, 821 (7th Cir. 1985). But many federal statutes defining substantive crimes include express provisions proscribing an attempt to commit the substantive offense. *See, e.g.*, 18 U.S.C. § 2113, which expressly prohibits an attempted bank robbery as well as a completed robbery. In United States v. Williams, 704 F.2d 315 (6th Cir. 1983), the Sixth Circuit generally defined the two requisite elements of an attempt as: "(1) an intent to engage in criminal conduct and (2) the performance of one or more overt acts which constitute a substantial step towards the commission of the substantive offense." *Id.* at 321. *Accord* United States v. Pennyman, 889 F.2d 104, 106 (6th Cir.1989) ("The government must establish two essential elements: (1) the intent to engage in the proscribed criminal activity, and (2) the commission of an overt act which constitutes a substantial step towards commission of the proscribed criminal activity").

The main case cited by the Sixth Circuit in *Williams* in support of this general definition was the Second Circuit's decision in United States v. Manley, 632 F.2d 978 (2d Cir. 1980). In *Manley*, the Second Circuit said that the "substantial step" required to convict must be "something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime." *Id.* at 987. The Second Circuit said that the defendant's behavior must be of such a nature that "a reasonable observer viewing it in the context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute." *Id.* at 988.

The second case cited by the Sixth Circuit in *Williams* in support of this general

definition was the Fifth Circuit's decision in United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974). In *Mandujano*, the Fifth Circuit approvingly quoted instructions stating that the "substantial step" required to convict must be "conduct strongly corroborative of the firmness of the defendant's criminal intent." *Id.* at 376. This language is consistent with the criminal attempt provisions of the Model Penal Code, from which the "substantial step" test was taken. *See* Model Penal Code § 5.01(2) ("[c]onduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose").

The Sixth Circuit continues to rely on United States v. Pennyman, 889 F.2d 104, 106 (6th Cir. 1989). *See, e.g.,* United States v. Price, 134 F.3d 340, 350 (6th Cir. 1998); United States v. Shelton, 30 F.3d 702, 705 (6th Cir. 1994). In addition to relying on *Pennyman*, the court also continues to rely on United States v. Williams, 704 F.2d 315 (6th Cir. 1983) and United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974). *See* United States v. Bilderbeck, 163 F.3d 971, 975 (6th Cir. 1999).

The court has articulated some refinements to attempt law. In a case relying on the *Pennyman* standard generally, the court also characterized evidence as sufficient to establish attempt if it shows that the "defendant's conduct goes beyond 'preliminary activities,' and 'a fragment of the crime [was] essentially ... in progress.'" United States v. Price, *supra* at 351, *quoting* United States v. Dolt, 27 F.3d 235, 239 (6th Cir. 1994) and United States v. Hadley, 918 F.2d 848, 853 (9th Cir. 1990). The court has noted that attempt "is to be construed in a 'broad and all inclusive manner.'" United States v. Bilderbeck, *supra* at 975, *quoting* United States v. Reeves, 794 F. 2d 1101, 1103 (6th Cir. 1986). The proof of the substantial step need not be sufficient to prove the criminal intent, but only to corroborate it; the act and intent are ultimately separate inquiries. *Bilderbeck,* 163 F.3d at 975. The standard for evaluating the substantial step element is objective: whether any reasonable person could find that the acts committed would corroborate the firmness of a defendant's criminal intent, assuming the defendant did, in fact, intend to commit the crime. *Id.* When a defendant engages in active negotiations to purchase drugs, he fulfills the substantial step requirement. *Id.* at 976, *citing Pennyman, supra; Williams, supra;* and United States v. Dworken, 855 F.2d 12, 19 (1st Cir. 1988). No defense of withdrawal, abandonment or renunciation exists after the crime of attempt is complete with proof of intent and acts constituting a substantial step toward the substantive offense. United States v. Shelton, *supra* at 706.

A frequent question is whether the defendant has met the substantial step element in attempted drug crimes. The court often finds this element satisfied. *See, e.g., Price*, 134 F.3d 340 (evidence of conduct sufficient based on defendant's action of assisting in driving, standing surveillance, participating in the examination of the cocaine, and carrying the bag of money).

5.02 SHAM CONTROLLED SUBSTANCE CASES

(1) The fact that the substance involved in this case was not real _____ is no defense to the attempt charge. But the government must convince you that the defendant actually thought he was buying [selling] real _____.

(2) The government must show that the defendant's actions uniquely marked his conduct as criminal. In other words, the defendant's conduct, taken as a whole, must clearly confirm beyond a reasonable doubt that he actually thought he was buying [selling] real _____.

Use Note

This instruction should be used when the defendant is charged with an attempted controlled substance offense based on a sale or purchase of sham drugs. This instruction should be given in addition to an instruction outlining the elements of attempt.

If the defendant is charged with buying or selling sham drugs knowing they were sham, the defendant lacks the mens rea for an attempted controlled substances crime and this instruction should not be given.

Committee Commentary 5.02

(current through December 1, 2009)

In United States v. Pennell, 737 F.2d 521, 524-25 (6th Cir. 1984), the Sixth Circuit held that the defendant could be convicted of an attempt to possess a controlled substance even though the substance he purchased from government agents was not real cocaine. The Sixth Circuit agreed with the Third Circuit's analysis in United States v. Everett, 700 F.2d 900, 907-08 (3d Cir. 1983), that "Congress intended to eliminate the impossibility defense in cases prosecuted under 21 U.S.C. §§ 841(a)(1) and 846." *Pennell, supra* at 525. *Accord,* United States v. Reeves, 794 F.2d 1101, 1104 (6th Cir. 1986) ("There can be no question that the Congressional intent in fashioning the attempt provision as part of an all-out effort to reach all acts and activities related to the drug traffic was all inclusive and calculated to eliminate technical obstacles confronting law enforcement officials.").

To convict a defendant in a sham delivery case, the government "must, of course, prove the defendant's subjective intent to purchase (or sell) actual narcotics beyond a reasonable doubt." United States v. Pennell, *supra*, 737 F.2d at 525. And in order to avoid unjust attempt convictions in these types of cases, the Sixth Circuit has held that the following evidentiary standard must be met:

> In order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, [must] mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law.

Id. *Accord*, United States v. Reeves, *supra*, 794 F.2d at 1104 ("This standard of proof has been

adopted in this circuit.").

What this means is that "the defendant's objective conduct, taken as a whole, must unequivocally corroborate the required subjective intent to purchase or sell actual narcotics." United States v. Pennell, *supra,* 737 F.2d at 525. *Accord* United States v. Pennyman, *supra*, 889 F.2d at 106.

The court continues to rely on *Pennell*. *See, e.g.,* United States v. Allen, 1993 WL 445082 at 4, 1993 U.S. App. LEXIS 28778 at 5 (6th Cir. 1993) (unpublished) (quoting the *Pennell* standard).

In sham drugs cases, this instruction alone is not sufficient but is to be given with the instruction setting out the elements of attempt.

An attempted controlled substances offense is only implicated if the defendant believed that the substance involved was a real controlled substance. Thus, if the defendant knew that the substance involved was not a controlled substance but was sham drugs, this instruction is not appropriate. In this situation, *i.e,* the drug is sham and the defendant knows it, the appropriate instruction should be based on 21 U.S.C. §§ 802(32) and 813 (the Controlled Substance Analogue Enforcement Act of 1986).

5.03 ABANDONMENT OR RENUNCIATION

(No Instruction Recommended)

Committee Commentary 5.03
(current through December 1, 2009)

The Committee recommends that no instruction be given.

A panel of the Sixth Circuit has endorsed the approach of Instruction 5.03. In United States v. Tanks, 1992 WL 317179, 1992 U.S. App. LEXIS 28889 (6th Cir. 1992) (unpublished), the district court refused to give an instruction on abandonment. On appeal, the panel stated that a defendant is entitled to instructions only on recognized defenses, and since the abandonment defense was not recognized in the Sixth Circuit, he was not entitled to an instruction. The panel quoted as follows the commentary on Instruction 5.03 from an earlier edition in support of its conclusion that the defense was not recognized:

> No federal cases have explicitly recognized voluntary abandonment or renunciation as a valid defense to an attempt charge. The closest the federal courts have come are two cases which assumed, without deciding, that even if abandonment or renunciation is a defense, the facts of the particular cases did not support a finding that a voluntary abandonment or renunciation had occurred. See United States v. Bailey, 834 F.2d 218, 226-227 (1st Cir. 1987); and United States v. McDowell, 705 F.2d 426, 428 (11th Cir.1983). See generally Model Penal Code § 5.01(4).

Tanks, supra 1992 U.S.App.LEXIS at 16. The panel then stated that the defendant presented insufficient evidence to raise the defense at any rate. *Id.* at 17.

In United States v. Shelton, 30 F.3d 702, 706 (6th Cir. 1994), the Sixth Circuit made clear that it does not recognize the defense of abandonment or renunciation, holding that "withdrawal, abandonment and renunciation, however characterized, do not provide a defense to an attempt crime." The court stated that the crime of attempt is "complete with proof of intent together with acts constituting a substantial step toward commission of the substantive offense," but noted that if a defendant withdraws prior to forming the required intent or taking the substantial step, then the question arises if he has committed the offense since the elements of the crime cannot be proved. *Id*.

Chapter 6.00

DEFENSES

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6.01 DEFENSE THEORY

(1) That concludes the part of my instructions explaining the elements of the crime. Next I will explain the defendant's position.

(2) The defense says

_____

_____

_____.

Committee Commentary 6.01
(current through December 1, 2009)

The Sixth Circuit has not reviewed this instruction directly.

When a defense theory finds some support in the evidence and the law, the defendant is entitled to some mention of that theory in the district court's instructions. United States v. Duncan, 850 F.2d 1104, 1117 (6th Cir. 1988). The test for determining whether some mention of the defense theory must be included is not whether the evidence presented in support of the theory appears reasonable. *Duncan, supra* at 1117. "It is not for the judge, but rather for the jury, to appraise the reasonableness or the unreasonableness of the evidence relating to the [defense] theory." *Id.* (interior quotations omitted). Instead, the test is whether "there is any foundation in the evidence sufficient to bring the issue into the case, even if that evidence is weak, insufficient, inconsistent, or of doubtful credibility." *Id.* (interior quotations omitted).

In United States v. O'Neal, 1999 WL 777307, 1999 U.S. App. LEXIS 23517 (6th Cir. 1999) (unpublished), the panel explained the law as follows: "Although a jury instruction 'should not be given if it lacks evidentiary support or is based upon mere suspicion or speculation,' if there is even weak supporting evidence, '[a] trial court commits reversible error in a criminal case when it fails to give an adequate presentation of a theory of defense.'" 1999 WL at 1, 1999 LEXIS at 3, *quoting* United States v. James, 819 F.2d 674, 675 (6th Cir. 1987) and United States v. Plummer, 789 F.2d 435, 438 (6th Cir. 1986). In *O'Neal*, the panel concluded that the trial court properly refused a defense instruction because it was not supported by the evidence.

Where the proposed instruction does not state a distinct legal theory, the Sixth Circuit has held that an instruction need not be given and the issue should be left to argument. The court explained, "Although a district court is required to instruct the jury on the theory of defense, it is not error to refuse to give 'instructions which merely represent a defendant's view of the facts of the case,' rather than a distinct legal theory." United States v. Chowdhury, 169 F.3d 402, 407 (6th Cir. 1999) (*quoting* United States v. Frost, 125 F.3d 346, 372 (6th Cir. 1997)). *See also* United States v. Mack, 159 F.3d 208, 218 (6th Cir. 1998) (finding no error when trial court refused defense theory instruction because proposed instruction was not statement of law but

rather denial of charges and it contained statements the defendant would have made if he had testified).

As to the content of the defense theory instruction, the district court does not have to accept the exact language of a proffered instruction on the defense theory. United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir.1984); United States v. Blane, 375 F.2d 249, 252 (6th Cir. 1967). It is sufficient if the court's instructions, as a whole, adequately cover the defense theory. *Id.* As stated by the Sixth Circuit in *McGuire*:

> A criminal defendant has no right to select the particular wording of a proposed jury instruction. As long as the instruction actually given is a correct statement of the law, fairly presents the issues to the jury, and is substantially similar to the defendant's proposed instruction, the district court has great latitude in phrasing it.

McGuire, supra.

The defense theory must, however, be stated "clearly and completely." Smith v. United States, 230 F.2d 935, 939 (6th Cir. 1956).

6.02 ALIBI

(1) One of the questions in this case is whether the defendant was present _____ _____.

(2) The government has the burden of proving that the defendant was present at that time and place. Unless the government proves this beyond a reasonable doubt, you must find the defendant not guilty.

Committee Commentary 6.02
(current through December 1, 2009)

Panels of the Sixth Circuit have endorsed Pattern Instruction 6.02 twice. In United States v. Lennox, 1994 WL 242411, 1994 U.S. App. LEXIS 13489 (6th Cir. 1994) (unpublished), the trial court gave Pattern Instruction 6.02, and the question was whether it was error to refuse defendant's proposed additional statement that there is no negative implication to the word "alibi" and that an alibi is a proper and legitimate claim in a defense of an indictment. The panel held it was not error to refuse this statement because the Pattern Instruction made it "abundantly clear" that the government continuously bore the burden of proof beyond a reasonable doubt. *Lennox*, 1994 WL at 5, 1994 LEXIS at 15. The panel stated, "Because this district court's actual jury instructions, taken as a whole, adequately informed the jury of the relevant considerations, and provided a sound basis in the law to aid the jury in reaching its decision, the district court did not err . . . ." *Id.*

In Moore v. United States, 1998 WL 537589, 1998 U.S. App. LEXIS 18795 (6th Cir. 1998) (unpublished), a panel affirmed the district court's conclusion that the pattern instruction adequately described the alibi defense. The panel stated, "The district court properly rejected [the defendant's inadequacy] claim because the trial court gave the pattern instruction for an alibi defense that is recommended in our circuit." *Moore*, 1998 WL at 3, 1998 LEXIS at 9, *citing* Pattern Instruction 6.02.

In United States v. McCall, 85 F.3d 1193 (6th Cir. 1996), the court did not review the pattern instruction as such but did cite it for authority in describing the "primary function" of an alibi instruction as being "to remind the jury as to the government's burden of demonstrating all elements of the crime beyond a reasonable doubt, including defendant's presence at the crime scene...." *Id.* at 1196, *citing* Pattern Instruction 6.02. The issue in *McCall* was whether failure to give an alibi instruction was plain error. The court noted that Sixth Circuit authority established that such a failure might be plain error. *Id.*, *citing* United States v. Hamilton, 684 F.2d 380, 385 (6th Cir. 1982). However, the court went on to hold that failure to give an alibi instruction is not plain error when two conditions are met. The court stated, "[W]e hold that omission of the [alibi] instruction is not plain error, as long as the jury is otherwise correctly instructed concerning the government's burden of proving every element of the crime charged, and the defendant is given a full opportunity to present his alibi defense in closing argument." *McCall,* 85 F.3d at 1196.

If requested, an alibi instruction is required when the nature of the offense charged requires the defendant's presence at a particular place or time, and the alibi tends to show his presence elsewhere at all such times. United States v. Dye, 508 F.2d 1226, 1231 (6th Cir. 1974).

The instruction must tell the jurors that the government has the burden of proof and must meet the reasonable doubt standard concerning the defendant's presence at the relevant time and place. "The defense can easily backfire, resulting in a conviction because the jury didn't believe the alibi rather than because the government has satisfied the jury of the defendant's guilt beyond a reasonable doubt, and it is the trial judge's responsibility to avoid this possibility." United States v. Robinson, 602 F.2d 760, 762 (6th Cir. 1979).

The use of "on or about" instructions may pose special problems in alibi cases. *See* Committee Commentary 2.04 and, in particular, United States v. Neuroth, 809 F.2d 339, 341-42 (6th Cir. 1987).

6.03 ENTRAPMENT

(1) One of the questions in this case is whether the defendant was entrapped.

(2) Entrapment has two related elements. One is that the defendant was not already willing to commit the crime. The other is that the government, or someone acting for the government, induced or persuaded the defendant to commit it.

(3) If the defendant was not already willing to commit the crime prior to first being approached by government agents or other persons acting for the government, and the government persuaded him to commit it, that would be entrapment. But if the defendant was already willing to commit the crime prior to first being approached by government agents or other persons acting for the government, it would not be entrapment, even if the government provided him with a favorable opportunity to commit the crime, or made the crime easier, or participated in the crime in some way.

(4) It is sometimes necessary during an investigation for a government agent to pretend to be a criminal, and to offer to take part in a crime. This may be done directly, or the agent may have to work through an informant or a decoy. This is permissible, and without more is not entrapment. The crucial question in entrapment cases is whether the government persuaded a defendant who was not already willing to commit a crime to go ahead and commit it.

(5) The government has the burden of proving beyond a reasonable doubt that the defendant was already willing to commit the crime prior to first being approached by government agents or other persons acting for the government. Let me suggest some things that you may consider in deciding whether the government has proved this:

(A) Ask yourself what the evidence shows about the defendant's character and reputation.

(B) Ask yourself if the idea for committing the crime originated with or came from the government.

(C) Ask yourself if the defendant took part in the crime for profit.

(D) Ask yourself if the defendant took part in any similar criminal activity with anyone else before or afterwards.

(E) Ask yourself if the defendant showed any reluctance to commit the crime and, if he did, whether he was overcome by government persuasion.

(F) And ask yourself what kind of persuasion and how much persuasion the government used.

(6) Consider all the evidence, and decide if the government has proved that the defendant was already willing to commit the crime. Unless the government proves this beyond a reasonable doubt, you must find the defendant not guilty.

Committee Commentary 6.03
(current through December 1, 2009)

A valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. Mathews v. United States, 485 U.S. 58, 62-63 (1988). *See also* United States v. Nelson, 922 F.2d 311, 317 (6th Cir. 1990).

In defining predisposition, the Sixth Circuit relies on the five factors identified in United States v. Nelson, 922 F.2d 311, 317 (6th Cir. 1990). *See, e.g.,* United States v. Harris, 1995 WL 6220, 2-3, 1995 U.S. App. LEXIS 254, 6 (6th Cir. 1995) (unpublished) (*quoting* United States v. McLernon, 746 F.2d 1098, 1112 (6th Cir. 1984)). Those five factors are: (1) the character or reputation of the defendant; (2) whether the suggestion of the criminal activity was originally made by the government; (3) whether the defendant was engaged in criminal activity for profit; (4) whether the defendant evidenced reluctance to commit the offense but was overcome by government persuasion; and (5) the nature of the inducement or persuasion offered by the government. *Nelson, supra* at 317. These five factors appear in plain English terms in parts (A), (B), (C), (E), and (F) of paragraph 5.

The pattern instruction adds a sixth factor, paragraph (D) ("Ask yourself if the defendant took part in any similar criminal activity with anyone else before or afterwards."). This addition has been specifically approved by a panel of the Sixth Circuit. United States v. Stokes, 1993 WL 312009, 3, 1993 U.S. App. LEXIS 21414, 9 (6th Cir. 1993) (unpublished). In *Stokes*, the panel explained that paragraph (D) concerns the evidence that may be considered when answering whether predisposition existed, and that "a jury may look at evidence of the defendant's character both before and after his arrest. Ex post facto evidence is relevant because it may shed light on whether defendant is the type of person who could commit the crime in question." *Id.*

In Jacobson v. United States, 503 U.S. 540 (1992), the Court refined the predisposition element, holding that to be convicted, a defendant must be predisposed to commit the criminal act prior to first being approached by government agents. *Jacobson*, 503 U.S. at 549. The words in paragraphs (3) and (5), "prior to first being approached by government agents or other persons acting for the government," are drawn from the *Jacobson* decision and from the modified instruction approved in United States v. Smith, 1994 WL 162584, 4, 1994 U.S. App. LEXIS 9914, 11 (6th Cir. 1994) (unpublished).

In paragraphs (2), (3) and (5), the instruction refers to the question of whether the defendant was "already willing" to commit the crime before being approached by government agents. In *Jacobson*, the Court used the term "predisposed" as opposed to "already willing." 503 U.S. at 549. The Committee decided to use the term "already willing" rather than "predisposed" because the Sixth Circuit has approved the use of "already willing," *see* United States v. Sherrod, 33 F.3d 723, 726 (6th Cir. 1994), and because it is consistent with a plain English approach.

In Mathews v. United States, 485 U.S. 58 (1988), the Supreme Court held that even if a defendant denies one or more elements of the crime for which he is charged, he is entitled to an

entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find that the government entrapped him.

As long as the defendant shows a predisposition to commit an offense, governmental participation in the commission of an offense by itself cannot be the basis of an entrapment defense. United States v. Tucker, 28 F.3d 1420 (6th Cir. 1994); United States v. Leja, 563 F.2d 244 (6th Cir. 1977).

No instruction on entrapment need be given unless there is some evidence of both government inducement and lack of predisposition. United States v. *Nelson*, supra, 922 F.2d at 317. It is the duty of the trial judge to determine whether there is sufficient evidence of entrapment to allow the issue to go before the jury. If there is, then the burden shifts to the government to prove predisposition. United States v. Meyer, 803 F.2d 246, 249 (6th Cir. 1986). The government must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. *See, e.g.*, United States v. Jones, 575 F.2d 81, 83-84 (6th Cir. 1978).

The entrapment defense should not be confused with the defense of entrapment by estoppel. *See* United States v. Blood, 435 F.3d 612 (6th Cir. 2006) (noting distinction between the theories of the two defenses of entrapment and entrapment by estoppel). Entrapment by estoppel is covered in Instruction 6.09.

6.04 INSANITY

(1) One of the questions in this case is whether the defendant was legally insane when the crime was committed. Here, unlike the other matters I have discussed with you, the defendant has the burden of proving this defense, and he must prove it by clear and convincing evidence. This does not require proof beyond a reasonable doubt; what the defendant must prove is that it is highly probable that he was insane.

(2) A mental disease or defect by itself is not a defense. For you to return a verdict of not guilty because of insanity, the defendant must prove both of the following by clear and convincing evidence:

(A) First, that he had a severe mental disease or defect when he committed the crime; and

(B) Second, that as a result of this mental disease or defect, he was not able to understand what he was doing, or that it was wrong.

(3) Insanity may be temporary or permanent. You may consider evidence of the defendant's mental condition before, during and after the crime in deciding whether he was legally insane when the crime was committed.

(4) In making your decision, you are not bound by what any of the witnesses testified. You should consider all the evidence, not just the opinions of the experts.

(5) So, you have three possible verdicts--guilty; not guilty; or not guilty only by reason of insanity. Keep in mind that even though the defendant has raised this defense, the government still has the burden of proving all the elements of the crime charged beyond a reasonable doubt.

Committee Commentary 6.04
(current through December 1, 2009)

The Sixth Circuit has not discussed this instruction specifically.

The Insanity Defense Reform Act of 1984, 18 U.S.C. § 17, (IDRA) states:

(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.

As the statute indicates, insanity is an affirmative defense and imposes on the defendant the burden of proving the defense by clear and convincing evidence. 18 U.S.C. § 17(b). The

statute also clarifies that the defendant's inability to appreciate the nature and quality or the wrongfulness of his acts must have been the result of a "severe" mental disease or defect. 18 U.S.C. § 17(a). This was intended to ensure that nonpsychotic behavior disorders such as "immature personality" or a pattern of "antisocial tendencies" cannot be used to raise the defense, and that the voluntary use of alcohol or drugs, even if they render the defendant unable to appreciate the nature and quality of his acts, do not constitute insanity. *See* S.R.Rep. No. 225, 98th Cong., 1st Sess. reprinted in 1984 U.S.Code Cong. & Adm.News 3182, 3407-3412.

Another statute, 18 U.S.C. § 4242, provides for a jury verdict of "not guilty only by reason of insanity."

The defendant has the burden of proving the insanity defense by a standard of "clear and convincing" evidence. 18 U.S.C. § 17(b). The Sixth Circuit has not defined this standard in a criminal case. In a civil case, United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981), the Sixth Circuit discussed the clear and convincing standard of proof by using the terms "highly probable" to describe it. The definition of clear and convincing evidence as "highly probable" is in paragraph (1) of the instruction. In addition, language in paragraph (1) indicates that clear and convincing evidence is a lower standard of proof than beyond a reasonable doubt. The rationale is that this relationship between the two standards of proof might not be clear to jurors just from the names of the standards.

In Shannon v. United States, 512 U.S. 573 (1994), the Court concluded that the IDRA generally does not require that juries be instructed on the consequences of a verdict of not guilty by reason of insanity (NGI). The Court's concern was that the result of giving such an instruction would be "to draw the jury's attention toward the very thing – the possible consequences of its verdict – it should ignore." *Shannon*, 512 U.S. at 586. The Court ruled that an instruction on the consequences of an NGI verdict should not be given as a matter of general practice but may be given when necessary under certain limited circumstances. *Id*. at 587. The Court described those 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 . . . will vary . . . . 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.

Id. at 587-88.

In United States v. Kimes, 246 F.3d 800 (6th Cir. 2001), the court stated:

> It is important . . . to distinguish between two different types of mental defect defense. The first, sometimes called the "diminished responsibility" defense, applies where the defendant's mental condition "completely absolves him of criminal responsibility regardless of whether or not guilt can be proven." (*citing* United States v. Fazzini, 871 F.2d 635, 641 (7th Cir. 1989)). The second, often referred to as the "diminished

> capacity" defense, applies "where the defendant claims only that his mental condition is such that he or she cannot attain the culpable state of mind required by the definition of the crime." (*citing Fazzini*, 871 F.2d at 641).

Kimes, 246 F.3d at 805-06.

In United States v. Gonyea, 140 F.3d 649 (6th Cir. 1998), the court described the difference between the insanity defense and diminished capacity. "The insanity defense . . . 'is not concerned with the mens rea element of the crime; rather, it operates to completely excuse the defendant whether or not guilt can be proven.'" *Id.* at 651, *quoting* United States v. Twine, 853 F.2d 676, 678 (9th Cir. 1988). Therefore,

> [I]nsanity is a defense to all crimes, regardless of whether they require general or specific intent. By contrast, the diminished capacity defense . . . is not an excuse. Rather, it "is directly concerned with whether the defendant possessed the ability to attain the culpable state of mind which defines the crime." (citation omitted). [Thus] diminished capacity is a defense only to specific intent crimes . . . ."

Gonyea, 140 F.3d at 651, *quoting* United States v. Twine, *supra*.

The *Gonyea* court concluded that defendant's right to pursue a diminished capacity approach survived enactment of the IDRA, *Gonyea, supra* at 650 n.3, *citing* United States v. Newman, 889 F.2d 88, 91 (6th Cir. 1989), but the diminished capacity approach can be used only for specific intent crimes. *Gonyea*, 140 F.2d at 651.

One concern raised when the defendant can use a diminished capacity approach is explained well by the First Circuit in the Committee Commentary to Instruction 5.07, Insanity. The Committee states:

> If evidence tends to show that a defendant failed to understand the "nature and quality" of his/her conduct, that evidence will not only tend to help prove an insanity defense but it will also typically tend to raise reasonable doubt about the requisite culpable state of mind.

The Committee noted that the "overlap problem" could be solved by adequate instructions given by the trial judge. This conclusion was based upon the Supreme Court's opinion in Martin v. Ohio, 480 U.S. 228, 234 (1987), which provides that the trial judge must adequately convey to the jury that evidence supporting an affirmative defense may also be considered, where relevant, to raise reasonable doubt as to the requisite state of mind. The Sixth Circuit has not discussed this aspect of *Martin* in any greater detail, but a panel of the court has indicated some concern with the diminished capacity defense. *See* United States v. Willis, 1999 WL 591440, 6, 1999 U.S. App. LEXIS 18298, 17-18 (6th Cir. 1999) (unpublished) ("[Diminished capacity defense] is a potentially misleading use of the term 'defense.' We think it is important to distinguish between the use of psychological testimony to negate an element of the crime and the use of such testimony as an affirmative defense to the crime.").

In United States v. Medved, 905 F.2d 935, 940-41 (6th Cir. 1990), the Sixth Circuit upheld instructions telling the jury to consider all the evidence, not just the expert testimony, in determining if the defense had been established.

6.05 COERCION/DURESS

(1) One of the questions in this case is whether the defendant was coerced, or forced, to commit the crime. Here, unlike the other matters I have discussed with you, the defendant has the burden of proof.

(2) Coercion can excuse a crime, but only if the following five factors are met:

(A) First, that the defendant reasonably believed there was a present, imminent, and impending threat of death or serious bodily injury [to himself] [to another];

(B) Second, that the defendant had not recklessly or negligently placed himself [another] in a situation in which it was probable that he would be forced to choose the criminal conduct;

(C) Third, that the defendant had no reasonable, legal alternative to violating the law;

(D) Fourth, that the defendant reasonably believed his criminal conduct would avoid the threatened harm; and

(E) Fifth, that the defendant did not maintain the illegal conduct any longer than absolutely necessary.

(3) If the defendant proves by a preponderance of the evidence the five elements listed above, then you must find the defendant not guilty.

(4) Preponderance of the evidence is defined as "more likely than not." In other words, the defendant must convince you that the five factors are more likely true than not true.

Use Note

In paragraph (2)(A), use the bracketed option that fits the facts.

Committee Commentary 6.05
(current through December 1, 2009)

The court identified the elements of this defense in United States v. Riffe, 28 F.3d 565, 569 (6th Cir. 1994) as follows:

> (1) that defendant was under an unlawful and present, imminent and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
> (2) that the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;
> (3) that the defendant had no reasonable, legal alternative to violating the law, a chance

both to refuse to do the criminal act and also to avoid the threatened harm;
(4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm;
(5) that defendant did not maintain the illegal conduct any longer than absolutely necessary.

United States v. Riffe, *supra* at 569, *quoting* United States v. Newcomb, 6 F.3d 1129, 1134-35 (6th Cir. 1993) and *citing* United States v. Singleton, 902 F.2d 471, 472-73 (6th Cir. 1990). These elements are stated in the text of the instruction with some plain English drafting.

The court continues to hold that the duress defense requires a threat of physical harm. *See* United States v. Huff, 1998 WL 385555, 5, 1998 U.S. App. LEXIS 14988, 10 (6th Cir. 1998) (unpublished) (affirming refusal to give duress instruction because no evidence of a threat of physical harm).

As the bracketed language in paragraph (2)(A) indicates, the threat of death or serious bodily harm may be a threat against another. In United States v. Garner, 529 F.2d 962, 969-70 (6th Cir. 1976), a coercion instruction was required when a defendant alleged that she committed the illegal acts because of anonymous threats against her daughter.

In order to raise the defense and warrant an instruction, the defendant need only present some evidence, even weak evidence, of all five elements of the defense. United States v. Riffe, *supra* at 570, *citing Newcomb*, 6 F.3d at 1132. *See also* United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976).

As to the standard of proof, once an instruction is warranted, paragraph (3) places the burden on the defendant based on Dixon v. United States, 126 S. Ct. 2437, 2447-48 (2006). In *Dixon*, the Court held that in a prosecution of firearms offenses under 18 U.S.C. §§ 922(n) and 922(a)(6), the defendant has the burden of proving the defense of duress by a preponderance of the evidence. The Court indicated that the burden of proof for duress would be on the defendant for most offenses. The Court explained, "In the context of the firearms offenses at issue – as will usually be the case, given the long-established common-law rule – we presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence." *Dixon, supra*. The definition of the preponderance standard in paragraph (4) is based on United States v. Ward, 68 F.3d 146, 148-49 (6th Cir. 1995); and United States v. Walton, 908 F.2d 1289, 1301-02 (6th Cir. 1990).

In cases involving any justification-type defense to a charge of possession of a firearm by a felon, significant modifications must be made in this instruction. *See* United States v. Singleton, 902 F.2d 471, 472-73 (6th Cir. 1990). *See also* United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir. 1991) (proffered defense of temporary innocent possession).

6.06 SELF-DEFENSE

(1) One of the questions in this case is whether the defendant acted in self-defense.

(2) A person is entitled to defend himself against the immediate use of unlawful force. But the right to use force in self-defense is limited to using only as much force as reasonably appears to be necessary under the circumstances.

(3) The government has the burden of proving that the defendant did not act in self-defense. For you to find the defendant guilty, the government must prove that it was not reasonable for him to think that the force he used was necessary to defend himself against an immediate threat. Unless the government proves this beyond a reasonable doubt, you must find him not guilty.

Committee Commentary 6.06
(current through December 1, 2009)

As with most affirmative defenses, once the defendant raises the defense the government must establish beyond a reasonable doubt that the defendant's action was not in self-defense. Including a specific statement of the burden of proof in a self-defense instruction is preferable to relying on a general burden of proof instruction. DeGroot v. United States, 78 F.2d 244 (9th Cir. 1935); United States v. Corrigan, 548 F.2d 879 (10th Cir. 1977); United States v. Jackson, 569 F.2d 1003 (7th Cir. 1978).

Sixth Circuit decisions indicate that a defendant is limited in using force in self-defense to those situations where there are reasonable grounds for believing that such force is necessary under the circumstances. *See* United States v. Guyon, 717 F.2d 1536, 1541 (6th Cir. 1983).

6.07 JUSTIFICATION

(1) One of the questions in this case is whether the defendant was justified in committing the crime. Here, unlike the other matters I have discussed with you, the defendant has the burden of proof.

(2) For you to return a verdict of not guilty because of a justification defense, the defendant must prove the following five factors by a preponderance of the evidence:

(A) First, that the defendant reasonably believed there was a present, imminent, and impending threat of death or serious bodily injury [to himself] [to another];

(B) Second, that the defendant had not recklessly or negligently placed himself [another] in a situation in which it was probable that he would be forced to choose the criminal conduct;

(C) Third, that the defendant had no reasonable, legal alternative to violating the law;

(D) Fourth, that the defendant reasonably believed his criminal conduct would avoid the threatened harm; and

(E) Fifth, that the defendant did not maintain the illegal conduct any longer than absolutely necessary.

(3) If the defendant proves by a preponderance of the evidence the five elements listed above, then you must find the defendant not guilty.

(4) Preponderance of the evidence is defined as "more likely than not." In other words, the defendant must convince you that the five factors are more likely true than not true.

Use Note

In paragraph (2)(A), use the bracketed option that fits the facts.

Committee Commentary 6.07
(current through December 1, 2009)

This instruction is based on United States v. Newcomb, 6 F.3d 1129 (6th Cir. 1993) and United States v. Singleton, 902 F.2d 471 (6th Cir. 1990). *See also* United States v. Ridner, 512 F.3d 846 (6th Cir. 2008); United States v. DeJohn, 368 F.3d 533 (6th Cir. 2004).

The court first recognized the defense of justification in *Singleton* in a prosecution of a felon in possession of a firearm under 18 U.S.C. § 922. The court stated, "The Sixth Circuit has not yet ruled on whether a felon can ever be justified in possession of a firearm. We hold that a defense of justification may arise in rare situations." *Singleton*, 902 F.2d at 472, *citing* United

States v. Gant, 691 F.2d 1159 (5th Cir. 1982) and United States v. Agard, 605 F.2d 665 (2d Cir. 1979). The court stated that the defense should be construed narrowly and then adopted the four factor test from *Gant*. *Singleton*, 902 F.2d at 472-73, *citing Gant*, 691 F.2d at 1162-63. The court concluded it was not error to refuse an instruction on the justification defense in this case because the defendant failed to show that he did not maintain possession of the firearm any longer than was absolutely necessary. *Singleton,* 902 F.2d at 473.

In *Newcomb*, the court elaborated on the justification defense established in *Singleton*. The court defined it as having five factors: the original four from *Gant* and the fifth added in *Singleton* that the defendant did not maintain the illegal conduct any longer than absolutely necessary. *Newcomb,* 6 F.3d at 1134-35 and 1134 n.4 ("This circuit . . . has clearly identified five distinct factors."). The court listed the elements of the defense:

> (1) that defendant was under an unlawful and present, imminent and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
> (2) that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;
> (3) that defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm; . . .
> (4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm; [and
> (5)] that the defendant . . . did not maintain the illegal conduct any longer than absolutely necessary.

Newcomb, 6 F.3d at 1134-35 (internal quotations and punctuation omitted), *quoting* United States v. Singleton, *supra* at 472-73. The court held that the justification defense applies not only when the defendant acts to avoid harm to himself but also when he acts to avoid harm to third parties, and concluded it was error to omit an instruction on the justification defense. *Newcomb*, 6 F.3d at 1135-36.

In paragraphs (2)(A) through (E), the five elements of the defense are taken from *Newcomb*, 6 F.3d at 1134-35. Some of the language was simplified consistent with a plain English approach.

Paragraph 2(A) has been drafted to reflect the *Newcomb* court's holding that the justification defense applies not only when the defendant acts to avoid harm to himself but also when he acts to avoid harm to third parties. *Newcomb,* 6 F.3d at 1135-36. On this issue, the *Newcomb* court explained that the language of United States v. Bailey, 585 F.2d 1087, 1110-11 (D.C. Cir. 1978) (Wilkey, J., dissenting) was broad enough to allow the defense to include fear on behalf of a third party, *Newcomb*, 6 F.3d at 1135 n.5, and further stated that most other circuits would treat this issue the same way. *Id.* at 1136. See also United States v. Ridner, 512 F.3d 846, 850 (6th Cir. 2008) ("[T]his Circuit also applies the necessity defense when a defendant is acting out of a desire to prevent harm to a third party.") (interior quotations and citation omitted).

"Instructions on the defense are proper if the defendant has produced evidence upon which a reasonable jury could conclude by a preponderance of the evidence that each of the . . . five circumstances exist . . . ." United States v. Hargrove, 416 F.3d 486, 490 (6th Cir. 2005). *See also* United States v. Ridner, 512 F.3d 846, 849-50 (6th Cir. 2008) (trial judge's duty is to require *prima facie* showing by defendant on each element of the defense) (*quoting* United States v. Johnson, 416 F.3d 464, 467-68 (6th Cir. 2005)). Paragraphs (1) and (2) place the burden on the defendant of proving the defense of justification by a preponderance of the evidence. United States v. Brown, 367 F.3d 549, 556 (6th Cir. 2004), *citing Singleton*, 902 F.2d at 472. The definition of the preponderance standard in paragraph (4) is based on United States v. Ward, 68 F.3d 146, 148-49 (6th Cir. 1995) and United States v. Walton, 908 F.2d 1289, 1301-02 (6th Cir. 1990).

In *Newcomb*, the court described the difference between the defenses of justification and necessity. Justification and necessity are not interchangeable; rather, necessity is a type of justification. The court explained:

> "Justification," and its counterpart, "excuse," are terms for general categories of defenses. "Justification" pertains to the category of action that is exactly the action that society thinks the actor should have taken, under the circumstances; "excuse," on the other hand, denotes a more grudging acceptance of an action, where society wishes the actor had not done what he did, but will not hold him blameworthy. . . . "[N]ecessity" is . . . a particular example of a defense that, when proved, will justify the defendant's action. . . . "[T]he 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. . . .". The precise content of the necessity defense has altered substantially over recent years. We will use the broader term of justification in discussing [the] proffered defense in an attempt to avoid confusion.

6 F.3d at 1133 (citations omitted). In view of this explanation, the Committee also used the broader term of justification. *But compare* United States v. Ridner, 512 F.3d 846 (6th Cir. 2008) (referring to the defense as necessity).

Singleton, *Newcomb*, *DeJohn*, and *Ridner* are all firearms possession cases, so the question arises whether the justification defense exists outside this context. Although the Sixth Circuit has not ruled explicitly, United States v. Milligan, 17 F.3d 177 (6th Cir. 1994) implies that the justification defense is not limited to firearms possession crimes. In *Milligan*, the district court gave a necessity defense instruction on mail and wire fraud, the jury convicted the defendant, and the Sixth Circuit held there was enough evidence to support the jury's rejection of the necessity defense. *Id.* at 181. On the conspiracy count, the district court refused to give a necessity instruction, and the Sixth Circuit affirmed this ruling on two grounds: the defendants failed to produce sufficient evidence that they ceased the criminal activity as soon as a safe opportunity arose, and conspiracy is a continuing offense. *Id.* at 182. *Milligan* indicates that district courts should be wary of giving necessity defense instructions for conspiracy charges, but it also indicates that the justification defense is not limited to firearms possession crimes.

6.08 FRAUD – GOOD FAITH DEFENSE

(See Instruction 10.04.)

Committee Commentary 6.08
(current through December 1, 2009)

Instruction 10.04 states a good faith defense to be used in conjunction with the elements instructions for mail, wire and bank fraud only; it does not articulate a general good faith defense. Instruction 10.04 is cross-listed here in Chapter 6 because it covers a defense, but its applicability is limited to those fraud crimes in Chapter 10.

6.09 ENTRAPMENT BY ESTOPPEL

(1) One of the questions in this case is whether the defendant reasonably relied on a government announcement that the criminal act was legal. This defense is called entrapment by estoppel. Here, unlike the other matters I have discussed with you, the defendant has the burden of proof.

(2) For you to return a verdict of not guilty based on the defense of entrapment by estoppel, the defendant must prove the following four factors by a preponderance of the evidence:

(A) First, that an agent of the United States government announced that the charged criminal act was legal.

(B) Second, that the defendant relied on that announcement.

(C) Third, that the defendant's reliance on the announcement was reasonable.

(D) Fourth, that given the defendant's reliance, conviction would be unfair.

(3) If the defendant proves by a preponderance of the evidence the four elements listed above, then you must find the defendant not guilty.

(4) Preponderance of the evidence is defined as "more likely than not." In other words, the defendant must convince you that the four factors are more likely true than not.

Committee Commentary 6.09
(current through December 1, 2009)

This instruction is based on United States v. Levin, 973 F.2d 463 (6th Cir. 1992) (*citing* United States v. Smith, 940 F.2d 710 (1st Cir. 1991)). *See also* United States v. Triana, 468 F.3d 308 (6th Cir. 2006) and United States v. Blood, 435 F.3d 612 (6th Cir. 2006).

"Entrapment by estoppel applies when an official tells a defendant that certain conduct is legal and the defendant believes that official to his detriment." *Triana*, 468 F.3d at 316 (*citing* Cox v. Louisiana, 379 U.S. 559 (1965)). The defense rests "upon a due process theory . . . focusing on the conduct of the government officials rather than on the defendant's state of mind." *Blood*, 435 F.3d at 626 (*citing* United States v. Batterjee, 361 F.3d 1210, 1218 (9th Cir. 2004)). The "underlying concept is that, under certain circumstances, an individual may be entitled reasonably to rely on the representations of an authorized government official as to the legality of his conduct." *Id*. Since the Due Process Clause requires that citizens have fair warning as to what is illegal, "[o]rdinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach." *Levin*, 973 F.2d at 467.

The Sixth Circuit first recognized the defense of entrapment by estoppel in *Levin*, 973 F.2d 463 (6th Cir. 1992). The court defined the defense as consisting of four factors: "To determine the availability of the defense, the court must conclude that (1) a government must

have announced that the charged criminal act was legal; (2) the defendant relied on the government announcement; (3) the defendant's reliance was reasonable; and, (4) given the defendant's reliance, the prosecution would be unfair." *Id.* at 469 (citations omitted).

In paragraphs 2(A) through (D), the four elements of the defense are based on this holding. Some of the language was simplified consistent with a plain English approach.

Paragraph 2(A) specifies that an agent of the United States government must announce that the charged criminal act was legal. The term "United States government" reflects the case law which specifies that the entrapment-by-estoppel defense will not shield a defendant from federal prosecution when the representations of legality were made by state officers. United States v. Hurst, 951 F.2d 1490, 1499 (6th Cir. 1991); *see also* United States v. Ormsby, 252 F.3d 844, 846 (6th Cir. 2001).

Paragraph (2)(A), and the instruction generally, require that a government agent have explicitly "announced" that the charged criminal act was legal. The terms "announced" and "announcement" are drawn from *Levin,* 973 F.2d at 468; *see also Triana*, 468 F.3d at 316 (quoting this term from *Levin*); *Blood*, 435 F.3d at 626 (same). Case law does not precisely define what constitutes an announcement. The Sixth Circuit has held that an announcement was established by official letters from Health Care Financing Administration "reimbursement specialists" approving the defendants' conduct. *Levin, supra* at 465. However, an announcement was not established by statements an FBI confidential informant made to defendants that a bank was legitimate and that the financing scheme had worked before. *Blood, supra* at 626. The Sixth Circuit has also held that probation officers' failure to prohibit defendant's involvement with federal health care programs was not an announcement because a government official did not "*explicitly* [tell defendant] his actions were legal . . . ." *Triana, supra* at 316 (emphasis in original).

Paragraph 2(B) requires that the defendant actually rely on the government announcement at the time the offense was committed. The defense does not apply to a subsequent grant of authority. United States v. Lowenstein, 108 F.3d 80, 83 (6th Cir. 1997). Similarly, if the defendant was not aware of the representation at the time of the offense, the defense fails. *Id*.

As indicated in paragraph 2(C), the defense will only succeed when, in light of the agent's statement, the defendant's conduct is reasonable. *See Blood*, 435 F.3d at 626 (defendants could not have reasonably relied on statements by a party they did not know to be a government agent at the time of the reliance).

Paragraph 2(D) requires that conviction would be "unfair." Case law does not clearly define unfairness. *See, e.g.,* United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 665 at 674-75 (1973); Cox v. Louisiana, 379 U.S. 559 at 570 (1965); Raley v. Ohio, 360 U.S. 423 at 426 (1959); *Levin*, 973 F.2d at 466. However, the court has emphasized the government's role in actively misleading the defendant. As the court explained in *Levin*, because the defense is grounded "upon fundamental notions of fairness embodied in the Due Process Clause of the Constitution," *id*. at 468, "criminal sanctions are not supportable if they are to be imposed under

'vague and undefined' commands; or if they are 'inexplicably contradictory'; *and certainly not if the Government's conduct constitutes 'active misleading.'* " *Id.* at 467 (citations omitted; emphasis in original).

Generally, the entrapment-by-estoppel defense developed in three Supreme Court cases: Raley v. Ohio, 360 U.S. 423 (1959); *Cox*, 379 U.S. 559; and United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973). In *Raley*, the defendants were convicted of contempt after they refused to answer the Ohio Un-American Activities Commission's questions about their alleged Communist party ties. The Court reversed the convictions, holding that the defendants had reasonably relied on the Commission's statements as to the right to refuse to answer. The Court noted that to uphold the convictions "would be to sanction an indefensible sort of entrapment by the State – convicting a citizen for exercising a privilege which the State clearly had told him was available to him." *Id*. at 426. In *Cox, supra*, the Court reversed the defendant's conviction under a Louisiana statute that prohibited picketing "near" a courthouse. The Court cited *Raley* as an analogous case:

> In effect, appellant was advised that a demonstration at the place it was held would not be one "near" the courthouse within the terms of the statute. . . . The Due Process Clause does not permit convictions to be obtained under such circumstances.

Id. at 570 (citations omitted). Finally, in *Pennsylvania Indus. Chem. Corp*., *supra*, the Court reversed the defendant's conviction and remanded the case to allow the defendant corporation to present evidence to satisfy an entrapment-by-estoppel defense when the defendant claimed reliance on erroneous agency regulations that permitted the discharge of pollutants into rivers.

The defendant bears the "threshold evidentiary burden" to prove that he is entitled to an instruction on the defense. *Triana*, 468 F.3d at 315 n.3 and 316. The case law does not clearly identify the amount of evidence that will satisfy this threshold requirement. *See, e.g., Triana*, 468 F.3d at 315 n.3 and 316 ("tenuous" evidence is not enough; defendant must show that an "evidentiary basis exists upon which the instruction can be issued") (citations omitted). "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Matthews v. United States, 485 U.S. 58, 63 (1988); *see also Triana*, 468 F.3d at 315 ("A district court must grant an instruction on the defendant's theory of the case if the theory has some support in the evidence and the law.") (citation omitted). The Sixth Circuit and panels of the circuit have occasionally concluded that the threshold showing was not made and that the district court properly omitted an instruction on the defense. *See Hurst*, 951 F.2d at 1499; United States v. Haire, 2004 U.S. App. LEXIS 4183 at 17, 2004 WL 406141 at 5 (6th Cir. 2004) (unpublished); United States v. Gross, 1997 U.S. App. LEXIS 25318 at 3, 1997 WL 572938 at 1 (6th Cir. 1997) (unpublished). However, district courts are cautioned that "so long as there is even weak supporting evidence, '[a] trial court commits reversible error in a criminal case when it fails to [give] an adequate presentation of a theory of defense.'" *Triana,* 468 F.3d at 316 (*quoting* United States v. Plummer, 789 F.2d 435, 438 (6th Cir. 1986)).

The defendant bears the burden of proving entrapment by estoppel by a preponderance of the evidence. United States v. Beaty, 245 F.3d 617, 624 (6th Cir. 2001). The definition of the

preponderance standard in paragraph (4) is based on United States v. Ward, 68 F.3d 146, 148-49 (6th Cir. 1995) and United States v. Walton, 908 F.2d 1289, 1301-02 (6th Cir. 1990).

In contrast to the entrapment defense, the entrapment-by-estoppel defense does not depend on the defendant's pre-disposition to commit the offense. *See Blood*, 435 F.3d at 626 ("defendant's pre-disposition to commit an offense is not at issue in an entrapment by estoppel defense"). For this reason, the Sixth Circuit has been careful to distinguish entrapment from entrapment by estoppel. In *Blood* the district court's instruction, which incorporated both elements of entrapment and entrapment by estoppel, "*could* have [been] 'confusing'" (internal citations omitted) (emphasis added). *Id*. The court held the error was harmless, because the defendant presented no evidence to justify the estoppel defense. *Id*.

Other circuits recognize the defense of entrapment by estoppel under different names, including "reliance on public authority," United States v. Howell, 37 F.3d 1197 (7th Cir. 1994), "official misleading," "unconscionably misleading conduct," or "misleading government conduct defense," United States v. Batterjee, 361 F.3d 1210, 1216-17 (9th Cir. 2004).

Chapter 7.00

SPECIAL EVIDENTIARY MATTERS

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7.01 INTRODUCTION

That concludes the part of my instructions explaining the elements of the crime [and the defendant's position]. Next I will explain some rules that you must use in considering some of the testimony and evidence.

Use Note

The bracketed language in the first sentence should be used when a defense has been explained or a defense theory instruction has been given.

Committee Commentary 7.01
(current as of December 1, 2009)

This instruction is a transitional one to be used as a lead-in to the instructions explaining the rules for evaluating evidence.

7.02A DEFENDANT'S ELECTION NOT TO TESTIFY OR PRESENT EVIDENCE

(1) A defendant has an absolute right not to testify [or present evidence]. The fact that he did not testify [or present any evidence] cannot be considered by you in any way. Do not even discuss it in your deliberations.

(2) Remember that it is up to the government to prove the defendant guilty beyond a reasonable doubt. It is not up to the defendant to prove that he is innocent.

Use Note

The bracketed language in paragraph (1) should be included when the defense has not presented any evidence.

If there is more than one non-testifying defendant, and some, but not all, the defendants request this instruction, it should be given in general terms without using the defendants' names.

Committee Commentary 7.02A
(current as of December 1, 2009)

The need for such an instruction in federal criminal cases was first noted in Bruno v. United States, 308 U.S. 287 (1939), in which a unanimous court held that 18 U.S.C. § 3481 required such an instruction where the defendant requested it. In Carter v. Kentucky, 450 U.S. 288 (1981), the Court firmly based the right on the Fifth Amendment and extended the requirement to state criminal prosecutions. The instruction is patterned after Federal Judicial Center Instruction 22.

In Lakeside v. Oregon, 435 U.S. 333 (1978), the Supreme Court upheld the practice of a state trial judge giving such an instruction over the defendant's objection that the instruction would call attention to his failure to testify. The *Lakeside* Court reasoned that the Fifth and Fourteenth Amendments bar only adverse comment on a defendant's failure to testify, and that "a judge's instruction that the jury must draw no adverse inferences of any kind from the defendant's exercise of this privilege not to testify is 'comment' of an entirely different order." *Id.* at 339. While it may be permissible to give this instruction over the defendant's objection, the better practice is not to give it unless it is requested by the defendant.

The Committee found no Sixth Circuit opinions where, in a case involving multiple defendants, one defendant requested such an instruction while another objected to it. However, following the reasoning in *Carter* and *Lakeside*, it is clear that any such instruction is not harmful to a co-defendant. The Commentary to Federal Judicial Center Instruction 22 recommends that if there is more than one non-testifying defendant and an instruction is requested by some but not all such defendants, it should be given in general terms without the use of the defendants' names.

7.02B DEFENDANT'S TESTIMONY

(1) You have heard the defendant testify. Earlier, I talked to you about the "credibility" or the "believability" of the witnesses. And I suggested some things for you to consider in evaluating each witness's testimony.

(2) You should consider those same things in evaluating the defendant's testimony.

Use Note

This instruction should be used when the defendant chooses to testify.

Committee Commentary 7.02B
(current as of December 1, 2009)

This instruction refers back to Instruction 1.07 Credibility of Witnesses.

7.02C WITNESS OTHER THAN THE DEFENDANT INVOKING THE FIFTH AMENDMENT

(1) You have heard _____ [*insert witness's name*] exercise his right under the Fifth Amendment to the United States Constitution to refuse to answer questions because the testimony might tend to incriminate him.

(2) You must not infer anything at all, for or against either the government or the defendant, because the witness did not answer.

Use Note

This instruction should be used when a witness other than the defendant declines to answer questions because of the Fifth Amendment.

Committee Commentary 7.02C
(current as of December 1, 2009)

This instruction is a cautionary instruction to help offset any prejudice that may arise when a witness declines to testify based on the Fifth Amendment.

The Sixth Circuit has quoted limiting instructions which helped avoid error when witnesses asserted the Fifth Amendment. *See* United States v. Mack, 159 F.3d 208, 217 (6th Cir. 1998); United States v. Okeezie, 1993 WL 20997, 10, 1993 U.S. App. LEXIS 1968, 4 (6th Cir. 1993) (unpublished). The language of Instruction 7.02C is based on these quoted instructions.

The Fifth Amendment to the United States Constitution states that "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." This privilege applies to a witness at a trial as well as to the defendant. *See, e.g., Mack, supra*; United States v. Gaitan-Acevedo, 148 F.3d 577, 588 (6th Cir. 1998). Thus, the parties' right to compel witnesses to testify must yield to the witness's assertion of the Fifth Amendment, assuming it is properly invoked. *Mack, supra*; *Gaitan-Acevedo,* 148 F.3d at 588, *citing* United States v. Damiano, 579 F.2d 1001, 1003 (6th Cir. 1978).

To assert the privilege, the witness must have a reasonable fear of danger of prosecution. *Mack*, *supra*; *Gaitan-Acevedo, supra* at 588, *citing Damiano, supra*. *See also* In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983) ("reasonable cause to apprehend a real danger of incrimination"), *citing* Hoffman v. United States, 341 U.S. 479 (1951). The privilege can be asserted to cover answers which would themselves support a criminal conviction, and also to cover answers which would furnish a link in the chain of evidence needed to prosecute. *In re* Morganroth, *supra* at 164, *citing Hoffman*, 341 U.S. at 486.

Although a witness has a right to assert the Fifth Amendment when called to testify, there is some danger in allowing the witness to assert it in front of a jury. In United States v. Vandetti,

623 F.2d 1144 (6th Cir. 1980), the court explained:

> There are two constitutional problems which may arise when a witness is presented who refuses to testify relying upon the fifth amendment privilege. The first problem is that such a witness permits the party calling the witness to build its case out of inferences arising from the use of the testimonial privilege, a violation of due process. "Neither side has the right to benefit from any inferences the jury may draw from the witness' assertion of the privilege alone or in conjunction with questions that have been put to him." Nevertheless, although guilt is not properly inferable from the exercise of the privilege, it is feared that its assertion in the presence of the jury may have a disproportionate effect on its deliberations.
>
> Second, calling such a witness encroaches upon the right to confrontation. . . . The probative value of this sort of testimony is almost entirely undercut by the impossibility of testing it through cross-examination.

Vandetti, supra (citations omitted). In addition, the American Bar Association Standards for Criminal Justice provide that the prosecution and defense should not call a witness in the presence of the jury who the party knows will claim a valid privilege not to testify. See American Bar Association Standards for Criminal Justice, the Prosecution Function, Standard 3-5.7(c) and *id.*, the Defense Function, Standard 4-7.6(c).

Notwithstanding these dangers, parties may still seek to call a witness, subject to the court's discretion, knowing the witness will refuse to answer under the Fifth Amendment. United States v. Vandetti, *supra* at 1147, *citing* United States v. Kilpatrick, 477 F.2d 357, 360 (6th Cir. 1973) and United States v. Compton, 365 F.2d 1, 5 (6th Cir. 1966). *See, e.g.,* United States v. Mack, *supra* at 217. *See also* Lindsey v. United States, 484 U.S. 934 (1987) (White and Brennan, JJ., dissenting from denial of cert., acknowledging Sixth Circuit law that party may seek to call witness whom party knows will assert the Fifth Amendment and noting circuit split on this issue).

Because of the competing interests involved, *i.e.*, the constitutional concerns versus the factfinders' need to operate with as much relevant information as possible, the judge should "closely scrutinize" requests to call a witness who has indicated he will assert the Fifth Amendment. *Vandetti*, 623 F.2d at 1147, *citing* United States v. Maffei, 450 F.2d 928, 929 (6th Cir. 1971). The judge should "weigh a number of factors in striking a balance between the competing interests." *Vandetti,* 623 F.2d at 1149, *citing* Eichel v. New York Central R. Co, 375 U.S. 253, 255 (1963). "The judge must determine whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice." *Vandetti,* 623 F.2d at 1149, *citing* F. R. Evid. 403. Factors to balance include: (1) the extent of the questioning following the witness's assertion of the Fifth Amendment, *see Vandetti*, 623 F.2d at 1149; (2) the value of the testimony sought, *id.*; (3) the phrasing of the questions to minimize prejudice, *id.* at 1150; and (4) the effect of a limiting instruction, United States v. Epley, 52 F.3d 571, 577 (6th Cir. 1995) and *Vandetti*, 623 F.2d at 1149.

The Sixth Circuit has elaborated on the role of cautionary instructions, stating:

> Even though a cautionary instruction may be useful, it may not be sufficiently ameliorative in all cases. . . . Some courts have suggested that any prejudice to the government arising from the absence of a witness, who, if called, would assert his fifth amendment privilege, can be dissipated by an instruction that the witness is not available to either side and that no inferences about his testimony may be drawn by the jury.

Vandetti, 623 F.2d at 1148 & 1150 (citations omitted).

7.03 OPINION TESTIMONY

(1) You have heard the testimony of _____, who testified as an opinion witness.

(2) You do not have to accept _____'s opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions. Also consider the other factors discussed in these instructions for weighing the credibility of witnesses.

(3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Use Note

If the witness testifies to both opinions and facts, a cautionary instruction such as Instruction 7.03A on the dual role should be given in addition to Instruction 7.03. This situation usually arises when law enforcement witnesses testify. See the discussion in the commentary below.

Committee Commentary 7.03
(current as of December 1, 2009)

In United States v. Johnson, 488 F.3d 690 (6th Cir. 2007), the court said that district judges should use the term "opinion" rather than "expert" in the presence of the jury. *Id.* at 698. Although the court found no plain error on the facts in *Johnson*, the court explained that, "'Except in ruling on an objection, the court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion . . . .'" *Johnson, supra* at 697, *quoting* ABA Civil Trial Practice Standard 17 (Feb. 1998). Based on *Johnson*, Instruction 7.03 uses the term "opinion" in lieu of the term "expert."

In *Johnson*, the court also counseled district judges not to certify before the jury that a witness is qualified as an expert. The court explained, "Instead, the proponent of the witness should pose qualifying and foundational questions and proceed to elicit opinion testimony. If the opponent objects, the court should rule on the objection, allowing the objector to pose voir dire questions to the witness's qualifications if necessary and requested." *Johnson, supra* at 698.

The *Johnson* court's disapproval of certifying a witness as an expert is consistent with previous cases. In Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994), the court pointed out that the Federal Rules of Evidence do not call for a proffer and stated that in a previous case, United States v. Kozminski, 821 F.2d 1186, 1219 (6th Cir. 1987) (en banc) (dissent), the Sixth Circuit "counseled against putting some general seal of approval on an expert after he has been qualified but before any questions have been posed to him." Berry v. City of Detroit, *supra* at 1351.

In paragraph (2), the final sentence mentioning other instructions on the credibility of witnesses refers to Instruction 1.07 Credibility of Witnesses, which identifies the general bases

for evaluating witness credibility.

The admissibility of expert testimony is governed by Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). These decisions do not affect the instruction.

"Expert testimony, even if uncontradicted, may be believed in its entirety, in part, or not at all." Dawahare v. Spencer, 210 F.3d 666, 671 (6th Cir. 2000). In holding that the arbitration panel was not compelled to accept the expert's damages evidence, the Sixth Circuit cited authority from other circuits, including Quinones-Pacheco v. American Airlines, Inc., 979 F.2d 1, 5 (1st Cir. 1992) (holding that fact finder is not ordinarily bound by uncontradicted expert opinion testimony, particularly where testimony "lacks great convictive force" in context of evidence as a whole); Gregg v. U.S. Indus., Inc., 887 F.2d 1462, 1469-70 (11th Cir. 1989) (holding that expert testimony is not conclusive and need not be accepted).

Caution is required when a law enforcement officer testifies both as a fact witness and as an opinion witness. See Instruction 7.03A.

Under the Federal Rules of Evidence, an expert may testify in order to assist the trier of fact to understand the evidence or determine a fact in issue. Such testimony may be in the form of an opinion. Fed. R. of Evid. 702. The basic approach to opinion testimony in the Federal Rules of Evidence is to allow it when it is helpful to the trier of fact. This includes opinions as to an ultimate issue to be decided by the trier of fact. Fed. R. of Evid. 704. However, opinion testimony as to ultimate issues with respect to a defendant's mental state or condition may not be introduced. Fed. R. of Evid. 704(b); United States v. Pickett, 604 F.Supp. 407 (S.D. Ohio 1985).

7.03A WITNESS TESTIFYING TO BOTH FACTS AND OPINIONS

(1) You have heard the testimony of _____, who testified to both facts and opinions. Each of these types of testimony should be given the proper weight.

(2) As to the testimony on facts, consider the factors discussed earlier in these instructions for weighing the credibility of witnesses.

(3) As to the testimony on opinions, you do not have to accept _____'s opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions along with the other factors discussed in these instructions for weighing the credibility of witnesses.

(4) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Use Note

If this instruction is given at the time the witness testifies, the language in paragraphs (2) and (3) referring to other instructions should be modified.

Committee Commentary 7.03A
(current as of December 1, 2009)

Caution is required when a witness testifies both as a fact witness and as an opinion witness. In this situation, the court should give a cautionary instruction so that the jury can give proper weight to each type of testimony and the court can guard against the inherent risk of confusion when a witness testifies in both roles. This situation usually arises when law enforcement witnesses testify.

In United States v. Lopez-Medina, 461 F.3d 724 (6th Cir. 2006), the court held it was plain error to allow a government agent to give dual testimony as both a fact witness and an opinion witness when no cautionary instruction was given and there was no clear demarcation between the officer's fact testimony and opinion testimony. *Id.* at 744-45. In such cases, the court " 'should take care to assure that the jury is informed of the dual roles of a law enforcement officer as a fact witness and an expert witness, so that the jury can give proper weight to each type of testimony.' " *Id.* at 743, *quoting* United States v. Thomas, 74 F.3d 676, 683 (6th Cir. 1996), *abrogated on other grounds by* General Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997). For example, the Sixth Circuit found no abuse of discretion in allowing such dual testimony "where the court 'instructed the jury, both before [an agent] gave his opinion and again in the jury charge, that it should consider [the agent's] dual roles in determining what weight . . . to give [his] expert testimony.' " *Lopez-Medina, supra* at 743, *quoting* United States v. Tocco, 200 F.3d 401, 419 (6th Cir. 2000). *See also* United States v. Cobbs, 2007 U.S. App. LEXIS 12826, 2007 WL 1544207 (6th Cir. 2007) (unpublished) (stating that a cautionary

instruction on the witness's dual role should have been given but finding no plain error on the facts).

In United States v. Martin, 520 F.3d 656 (6th Cir. 2008), the court distinguished *Lopez-Medina, supra* and found that failure to give a cautionary instruction on dual role testimony did not constitute plain error based on the particular facts in *Martin*. The court stated that the fact and opinion testimony were not so thoroughly intertwined in *Martin* as they were in *Lopez-Medina*, and that *Lopez-Medina* involved other evidentiary errors whereas *Martin* did not. *Id.* at 659.

Paragraph (1) is based on the phrase from *Lopez-Medina* quoted above that the jury should be informed of the dual roles so it can give "proper weight to each type of testimony."

Paragraph (2) refers to the factors mentioned in Instruction 1.07 Credibility of Witnesses.

Paragraphs (3) and (4) are based on Instruction 7.03 Opinion Testimony.

7.04 IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT NOT UNDER OATH

(1) You have heard the testimony of _____. You have also heard that before this trial he made a statement that may be different from his testimony here in court.

(2) This earlier statement was brought to your attention only to help you decide how believable his testimony was. You cannot use it as proof of anything else. You can only use it as one way of evaluating his testimony here in court.

Use Note

This instruction must be given when a prior inconsistent statement which does not fall within Fed.R.Evid. 801(d)(1)(A) has been admitted.

If several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, this instruction should identify which statements were offered for impeachment purposes.

Committee Commentary 7.04
(current as of December 1, 2009)

A panel of the Sixth Circuit has stated that this instruction is "clearly a correct statement of the law . . . ." United States v. Johnson, 1995 WL 517229, 3, 1995 U.S. App. LEXIS 32896, 6 (6th Cir. 1995) (unpublished).

Often the question is not the content of the instruction but whether it should be given. In two cases, the Sixth Circuit did not resolve whether omitting the instruction was error because it found the omission harmless. In United States v. Aguwa, 123 F.3d 418, 422 (6th Cir. 1997), the trial court refused to instruct that prior inconsistent statements not under oath are evidence of credibility only and not substantive evidence. The Sixth Circuit affirmed the conviction, stating that the defendant was not prejudiced and might have actually benefitted from the absence of such an instruction. *Id.*

In the second case the Sixth Circuit concluded it was error to give the instruction but found the error harmless. *See* United States v. Toney, 161 F.3d 404 (6th Cir. 1998) (holding it was error for district court to give Instruction 7.04 because no evidence of a prior inconsistent statement was admitted but error harmless).

This instruction deals only with prior inconsistent statements *not* under oath. The Committee considered drafting an instruction on prior statements under oath and discarded the idea. As the First Circuit explains in commentary, the instruction on prior inconsistent statements not under oath is:

> for use where a witness's prior statement is admitted only for impeachment purposes. Where a prior statement is admitted substantively under Fed.R. Evid. 801(d)(1), this instruction is not appropriate. Once a prior statement is admitted substantively as non-

hearsay under Rule 801(d)(1), it is actual evidence and may be used for whatever purpose the jury wishes. No instruction seems necessary in that event, but one may refer to Federal Judicial Center Instructions 33 and 34.

Pattern Jury Instructions: First Circuit, Criminal Cases, Instruction 2.02 Comment.

The traditional view had been that a prior statement of a witness is hearsay if offered to prove the matters asserted therein. This did not preclude the use of the prior statement to impeach the witness if the statement was inconsistent with his testimony. Fed. R. Evid. 801(d)(1)(A) carved out an exception where the prior statement was under oath in a judicial hearing or in a deposition. Where a prior statement does not fall within Fed. R. Evid. 801(d)(1)(A), the jury must be instructed that the statement is offered solely to impeach the credibility of the witness. United States v. Harris, 523 F.2d 172, 175 (6th Cir.1975).

If during the course of the trial, several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, then this instruction should be given with the court identifying the impeaching statement or statements.

7.05A IMPEACHMENT OF DEFENDANT BY PRIOR CONVICTION

(1) You have heard that before this trial the defendant was convicted of a crime.

(2) This earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. You cannot use it for any other purpose. It is not evidence that he is guilty of the crime that he is on trial for now.

Use Note

This instruction should not be given if evidence of other crimes has been admitted for one of the approved purposes under Fed. R. Evid. 404(b). Instead, the jury should be specifically instructed on the purpose for which the evidence was admitted. See Instruction 7.13.

Committee Commentary 7.05A
(current as of December 1, 2009)

Generally, evidence of a defendant's prior conviction is only admissible to attack his credibility as a witness. See Fed. R. Evid. 609; United States v. Sims, 588 F.2d 1145, 1149 (6th Cir.1978). 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 defendant's commission of other crimes may also be admissible for other purposes under Fed. R. Evid. 404(b). In such cases, this instruction should not be given. Instead the jury should be specifically instructed on the purpose for which the evidence may be considered. See Instruction 7.13.

7.05B IMPEACHMENT OF A WITNESS OTHER THAN DEFENDANT BY PRIOR CONVICTION

(1) You have heard the testimony of _____. You have also heard that before this trial he was convicted of a crime.

(2) This earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. Do not use it for any other purpose. It is not evidence of anything else.

Committee Commentary 7.05B
(current as of December 1, 2009)

This instruction should be used when a witness other than the defendant is impeached by a prior conviction.

7.06A TESTIMONY OF A PAID INFORMANT

(1) You have heard the testimony of _____. You have also heard that he received money [or _____] from the government in exchange for providing information.

(2) The use of paid informants is common and permissible. But you should consider _____'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the government gave him.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

Use Note

The bracketed language in paragraph (1) should be used when some consideration other than money has been given.

This instruction may not be necessary if the informant's testimony has been materially corroborated, or if an accomplice cautionary instruction has been given.

Committee Commentary 7.06A
(current as of December 1, 2009)

In United States v. Wheaton, 517 F.3d 350 (6th Cir. 2008), the court rejected a challenge to an instruction similar to Instruction 7.06A for two reasons. The first reason was that the instruction given provided ample notice that the testimony should be viewed with suspicion; the second reason was that the instruction given was "almost identical to . . . Sixth Circuit Pattern Criminal Jury Instruction 7.06A . . . ." *Id.* at 363.

In On Lee v. United States, 343 U.S. 747, 757 (1952), the Supreme Court said that to the extent an informant's testimony raises serious questions of credibility, the defendant is entitled to have the issue submitted to the jury "with careful instructions."

No cautionary instruction is required when there is no evidence that the witness was an informant. See United States v. Vinson, 606 F.2d 149, 154 (6th Cir. 1979). Less clear is whether an instruction is required if the witness's testimony has been materially corroborated. In United States v. Griffin, 382 F.2d 823, 827-28 (6th Cir. 1967), the Sixth Circuit indicated in dictum that even if corroborated, the better practice would be to give a cautionary instruction. But subsequently, in United States v. Vinson, *supra*, the Sixth Circuit rejected the argument that a cautionary instruction should have been given, in part on the ground that the witness's testimony had been materially corroborated. *Vinson* also indicated that no instruction was required because the district court had instructed the jury to treat the witness's testimony with care because of evidence that he was an accomplice, and that this "had the same cautionary effect" as if the court had given an informant instruction. *Id.*

Instruction 7.06A does not use the term "informer" in order to avoid pejorative labeling. *See* United States v. Turner, 490 F.Supp. 583 (E.D.Mich.1979), *aff'd*, 633 F.2d 219 (6th Cir.1980). It is based on Federal Judicial Center Instruction 24.

7.06B TESTIMONY OF AN ADDICT-INFORMANT UNDER GRANT OF IMMUNITY OR REDUCED CRIMINAL LIABILITY

(1) You have heard the testimony of _____. You have also heard that he was using _____ during the time that he testified about, and that the government has promised him that he will not be prosecuted for _____ [or will _____] in exchange for his testimony.

(2) It is permissible for the government to make such a promise. But you should consider _____'s testimony with more caution than the testimony of other witnesses. An addict may have a constant need for drugs, and for money to buy drugs, and may also have a greater fear of imprisonment because his supply of drugs may be cut off. Think about these things and consider whether his testimony may have been influenced by the government's promise.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

Use Note

The bracketed language in paragraph (1) should be used when some consideration other than an agreement not to prosecute has been given by the government.

Whether this instruction must be given may depend on the particular circumstances of the case.

Committee Commentary 7.06B
(current as of December 1, 2009)

In United States v. Anderson, 1998 WL 833701, 1998 U.S. App. LEXIS 30121 (6th Cir. 1998) (unpublished), the defendant requested an "addict-witness instruction" and the district court refused. A panel of the Sixth Circuit noted that Pattern Instruction 7.06B, and the underlying case law, refer to addict-*informants*, and then went on to discuss the propriety of refusing the instruction. The panel stated there was no "per se rule" requiring this instruction whenever an addict-informant testifies; district courts should assess the need for such an instruction based on the circumstances of each case. *Anderson*, 1998 WL at 4, 1998 LEXIS at 12, *quoting* United States v. Brown, 946 F.2d 1191, 1195 (6th Cir. 1991). The panel concluded that, assuming that the addict-informant instruction applied in the case of an addict-witness/codefendant, the district court did not err by refusing the instruction because the jury was aware of the witness's addiction, the witness's testimony was corroborated, and a cautionary instruction was given. *Anderson*, 1998 WL at 4, 1998 LEXIS at 13, *citing* United States v. McGhee, 882 F.2d 1095, 1100 (6th Cir. 1989) (stating there is less need for an addict-informant instruction when the jury is aware of the witness's addiction and there is substantial corroboration for the witness's testimony).

In other cases, panels of the Sixth Circuit have likewise concluded that omission of an addict-informant instruction was not error. In United States v. Rich, 2000 WL 92269, 5, 2000 U.S. App. LEXIS 826, 13 (6th Cir. 2000) (unpublished), the panel reiterated that there was no

per se rule requiring an addict-informant instruction, *citing Brown, supra* at 1195, and concluded it was not error to refuse the instruction because no evidence suggested that the witness was addicted at the relevant time. In United States v. Lopez, 1999 WL 397947, 1999 U.S. App. LEXIS 11827 (6th Cir. 1999) (unpublished), a panel held that it was not error to omit an addict-informant instruction. The trial judge gave a general witness credibility instruction, cautioning the jury to weigh carefully testimony affected by a witness's own interest, and the panel stated that this instruction accomplished the same objective as an addict-informant instruction by warning jurors that the credibility of the witnesses might be suspect.

The instruction is a plain English version of the instruction approved in United States v. Hessling, 845 F.2d 617 (6th Cir.1988). *Hessling* approved the instruction but did not mandate its use.

7.07 TESTIMONY OF A WITNESS UNDER GRANT OF IMMUNITY OR REDUCED CRIMINAL LIABILITY

(1) You have heard the testimony of _____. You have also heard that the government has promised him that [he will not be prosecuted for _____] [he will _____] in exchange for his cooperation.

(2) It is permissible for the government to make such a promise. But you should consider _____'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by the government's promise.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

Use Note

In paragraph (1) , the first bracketed language should be used when the plea agreement is based on a government promise not to prosecute; the second bracketed language should be used when the plea agreement is based on some other consideration, such as a recommendation for a reduced sentence.

This instruction may not be necessary when the witness's testimony has been materially corroborated.

Committee Commentary 7.07

(current as of December 1, 2009)

The Sixth Circuit has described this as a "proper jury instruction[]" that "correctly" and "properly" informs the jury about this issue. United States v. Hynes, 467 F.3d 951, 971 (6th Cir. 2006) (instruction given was Pattern Instruction 7.07, see Joint Appendix at 940).

The purpose of this instruction is to alert the jury to potential credibility problems with witnesses who have entered into plea bargains in exchange for their testimony.

The instruction avoids using the terms plea bargain and plea agreement.

Since the rationale for this instruction is similar to that for Instruction 7.06A on the testimony of an informant, the limitations from United States v. Vinson, 606 F.2d 149 (6th Cir.1979) should apply. Where ample corroboration of the testimony exists, the instruction may not be necessary.

7.08 TESTIMONY OF AN ACCOMPLICE

(1) You have heard the testimony of _____. You have also heard that he was involved in the same crime that the defendant is charged with committing. You should consider _____'s testimony with more caution than the testimony of other witnesses.

(2) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

[(3) The fact that _____ has pleaded guilty to a crime is not evidence that the defendant is guilty, and you cannot consider this against the defendant in any way.]

Use Note

This instruction is not necessary if the jury has been instructed to treat the witness's testimony with caution for other reasons.

Bracketed paragraph (3) should be included when the fact that an accomplice has pleaded guilty has been brought to the jury's attention.

Committee Commentary 7.08
(current as of December 1, 2009)

The Sixth Circuit has described this as a "proper jury instruction[]" that "correctly" and "properly" informs the jury about this issue. United States v. Hynes, 467 F.3d 951, 971 (6th Cir. 2006) (instruction given was Pattern Instruction 7.08, see Joint Appendix at 941). In addition, a panel has cited Instruction 7.08(1) and (2) with approval. United States v. Savoca, 2006 WL 126737, 2006 U.S. App. LEXIS 1465 (6th Cir. 2006) (unpublished) (stating that the instruction "was not erroneous. Indeed, the charge is taken from Sixth Circuit Pattern Instruction 7.08.").

In United States v. Wheaton, 517 F.3d 350 (6th Cir. 2008), the court held that omitting Instruction 7.08 was not error because "an accomplice instruction 'is not necessary if the jury has been instructed to treat the witness's testimony with caution for other reasons.' " *Id.* at 363 (*quoting* the Use Note to Instruction 7.08). Because the district court had given an instruction on treating the witness's testimony with caution that was almost identical to Instruction 7.06A, it was not error to omit Instruction 7.08. *Id.* *Accord*, United States v. Carr, 5 F.3d 986, 992 (6th Cir. 1993) (finding no reversible error in omitting an explicit accomplice testimony instruction because the court substantially covered the same considerations in the general witness credibility instructions; those instructions were adequate because they cautioned the jury to consider "any relation that a witness may bear to either side of the case and his or her reasons for testifying" and stated that "the testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a crime.").

In United States v. Ailstock, 546 F.2d 1285, 1288 (6th Cir. 1976), the Sixth Circuit held

that an accomplice instruction alone adequately cautioned the jury about the weight to be given an accomplice's testimony, even though the accomplice had a plea bargain with the government and no plea bargain instruction had been given.

If the court thoroughly instructs the jury about evaluating the witness's credibility, and cautions the jury to use care in considering accomplice testimony, it is not an abuse of discretion to refuse any additional instruction on perjured testimony. United States v. Frost, 914 F.2d 756, 766 (6th Cir. 1990).

7.09 CHARACTER AND REPUTATION OF DEFENDANT

You have heard testimony about the defendant's good character. You should consider this testimony, along with all the other evidence, in deciding if the government has proved beyond a reasonable doubt that he committed the crime charged.

Committee Commentary 7.09
(current as of December 1, 2009)

Some instruction on the defendant's good character is required if supported by the evidence. *See* Edgington v. United States, 164 U.S. 361, 365-67 (1896); *accord* United States v. Huddleston, 811 F.2d 974, 977 (6th Cir. 1987). But there is disagreement about whether the instruction must say that good character evidence "standing alone" may create a reasonable doubt of guilt. *See* Spangler v. United States, 487 U.S. 1224 (1988) (White, J., dissenting from denial of certiorari) (noting disagreement).

Old Supreme Court cases provide some support for the position that "standing alone" language may be appropriate, at least in some circumstances. *See Edgington, supra*, 164 U.S. at 366 ("The circumstances may be such that . . . good character . . . would alone create a reasonable doubt."); Michelson v. United States, 335 U.S. 469, 476 (1948) ("[T]his Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed.").

In Poliafico v. United States, 237 F.2d 97, 114 (6th Cir.1956), the court, without extensive analysis, rejected the argument that "standing alone" language should have been included in the district court's instructions. The Sixth Circuit characterized the instructions given, which told the jury to consider the good character evidence along with all the other evidence in the case, as "proper," citing *Edgington* in support. In *Huddleston, supra,* the Sixth Circuit, again without extensive analysis, held that the district court adequately met its responsibility to instruct on good character evidence by instructing the jury to consider such evidence along with all the other evidence in determining whether the government had sustained its burden of proving guilt beyond a reasonable doubt. Based on these cases, the Committee has omitted the "standing alone" language. *See also* United States v. Kirkland, 1994 WL 454864 at 9 n.8, 1994 U.S. App. LEXIS 22925 at 27 n.8 (6th Cir. 1994) (unpublished) (describing "standing alone" language as "not warranted under the law") (*citing* Poliafico v. United States, 237 F.2d 97, 114 (6th Cir. 1956)).

7.10 AGE OF WITNESS

You have heard the testimony of _____, a young witness. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. With any witness, young or old, you should consider not only age, but also the witness's intelligence and experience, and whether the witness understands the duty to tell the truth and the difference between truth and falsehood.

Committee Commentary 7.10
(current as of December 1, 2009)

A panel of the Sixth Circuit described this instruction as "a general admonition to the jury to weigh the maturity and experience of a young witness when the jury considers the substance of the testimony presented by that witness." United States v. Bourne, 1994 WL 84742 at 1, 1994 U.S. App. LEXIS 4562 at 2-3 (6th Cir. 1994) (unpublished).

Under Fed. R. Evid. 601 there is no specific age requirement for the competency of witnesses.

In 1990, Congress enacted The Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509. This Act defines children as persons under eighteen who are or allegedly are victims of physical abuse, sexual abuse or exploitation, or are witnesses to a crime committed against another. *Id.* § 3509(a)(2). The Act provides, "A child is presumed to be competent." *Id.* § 3509(c)(2). In *Bourne*, *supra*, a panel of the Sixth Circuit noted that this provision lends itself to the interpretation that a child witness is presumed competent to testify in the absence of an express determination to the contrary, but the issue was not preserved and the panel did not rule on it. *Bourne*, 1994 WL at 1, 1994 U.S. App. LEXIS at 3.

In United States v. Allen J., 127 F.3d 1292, 1295 (10th Cir. 1997), the court stated: "Upon enactment of § 3509, the rules changed. Now children are presumed competent and the party seeking to prevent a child from testifying has the burden of providing a compelling reason for questioning the child's competence." Similarly, the Seventh Circuit has concluded that § 3509(c)(2) means that "Children are presumed to be competent to testify." United States v. Snyder, 189 F.3d 640, 645 (7th Cir. 1999).

The statutory presumption of competency is a procedural rule to use in determining the competency of a child witness and does not affect the applicability of the instruction after the child witness is found competent.

7.11 IDENTIFICATION TESTIMONY

(1) You have heard the testimony of _____, who has identified the defendant as the person who _____. You should carefully consider whether this identification was accurate and reliable.

(2) In deciding this, you should especially consider if the witness had a good opportunity to see the person at that time. For example, consider the visibility, the distance, whether the witness had known or seen the person before, and how long the witness had to see the person.

[(3) You should also consider the circumstances of the earlier identification that occurred outside of court. For example, consider how that earlier identification was conducted, and how much time passed after the alleged crime before the identification was made.]

[(4) You may take into account any occasion in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]

(5) Consider all these things carefully in determining whether the identification was accurate and reliable.

(6) Remember that the government has the burden of proving beyond a reasonable doubt that the defendant was the person who committed the crime charged.

Use Note

This instruction should be given when the identification has become an issue because of lack of corroboration, or limited opportunity for observation, or when the witness's memory has faded by the time of trial.

Bracketed paragraph (3) should be included when evidence of an out-of-court identification has been admitted.

Bracketed paragraph (4) should be included when evidence of an earlier failure to make identification or evidence of an inconsistent identification is admitted.

Committee Commentary 7.11
(current as of December 1, 2009)

The testimony of a single eyewitness is sufficient to take a criminal case to the jury. However, courts have recognized that there is a serious possibility of mistake inherent in uncorroborated identification testimony. United States v. O'Neal, 496 F.2d 368 (6th Cir.1974). In cases where identification is a key issue, courts have required an instruction that emphasizes the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt.

The leading case is United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). *Telfaire* set out a model instruction in an appendix which emphasized: (1) the capacity and opportunity of the witness to observe reliably the offender; (2) the question whether the identification was the product of the witness's own recollection; (3) the inconsistent identification made by the same witness; and (4) the credibility of the witness. *Id.* at 558-59. The *Telfaire*-type instruction was adopted by the Sixth Circuit in United States v. Scott, 578 F.2d 1186, 1191 (6th Cir. 1978). The language in the instruction is drawn directly from *Telfaire, supra*.

The instruction should be given when the identification has become an issue because of lack of corroboration or limited opportunity for observation, or where the witness's memory has faded by the time of trial. *Scott, supra.*

This instruction omits any mention of the credibility of the identification witnesses because that topic is adequately covered in the general credibility instruction, Instruction 1.07. If the credibility of identification witnesses is a particularly significant issue in a case, the *Scott* decision gives district courts the leeway to mention the credibility factor in this instruction as well as in the general credibility instruction. *See Scott, supra* (listing as a factor the jury should consider "(4) the credibility of the witness.").

7.12 SUMMARIES AND OTHER MATERIALS NOT ADMITTED IN EVIDENCE

During the trial you have seen counsel use [summaries, charts, drawings, calculations, or similar material] which were offered to assist in the presentation and understanding of the evidence. This material is not itself evidence and must not be considered as proof of any facts.

Use Note

This instruction should be used when pedagogical-device summaries or similar material are not admitted into evidence.

If the summaries or similar material are admitted into evidence as secondary-evidence summaries, see Instruction 7.12A.

If the summaries or similar material are admitted into evidence as primary-evidence summaries, no instruction is necessary.

Committee Commentary 7.12
(current as of December 1, 2009)

This instruction is based on United States v. Bray, 139 F.3d 1104, 1112 (6th Cir. 1998), in which the Sixth Circuit noted some confusion in past cases and provided a comprehensive discussion on the treatment of summary evidence. The court explained:

> To recapitulate, there are three kinds of summaries:
> (1) Primary-evidence summaries, ... which summarize "voluminous writings, recordings, or photographs" that, because they are so voluminous, "cannot conveniently be examined in court." Fed.R.Evid. 1006. In this instance, the summary, and not the underlying documents, is the evidence to be considered by the factfinder.
> (2) Pedagogical-device summaries, or illustrations, such as chalkboard drawings, graphs, calculations, or listings of data taken from the testimony of witnesses or documents in evidence, which are intended to summarize, clarify or simplify testimonial or other evidence that has been admitted in the case, but which are not themselves admitted, instead being used only as an aid to the presentation and understanding of the evidence. For these the jury should be instructed that the summaries are not evidence and were used only as an illustrative aid.
> (3) Secondary-evidence summaries that are a combination of (1) and (2), in that they are not prepared entirely in compliance with Rule 1006 and yet are more than mere pedagogical devices designed to simplify and clarify other evidence in the case. These secondary-evidence summaries are admitted in evidence not in lieu of the evidence they summarize but in addition thereto, because in the judgment of the trial court such summaries so accurately and reliably summarize complex or difficult evidence that is received in the case as to materially assist the jurors in better understanding the evidence. In the unusual instance in which this third form of secondary evidence summary is admitted, the jury should be instructed that the summary is not independent evidence of

its subject matter, and is only as valid and reliable as the underlying evidence it summarizes.

Id. (citations omitted).

As the Sixth Circuit explained, when summaries are used as (2) pedagogical-device summaries or (3) secondary-evidence summaries, the trial court should give a limiting instruction. Pattern Instruction 7.12 is the limiting instruction designed to cover the type of material described in category (2) as pedagogical-device summaries. This instruction should be given only when the material is not admitted into evidence. If the summary or other material falls into category (3) as secondary-evidence summaries and is admitted into evidence, Pattern Instruction 7.12A should be given. Finally, if the summary or other material falls into category (1) as primary-evidence summaries and is admitted into evidence, no limiting instruction is necessary since Rule 1006 authorizes the admission into evidence of the summary itself. *Bray,* 139 F.3d at 1111-12.

In United States v. Paulino, 935 F.2d 739 (6th Cir. 1991), the court stated that summaries other than those directly admissible under Rule 1006 should generally be accompanied by a limiting instruction, but held that omission of a limiting instruction was not reversible error because the defendants did not request a limiting instruction, the trial judge did give a limiting instruction at the close of the proof, the defendants had a full opportunity to cross-examine the witness on the summaries, and the summaries were not substantially inconsistent with the evidence. *Id.* at 753-54. The Sixth Circuit later relied again on the opportunity to cross-examine, explaining "we have not held a court's failure to issue such [limiting] instructions fatal where the defendants had a full opportunity to cross-examine the witness and thereby 'alleviat[e] any danger or inaccuracy or unfair characterization.'" United States v. Gaitan-Acevedo, 148 F.3d 577, 587-88 (6th Cir. 1998), *quoting Paulino*, 935 F.2d at 753.

7.12A SECONDARY- EVIDENCE SUMMARIES ADMITTED IN EVIDENCE

(1) During the trial you have seen or heard summary evidence in the form of [a chart, drawing, calculation, testimony, or similar material]. This summary was admitted in evidence, in addition to the material it summarizes, because it may assist you in understanding the evidence that has been presented.

(2) But the summary itself is not evidence of the material it summarizes, and is only as valid and reliable as the underlying material it summarizes.

Use Note

Giving Instruction 7.03 Opinion Testimony does not obviate the need for this instruction when summary evidence is admitted.

This instruction should be used when summaries or similar material are admitted into evidence as secondary-evidence summaries

The bracketed items in the first sentence should be tailored to fit the facts of the case.

If the summaries or similar material are admitted as primary-evidence summaries, no instruction is necessary.

If the summaries or other material are not admitted into evidence, see Instruction 7.12.

Committee Commentary 7.12A
(current through December 1, 2009)

This instruction is based on United States v. Bray, 139 F.3d 1104, 1112 (6th Cir. 1998), which is discussed in the Commentary to Instruction 7.12.

In United States v. Vasilakos, 508 F.3d 401, 412 (6th Cir. 2007), the court held that omission of a limiting instruction on the summary testimony of an IRS agent was plain error. This holding is reflected in the words in paragraph (1) that refer to hearing summary evidence in the form of testimony.

7.13 OTHER ACTS OF DEFENDANT

(1) You have heard testimony that the defendant committed [crimes, acts, wrongs] other than the ones charged in the indictment. If you find the defendant did those [crimes, acts, wrongs], you can consider the evidence only as it relates to the government's claim on the defendant's [intent] [motive] [opportunity] [preparation] [plan] [knowledge] [identity] [absence of mistake] [absence of accident]. You must not consider it for any other purpose.

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

Use Note

This instruction should be used when evidence of other acts has been admitted for an appropriate purpose under Fed.R.Evid. 404(b). In identifying the purposes for which the evidence may be used, the instruction should name only the purpose or purposes actually in issue. The instruction facilitates this by bracketing each of the purposes separately.

This instruction should be given when the evidence is introduced and at the end of the case as well.

Committee Commentary 7.13
(current through December 1, 2009)

Once evidence of other crimes, acts or wrongs has been admitted under Rule 404(b), the trial court should give a cautionary instruction identifying the specific, limited purpose for which the evidence was admitted. The district court "must 'clearly, simply, and correctly' instruct the jury as to the specific purpose for which they may consider the evidence." United States v. Merriweather, 78 F.3d 1070, 1077 (6th Cir. 1996) (*quoting* United States v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994)). In the limiting instruction, the court should be careful to identify only purposes for using the other acts evidence that are actually in issue. In *Merriweather*, the Sixth Circuit reversed a conviction because the limiting instructions allowed the jury to consider the other acts evidence for seven of the nine purposes listed in Rule 404(b) when only two purposes were arguably presented on the facts. 78 F.3d at 1077. Similarly, in United States v. Ward, 190 F.3d 483 (6th Cir. 1999), the court held the limiting instruction to be error because it recited the list of all the purposes for which other acts evidence was admissible as set out in Rule 404(b). The Sixth Circuit cautioned district courts as follows:

> Rule 404(b) evidence, even when properly admitted, under a properly limiting instruction, asks jurors to engage in mental gymnastics that may well be beyond their ability or even their willingness. Such evidence has great potential for unfair prejudice, and ordinarily it is only the trial court's carefully and clearly articulated limiting instruction as to the specific purpose for which the evidence may be considered by the jurors, that avoids substantial unfairness to the accused. Here, the court's instruction was certainly error, but [not plain error]. We do, however, caution district courts, when

> admitting rule 404(b) evidence, to instruct the jury that the "other act" evidence may be considered only with respect to the specific factor named in the rule–usually only one–which is in issue in the case.

Id. at 489-90. *See also* United States v. Davis, 547 F.3d 520, 526-27 (6th Cir. 2008) (limiting instruction erroneous for listing purposes not in issue; error not harmless); United States v. Bell, 516 F.3d 432, 446-47 (6th Cir. 2008) (limiting instruction erroneous for listing purposes not in issue and for listing prior convictions not probative of intent; error not harmless); United States v. Fraser, 448 F.3d 833, 842 (6th Cir. 2006) (limiting instruction erroneous for listing three purposes not in issue but error did not affect defendant's substantial rights); United States v. Everett, 270 F.3d 986, 992 (6th Cir. 2001) (limiting instructions erroneous but error harmless); United States v. Spikes, 158 F.3d 913, 929-30 (6th Cir. 1998) (same).

The instruction responds to these concerns by listing the appropriate purposes for which the evidence may be admitted under Rule 404(b) rather than just leaving a blank for the district court to fill in. Rule 404(b) states that the evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." Each purpose is separately bracketed so district courts can readily identify the appropriate purpose or purposes involved and include only those actually raised in the case. Rule 404(b) is reprinted in full below.

District courts are urged to instruct the jury on the specific use or uses for the evidence that are actually implicated in the case even if defense attorneys do not object to an instruction listing purposes not implicated in the case. In United States v. Davis, 547 F.3d 520 (6th Cir. 2008), the defendant objected to the admission of the Rule 404(b) evidence but did not separately object to the limiting instruction. The court held it was not limited to plain error review of the instruction because the defendant had already objected to admission of the evidence for the purposes identified in the limiting instruction. The *Davis* court distinguished United States v. Fraser, 448 F.3d 833 (6th Cir. 2006), in which the court reversed for plain error because no such objection to admission of the evidence had been made. The *Davis* court stated, "It is proper for us to look at the limiting instruction when we review the admission of such evidence." *Davis, supra* at 526. *See also* United States v. Newsom, 452 F.3d 593, 607 (6th Cir. 2006) (*citing* United States v. Johnson, 27 F.3d 1196, 1194 (6th Cir. 1994) and commenting on "the tension between existing Sixth Circuit opinions regarding Rule 404(b) jury instructions"); United States v. Yopp, 577 F.2d 362 (6th Cir. 1978) (stating that if no limiting instruction is requested by the defendant, the failure to give an instruction will not necessarily result in reversible error but noting that it would have been better practice for the court to give the instruction sua sponte).

The Use Note indicates that the instruction should be given when the evidence is admitted as well as at the close of the case. However, a delayed instruction alone has been held not to be reversible error. *See* United States v. Fraser, *supra* at 843 n.4 (6th Cir. 2006) ("A delayed limiting instruction is no basis for reversal.") (*citing* United States v. Miller, 115 F.3d 361, 366 (6th Cir. 1997)); United States v. Cook, 2008 WL 3983925 at 9, 2008 U.S. App. LEXIS 18788 at 25 (6th Cir. 2008) (unpublished) (mentioning with approval that the court gave limiting instructions twice).

Federal Rule of Evidence 404(b) states:

> (b) Other crimes, wrongs, or acts. 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The threshold inquiry the trial court must make before admitting evidence under Rule 404(b) is whether such evidence is "probative of a material issue other than character." Huddleston v. United States, 485 U.S. 681, 686 (1988). In so doing, the court necessarily assesses whether the evidence is relevant and, if so, whether the probative value is substantially outweighed by its potential for unfair prejudice under Fed. R. Evid. 403.

7.14 FLIGHT, CONCEALMENT OF EVIDENCE, FALSE EXCULPATORY STATEMENTS

(1) You have heard testimony that after the crime was supposed to have been committed, the defendant _____.

(2) If you believe that the defendant _____, 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 committed the crime charged. This conduct may indicate that he thought he was guilty and was trying to avoid punishment. On the other hand, sometimes an innocent person may _____ for some other reason.

Use Note

The language in paragraphs (1) and (2) should be tailored to the specific kinds of evidence in the particular case.

Committee Commentary 7.14

(current through December 1, 2009)

The Sixth Circuit recognizes defendants' flight, concealment of evidence and implausible stories as evidence which allows an inference of guilty knowledge. *See* United States v. Jackson, 55 F.3d 1219, 1226 (6th Cir. 1995).

Flight has been deemed relevant to show guilt through consciousness of guilt. United States v. Touchstone, 726 F.2d 1116, 1119 (6th Cir. 1984); United States v. Rowan, 518 F.2d 685, 691 (6th Cir. 1975). The relevance of such evidence depends on a series of inferences. For example, the relevance of evidence of flight depends on being able to draw three inferences: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; and (3) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

In United States v. Carter, 236 F.3d 777 (6th Cir. 2001), the trial court gave an instruction on flight substantially similar to Pattern Instruction 7.14. The Sixth Circuit concluded that giving the instruction was not an abuse of discretion and did not unconstitutionally require the defendant to testify or explain prior incidents of flight. The instruction did not appear to suggest guilt on the defendant's part, but rather stated that "evidence of flight *may or may not* indicate a defendant's guilty conscience or intent to avoid punishment." *Id*. at 792 n.11 (italics in original), *citing* Illinois v. Wardlow, 528 U.S. 119, 123-27 (2000). *See also* United States v. Swain, 2007 U.S. App. LEXIS 16825 at 7-9, 2007 WL 2031447 (6th Cir. 2007) (unpublished) (giving Instruction 7.14 on flight was not error because adequate evidence existed; Instruction 7.14 accurately reflects the law, *citing* United States v. Carter, *supra* and United States v. Diakite, 5 Fed. Appx. 365, 370-71 (6th Cir. 2001) (unpublished)).

The Sixth Circuit has held that evidence of flight is admissible even though the flight was not immediately after the commission of the crime or after the defendant is accused of the crime.

Touchstone, supra at 1119-20. In that case the court explicitly approved the following instruction:

> The intentional flight or concealment of a defendant is not of course 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 evidence in the case, in determining guilt or innocence.

Id. at 1118 and 1120 n.6.

In Illinois v. Wardlow, *supra*, the Supreme Court recognized flight as a factor the police could use in determining whether they had reasonable suspicion to justify a stop under the Fourth Amendment. The Court stated, "Headlong flight–wherever it occurs–is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Wardlow, supra* at 124.

The Sixth Circuit has approved implausible stories as evidence allowing an inference of guilt in several cases. *See Jackson, supra, quoting* United States v. Diaz-Carreon, 915 F.2d 951, 955 (5th Cir. 1990) *and citing* United States v. Mari, 47 F.3d 782, 785 & n.2 (6th Cir. 1995) and United States v. Chu, 988 F.2d 981, 984 (9th Cir. 1993).

False exculpatory statements are also recognized as evidence from which the jury may infer consciousness of guilt. Stanley v. United States, 245 F.2d 427 (6th Cir. 1957). *See, e.g.,* United States v. Tedesco, 1996 WL 690152 at 2, 1996 U.S. App. LEXIS 31285 at 7 (6th Cir. 1996) (unpublished). *Cf.* United States v. McDougald, 990 F.2d 259, 262-63 (6th Cir. 1993) (describing defendant's false exculpatory statements as "of little value" in establishing guilty knowledge at relevant time because statements were made eight months after the crime when he was questioned by police; conviction reversed for insufficient evidence).

Spoliation of evidence is admissible to show consciousness of guilt. The fact that a defendant attempts to fabricate or conceal evidence indicates a consciousness that his case is weak and from that the defendant's guilt may be inferred. United States v. Mendez-Ortiz, 810 F.2d 76, 79 (6th Cir. 1986); United States v. Franks, 511 F.2d 25, 36 (6th Cir. 1975). It has been held to be reversible error for the court to instruct that such evidence might be considered evidence of guilt rather than evidence of "consciousness of guilt." As with all consciousness of guilt evidence, there is some dispute as to its admissibility.

The Federal Judicial Center includes a general instruction on "Defendant's Incriminating Actions After the Crime." See Federal Judicial Center Instruction 43. But the Committee Commentary recommends that it should not be given in most cases, and that generally these matters should be left to argument by counsel.

Based on Sixth Circuit authority, the Committee recommends one generic instruction for all consciousness of guilt situations which can be modified as circumstances dictate.

7.15 SILENCE IN THE FACE OF ACCUSATION

(No Instruction Recommended)

Committee Commentary 7.15
(current through December 1, 2009)

The Committee withdrew this instruction in view of Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000) (use of prearrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination). However, evidence of the defendant's prearrest, pre-*Miranda* silence is still admissible to impeach the defendant if he testifies at trial. *See* Fletcher v. Weir, 445 U.S. 603, 607 (1982); Jenkins v. Anderson, 447 U.S. 231, 238-39 (1980); Combs v. Coyle, 205 F.3d at 280.

7.16 POSSESSION OF RECENTLY STOLEN PROPERTY

(1) You have heard testimony that the defendant had possession of some property that was recently stolen.

(2) If you believe that the defendant had possession of this property, you may consider this, along with all the other evidence, in deciding whether the defendant knew that the property was stolen [or stole the property]. But the longer the period of time between the theft and his possession, the less weight you should give this evidence.

(3) You do not have to draw any conclusion from the defendant's possession of the property. You may still have a reasonable doubt based on all the other evidence. Remember that the burden is always on the government to prove beyond a reasonable doubt that the defendant committed the crime charged.

Use Note

The bracketed language in paragraph (2) should be used when the government is attempting to prove in the alternative that the defendant either possessed the property knowing that it was stolen, or stole the property.

Committee Commentary 7.16

(current through December 1, 2009)

In Barnes v. United States, 412 U.S. 837, 843 (1973), the Supreme Court noted that "For centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods." The inference is only possible where the accused is found in exclusive possession of property recently stolen and the possession is not otherwise explained. Pendergrast v. United States, 416 F.2d 776 (D.C. Cir. 1969).

How far the inference may be taken is somewhat in question. In *Barnes*, the prosecution was for the possession of checks, and the inference only extended to the knowledge of the defendant that they were stolen. However, some courts have extended the inference, when combined with the other evidence in the case, from possession of stolen goods to the theft itself. United States v. Carter, 522 F.2d 666, 679 (D.C. Cir. 1975); United States v. Johnson, 433 F.2d 1160 (D.C. Cir. 1970).

In United States v. Jennewein, 580 F.2d 915 (6th Cir.1978), the Sixth Circuit initially reversed an interstate theft conviction because the district court had given an instruction that authorized the jury to infer that the defendant had participated in the theft based on his possession of recently stolen property. The panel said that "Neither Barnes nor any other authority cited or discovered justifies the additional inference that would permit the finder of fact to conclude that the possessor of stolen property by virtue of such possession may be deemed to have participated in its theft." But on rehearing, the Sixth Circuit vacated its initial decision and upheld the district court's instruction, stating that the instruction "did not misstate the law." *Jennewein, supra* at 192.

The instruction approved and reprinted by the D.C. Circuit in *Pendergrast, supra* at 790, clearly extends the inference to the theft or robbery itself:

> In weighing the evidence adduced at this trial, you may consider the circumstance, if you find that it is established beyond a reasonable doubt, that the defendant had the exclusive possession of property specified in the (_____ count of the) indictment, recently after that property was stolen in the robbery alleged therein. You are not required to draw any conclusion from that circumstance, but you are permitted to infer, from the defendant's unexplained or unsatisfactorily explained possession of the recently stolen property, that the defendant is guilty of the offense, if in your judgment such an inference is warranted by the evidence as a whole.
>
> The defendant's possession of the recently stolen property does not shift the burden of proof. The burden is always upon the Government to prove beyond a reasonable doubt every essential element of an offense before the defendant may be found guilty of that offense. Before you may draw any inference from the defendant's unexplained or unsatisfactorily explained possession of property stolen in the robbery charged in the (_____ count of the) indictment, you must first find that the Government has proved beyond a reasonable doubt every essential element of that offense, and as to those elements I have already instructed you. If you should find that the Government has proved beyond a reasonable doubt every essential element of that offense, the defendant's unexplained or unsatisfactorily explained possession of the recently stolen property is a circumstance from which you may find, by the process of inference, that the defendant was the person (one of the persons) who stole it. In short, if the Government has proved beyond a reasonable doubt every essential element of the offense of robbery charged in this case, then, but only then, the defendant's unexplained or unsatisfactorily explained possession of property stolen in that robbery permits you to infer that the defendant was the robber (one of the robbers).
>
> The word "recently," as used in these instructions, is a relative term, and it has no fixed meaning. Whether property may be considered as recently stolen depends upon all the facts and circumstances shown by the evidence. The longer the period of time since the theft of the property, the more doubtful becomes the inference which may reasonably be drawn from its unexplained or unsatisfactorily explained possession.
>
> In considering whether the defendant's possession of the recently stolen property has been satisfactorily explained, you must bear in mind that the defendant is not required to (take the witness stand or) furnish an explanation. His possession may be satisfactorily explained by other circumstances shown by the evidence independently of any testimony by the defendant himself. And even though the defendant's possession of the recently stolen property is unexplained or is not satisfactorily explained, you cannot draw the inference under consideration if on the evidence as a whole you have a reasonable doubt as to his guilt.
>
> It is exclusively within your province to determine (a) whether property specified in the (_____ count of the) indictment was stolen in the robbery alleged and, if so, (b) whether while recently stolen it was in the exclusive possession of the defendant and, if so, (c) whether the possession of the property has been satisfactorily explained, and (d) whether the evidence as a whole warrants any such inference.
>
> If you should find that the Government has proved beyond a reasonable doubt

every essential element of the offense of robbery charged in the (_____ count of the) indictment, and that property specified in the (_____ count of the) indictment was stolen as alleged, and that, while recently stolen, it was in the exclusive possession of the defendant, you may draw, but you are not required to draw, from these circumstances the inference that the defendant is guilty of the offense of robbery charged in the (_____ count of the) indictment, unless his possession of the property is satisfactorily explained by other circumstances shown by the evidence, or unless on the evidence as a whole you have a reasonable doubt as to his guilt.

If you should find that the Government has failed to prove beyond a reasonable doubt every essential element of the offense of robbery charged in the (_____ count of the) indictment; or if you should find that the Government has failed to prove beyond a reasonable doubt that property specified in the (_____ count of the) indictment was in the exclusive possession of the defendant while recently stolen; or if the defendant's possession of the stolen property is satisfactorily explained by other circumstances shown by the evidence; or if, on the evidence as a whole, you have a reasonable doubt as to the defendant's guilt; then, in any one or more of these events, you must find the defendant not guilty of the offense of robbery charged in the (_____ count of the) indictment.

7.17 TRANSCRIPTIONS OF TAPE RECORDINGS

(1) You have heard some tape recordings that were received in evidence, and you were given some written transcripts of the tapes.

(2) 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 tapes themselves are the evidence. If you noticed any differences between what you heard on the tapes 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 tapes, you must ignore the transcripts as far as those parts are concerned.

Committee Commentary 7.17

(current through December 1, 2009)

Tape recordings are generally admissible unless the incomprehensible portions of the tapes are so substantial as to render the recordings as a whole untrustworthy. United States v. Terry, 729 F.2d 1063, 1068 (6th Cir. 1984). The decision to admit tape recordings into evidence rests with the trial court. United States v. Vinson, 606 F.2d 149 (6th Cir. 1979). Such tapes must be authentic, accurate, trustworthy and sufficiently audible and comprehensible for the jury to consider the contents. *See* United States v. Robinson, 707 F.2d 872, 876 (6th Cir. 1983). *See also* United States v. Elder, 90 F.3d 1110, 1129-30 (6th Cir. 1996); United States v. Scarborough, 43 F.3d 1021, 1024 (6th Cir. 1994); United States v. Segines, 17 F.3d 847, 854 (6th Cir. 1994).

When a recording is admissible, an accurate transcript of the recording may be provided, in the trial court's discretion, for the jury to use while the recording is played, so that the jury may follow the recording more easily. *See Robinson, supra* at 876. But the Sixth Circuit has expressed a clear preference that a transcript not be submitted to the jury unless the parties stipulate to its accuracy. *Id.; see also Vinson, supra* at 155.

In the absence of a stipulation, the transcriber should verify that he or she has listened to the tape and accurately transcribed its content, and the court should make an independent determination of accuracy by comparing the transcript against the tape and directing the deletion of the unreliable portion of the transcript. *Robinson, supra* at 879.

Another option, but the least preferred, is to submit two transcripts to the jury, one from the government and one from the defense. *See* United States v. Martin, 920 F.2d 393, 396 (6th Cir. 1990). But this has been held to be prejudicial error requiring reversal if the tape is significantly inaudible, even if a cautionary instruction is given. *Robinson, supra* at 879.

In *Segines,* the Sixth Circuit elaborated on the procedural alternatives when a transcript is used:

> The preferred method is stipulation to its accuracy by all parties. The next best alternative is for the transcriber to attest to its accuracy and for the court to test that accuracy, outside of the jury's presence, "by reading the transcripts while listening to the

> tapes." (citation omitted.) When tapes are unintelligible, however, a transcript intended as an aid to the jury inevitably becomes, in the minds of the jurors, the evidence itself (citation omitted). As is required whenever a transcript is used and there is no stipulation as to its accuracy, the trial court here gave a cautionary instruction to the jury regarding the limited use to be made of the transcript. Such an instruction does not suffice, however, to erase the prejudice created by "shepherding hearsay to the jury via the transcripts . . . ."

Segines, supra at 854.

One point made clear in *Segines* is that cautionary instructions on the limited role of the transcript alone are not sufficient to justify its use. The *Segines* court concluded that use of transcripts was error, despite repeated use of a cautionary instruction on the limited role of the transcript, because the judge found much of the tape unintelligible. The Sixth Circuit stated that at retrial, a transcript should not be given to the jury. *Id.* at 855.

See also Scarborough, supra at 1024-25 (no error to use government's transcript where district court reviewed it and found it accurate and gave limiting instruction); United States v. Wilkinson, 53 F.3d 757 (6th Cir. 1995) (any potential prejudice from use of government's transcript was remedied, *inter alia*, by a cautionary jury instruction), *citing* United States v. Hughes, 895 F.2d 1135, 1147 (6th Cir. 1990). In United States v. Elder, 90 F.3d 1110, 1129-30 (6th Cir. 1996), the Sixth Circuit held that it was not error to allow transcripts as an aid to the jury when the trial judge followed the *Robinson* guidelines to review the tapes and gave a limiting instruction substantially the same as Pattern Instruction 7.17.

On whether transcripts can be used by the jury during deliberations, the Sixth Circuit has allowed such use. *See Scarborough, supra* at 1024-25 (transcripts can be used in deliberations, even if transcripts not admitted into evidence, as long as court instructs that the tapes and not the transcripts are evidence) (*citing* United States v. Puerta Restrepo, 814 F.2d 1236, 1242 (7th Cir. 1987)). While the Committee takes no position on whether transcripts should go to the jury room, if they do, the court should instruct the jury again that the tapes are the evidence rather than the transcripts.

7.18 SEPARATE CONSIDERATION--EVIDENCE ADMITTED AGAINST CERTAIN DEFENDANTS ONLY

(1) You have heard testimony from _____ that _____.

(2) You can only consider this testimony against _____ in deciding whether the government has proved him guilty. You cannot consider it in any way against any of the other defendants.

Committee Commentary 7.18
(current through December 1, 2009)

This instruction is designed to supplement any mid-trial instructions given when evidence admissible against only one defendant is introduced. See Fed. R. Evid. 105 and United States v. Gallo, 763 F.2d 1504, 1528 (6th Cir. 1985) for when such an instruction must be given.

Recent cases indicate that limiting instructions such as Instruction 7.18 can cure a risk of prejudice when there are multiple defendants. In Zafiro v. United States, 506 U.S. 534 (1993), the Supreme Court held that mutually antagonistic defenses alone do not mandate separate trials; there must be some risk of prejudice. Even when the risk of prejudice is high, the Court explained, severance may not be necessary because "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Id*. at 539. In *Zafiro*, the Court found the risk of prejudice was cured by proper instructions, including an instruction that told the jury to "give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his or her case determined from his or her own conduct and from the evidence [that] may be applicable to him or to her." *Id*. at 541.

The Sixth Circuit relied on *Zafiro* in United States v. Pierce, 62 F.3d 818 (6th Cir. 1995) to find no error in a joint trial because the risk of prejudice was cured by several cautionary instructions, including one stating "[y]ou must decide, for each defendant, whether the United States has presented proof beyond a reasonable doubt that the particular defendant is guilty of a particular charge." *Id*. at 830-31.

This issue is also covered by Pattern Instruction 2.01B, Separate Consideration – Multiple Defendants Charged with a Single Crime.

7.19 JUDICIAL NOTICE

I have decided to accept as proved the fact that _____, even though no evidence was presented on this point. You may accept this fact as true, but you are not required to do so.

Committee Commentary 7.19
(current through December 1, 2009)

This instruction is based on Fed. R. Evid. 201(g). It should be given whenever the court has taken judicial notice of a fact.

This instruction applies only to adjudicative facts and must not be used in connection with a court's determination of law. In United States v. Dedman, 527 F.3d 577, 587-88 (6th Cir. 2008), the court held that giving Instruction 7.19 was error when the district court gave it in connection with announcing applicable state law because the last sentence of the instruction empowered the jury to disregard that law. The court quoted the official commentary to Instruction 7.19 to the effect that the instruction should be given only when the court takes judicial notice of facts and further counseled, "Accordingly, judges should take care to limit judicial notice and use of criminal Pattern Jury Instruction 7.19 to matters of fact." *Id.* at 588.

Chapter 8.00

DELIBERATIONS AND VERDICT

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8.01 INTRODUCTION

(1) That concludes the part of my instructions explaining the rules for considering some of the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room, and your possible verdicts.

(2) The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions, and will speak for you here in court.

(3) Once you start deliberating, do not talk to the jury officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and then give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson.

[(4) If you want to see any of the exhibits that were admitted in evidence, you may send me a message, and those exhibits will be provided to you.]

(5) One more thing about messages. Do not ever write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that you are split 6-6, or 8-4, or whatever your vote happens to be. That should stay secret until you are finished.

Use Note

Bracketed paragraph (4) should be included if the exhibits are not being submitted to the jury except upon request.

Committee Commentary 8.01

(current through December 1, 2009)

This instruction covers some miscellaneous concepts such as selection of a foreperson, communications with the court and not disclosing numerical divisions that are commonly included in instructions on the jury's deliberations.

In some districts all exhibits are routinely submitted to the jury when deliberations begin. In other districts exhibits are not provided unless the jury asks for them. Bracketed paragraph (4) should be used when the exhibits are not provided unless the jury makes a request.

8.02 EXPERIMENTS, RESEARCH AND INVESTIGATION

(1) Remember that you must make your decision based only on the evidence that you saw and heard here in court. Do not try to gather any information about the case on your own while you are deliberating.

(2) For example, do not conduct any experiments inside or outside the jury room; do not bring any books, like a dictionary, or anything else with you to help you with your deliberations; do not conduct any independent research, reading or investigation about the case; and do not visit any of the places that were mentioned during the trial.

(3) Make your decision based only on the evidence that you saw and heard here in court.

Committee Commentary 8.02

(current through December 1, 2009)

The purpose of this instruction is to caution the jurors that they must not attempt to gather any information about the case on their own during their deliberations. It is based on language commonly included in the court's preliminary instructions to the jury.

8.03 UNANIMOUS VERDICT

(1) Your verdict, whether it is guilty or not guilty, must be unanimous.

(2) To find the defendant guilty, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves his guilt beyond a reasonable doubt.

(3) To find him not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt.

(4) Either way, guilty or not guilty, your verdict must be unanimous.

Committee Commentary 8.03
(current through December 1, 2009)

Fed. R. Crim. P. 31(a) mandates that jury verdicts in federal criminal trials "shall be unanimous." This also appears to be constitutionally required. *See* Johnson v. Louisiana, 406 U.S. 356, 366-403 (1972) (five justices indicating in dicta that the Sixth Amendment requires unanimous verdicts in federal criminal trials).

Given the importance of the reasonable doubt requirement, the Committee believes that the jurors should be specifically instructed on the relationship between proof beyond a reasonable doubt and the unanimity requirement. As characterized by the Supreme Court in In re Winship, 397 U.S. 358, 363-64 (1970), the reasonable doubt standard plays a "vital" role in our criminal justice system. It is a "prime instrument" for reducing the risk of an erroneous conviction. And it performs the "indispensable" function of "impress[ing] . . . the trier of fact [with] the necessity of reaching a subjective state of certitude [on] the facts in issue."

On the question of whether a specific unanimity instruction is required, the Sixth Circuit relies on United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988), which is discussed in the Committee Commentary to Instruction 8.03A. "A specific unanimity instruction is ordinarily unnecessary unless: '1) a count is extremely complex, 2) there is a variance between the indictment and the proof at trial, or 3) there is tangible risk of jury confusion.' " United States v. Kimes, 246 F.3d 800, 810 (6th Cir. 2001), *quoting* United States v. Sanderson, 966 F.2d 184, 187 (6th Cir. 1992) *and citing* United States v. Duncan, *supra* at 1114.

In *Sanderson, supra*, the question involved a conviction under 18 U.S.C. § 666 for theft. The district court did not give a specific unanimity instruction. The Sixth Circuit, after recounting the three *Duncan* factors, stated, "Simply put, we interpret Schad to hold that there must be a common-sense determination of a subject statute's application and purpose in light of traditional notions of due process and fundamental fairness." *Sanderson,* 966 F.2d at 188 (citing Schad v. Arizona, 501 U.S. 624 (1991) (plurality decision)). The court looked to the intent of the statute and its legislative history, and concluded that under a plain error standard, failure to give a specific unanimity instruction in the § 666 conviction did not offend fundamental fairness. *Sanderson, supra* at 188-89.

In United States v. Kimes, *supra*, the court applied the three-factor test set out in *Duncan* and *Sanderson* and concluded that failure to give a specific unanimity instruction was not error when the defendant was charged under 18 U.S.C. § 111(a)(1)(harming or threatening a federal official) and the government presented evidence that the defendant violated this provision by using all six methods listed in the statute.

8.03A UNANIMITY OF THEORY

(No Instruction Recommended)

Committee Commentary 8.03A
(current through December 1, 2009)

The Committee withdrew this instruction in view of Richardson v. United States, 526 U.S. 813 (1999) and Schad v. Arizona, 501 U.S. 624 (1991).

Fed.R.Crim.P. 7(c) permits the government to allege in one count of an indictment that "the defendant committed (the offense) by one or more specified means." In Schad v. Arizona, 501 U.S. 624 (1991) (plurality opinion), the Supreme Court rejected the approach of requiring unanimity when the means used to commit an offense simply satisfy an element of a crime and do not themselves constitute a separate offense or an element of an offense. In these circumstances, unanimity is not required. *Id*. at 630-33. On the other hand, if the means used to commit an offense are deemed an element of the crime, unanimity is required.

Schad was followed by Richardson v. United States, in which the Court again distinguished the elements of a crime from the means used to commit the elements of the crime. *Richardson, supra* at 817, *citing Schad, supra* at 631-32. If a fact is an element, "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved [it]." *Id.* (citations omitted). On the other hand, if the fact is defined as a means of committing the crime, "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Richardson,* 526 U.S. at 817, *citing* Schad v. Arizona, *supra*.

Accordingly, the Committee withdrew Instruction 8.03A Unanimity of Theory. In its place is Instruction 8.03B Unanimity Not Required – Means. This instruction covers cases where unanimity is not required because it is alleged the defendant used several possible means to commit a single element of the crime as described in *Schad* and *Richardson*. Instruction 8.03B is discussed in detail in its commentary.

8.03B UNANIMITY NOT REQUIRED – MEANS

(1) One more point about the requirement that your verdict must be unanimous. Count ___ of the indictment accuses the defendant of committing the crime of _____ in more than one possible way. The first is that he _____. The second is that he _____.

(2) The government does not have to prove all of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of any one of these ways is enough. In order to return a guilty verdict, all twelve of you must agree that at least one of these has been proved; however, all of you need not agree that the same one has been proved.

Use Note

This instruction should be used if the indictment alleges that the defendant committed a single element of an offense in more than one way.

Committee Commentary 8.03B
(current through December 1, 2009)

In Schad v. Arizona, 501 U.S. 624 (1991) (plurality opinion), the Supreme Court rejected the approach of requiring jury unanimity when the means used to commit an offense simply satisfy an element of a crime and do not themselves constitute a separate offense or an element of an offense. In these circumstances, unanimity is not required. *Id*. at 630-33.

Schad was followed by Richardson v. United States, in which the Court again distinguished the elements of a crime from the means used to commit the elements of the crime. Richardson v. United States, 526 U.S. 813, 817 (1999), *citing* Schad v. Arizona, *supra* at 631-32 (1991) (plurality opinion). If a fact is an element, "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved [it]." *Richardson*, 526 U.S. at 817, *citing* Johnson v. Louisiana, 406 U.S. 356, 369-71 (1972) (Powell, J., concurring); Andres v. United States, 333 U.S. 740, 748 (1948); and Fed. R.Crim. Pro. 31(a). On the other hand, if the fact is defined as a means of committing the crime, "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Richardson*, 526 U.S. at 817, *citing* Schad v. Arizona, *supra* and Andersen v. United States, 170 U.S. 481, 499-501 (1898).

This instruction covers situations where the crime charged includes an element that can be committed by multiple means, so jury unanimity on a particular means is not required. The use note indicates that the instruction should only be given if the indictment alleges that the defendant committed a single element through more than one means.

The question of whether the language in a particular statute states multiple elements or

merely a single element which can be accomplished by multiple means is resolved by analyzing the offense in question. In *Richardson*, the question was whether the "series of violations" language in the Continuing Criminal Enterprise statute, 21 U.S.C. § 848, required the jury to agree unanimously on the exact violations involved or only to agree that there had been a series of them. The Court analyzed the statute and concluded that each individual violation was an element, so the jury had to agree unanimously on each violation rather than merely agreeing that there had been a series of violations. 526 U.S. at 824.

Aside from § 848, other statutes which have been analyzed on this point include:

– 18 U.S.C. § 2 (terms listed in § 2 describe various means by which the elements of the crime can be accomplished, and do not require jury unanimity as to each of these terms, United States v. Davis, 306 F.3d 398, 414 (6th Cir. 2002));

–18 U.S.C. § 111 (harming or threatening a federal officer under § 111(a)(1) states a singular crime which can be committed six ways, United States v. Kimes, 246 F.3d 800, 809 (6th Cir. 2001));

– 18 U.S.C. § 666 (theft of government services under § 666 exemplifies an offense which can be committed by a variety of acts, United States v. Sanderson, 966 F.2d 184, 188-89 (6th Cir. 1992));

– 18 U.S.C. § 922(g)(1) (when the indictment charges a felon possessed more than one firearm, the particular firearm is not an element, but "instead the means used to satisfy the element of 'any firearm'," United States v. DeJohn, 368 F.3d 533, 542 (6th Cir. 2004));

– 18 U.S.C. § 1001 (duty to disclose and concealment of material information as alternative ways to prove violation of single offense, United States v. Zalman, 870 F.2d 1047, 1055 n.10 (6th Cir. 1989)). *See also* United States v. Hixon, 987 F.2d 1281, 1265 (6th Cir. 1993) (three subsections are separate means of committing single offense).

Cf. 18 U.S.C. § 1425 ("Rather than defining two crimes, [subsections (a) and (b)] provide two means by which unlawful naturalization can be obtained." United States v. Damrah, 412 F.3d 618, 622 (6th Cir. 2005) (analyzing the issue in the context of a duplicity claim)) and 18 U.S.C. § 242 ("[T]he Fourteenth Amendment and Eighth Amendment excessive force standards describe two alternative methods by which one crime could be committed, rather than two crimes." U.S. v. Budd, 496 F.3d 517 (6th Cir. 2007) (analyzing the issue in the context of a constructive amendment claim)).

8.03C – UNANIMITY REQUIRED: STATUTORY MAXIMUM PENALTY INCREASED (CONTROLLED SUBSTANCES: 21 U.S.C. § 841)

(1) The defendant is charged in Count ___ of the indictment with _____. If you find the defendant guilty of this charge, you will then be asked to determine the quantity of the controlled substance involved in the offense. You will be provided with a special verdict form for this purpose.

(2) If you find by unanimous agreement that the government has proved beyond a reasonable doubt that the offense involved a quantity of at least ____ of a mixture or substance containing a detectable amount of _____, then please indicate this finding in the special verdict form.

[(3) If you do not so find, you will then be asked to determine whether the government has proved a lesser quantity. If you unanimously find that the government has proved beyond a reasonable doubt that the offense involved a quantity of at least ____ of a mixture or substance containing a detectable amount of _____, then please indicate this finding in the special verdict form.]

(4) In determining the quantity of the controlled substance involved in the offense, you need not find that the defendant knew the quantity involved in the offense.

Use Note

This is an example of a jury instruction which satisfies the requirements of Apprendi v. New Jersey, 530 U.S. 466 (2000) in a drug case. In these cases, it is recommended that the court use a special verdict form.

Depending upon the nature and quantity of the controlled substance alleged in the indictment, bracketed paragraph (3) may not be necessary to determine the quantity for sentencing purposes.

Thus, for example, if the indictment alleges a quantity of 50 grams or more of crack cocaine (cocaine base), then this instruction is intended to elicit, first, whether an amount of 50 grams or more has been proved by the government. Such a finding would invoke a statutory maximum sentence of life imprisonment (and a mandatory minimum sentence of 10 years imprisonment) under 21 U.S.C. § 841(b)(1)(A)(iii) (assuming that the defendant has no prior felony drug convictions, which would further enhance his sentence). If the jury does not find this quantity, it must then determine whether the amount met or exceeded a lesser threshold, in this case 5 grams of cocaine base. Such a finding would invoke a statutory maximum sentence of 40 years imprisonment (and a mandatory minimum sentence of 5 years imprisonment) under 21 U.S.C. § 841(b)(1)(B)(iii). If the jury finds that neither of these threshold quantities has been proved, then the base statutory maximum sentence of 20 years imprisonment would apply under 21 U.S.C. § 841(b)(1)(C).

Committee Commentary 8.03C
(current through December 1, 2009)

Instruction 8.03C, Unanimity Required – Statutory Maximum Penalty Increased (Controlled Substances, 21 U.S.C. § 841), is designed to cover prosecutions where unanimity is required because the amount of the controlled substance increases the statutory maximum penalty as described in Apprendi v. New Jersey, 530 U.S. 466 (2000).

Aside from the requirement that the jury must unanimously agree on all facts deemed to be elements of the offense, *see* Richardson v. United States, 526 U.S. 813, 817 (1999), the jury must also unanimously agree on any fact (other than a prior conviction) that increases the penalty for the crime beyond the prescribed statutory maximum. Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000); and Jones v. United States, 526 U.S. 227 (1999), discussed in Commentary to Instruction 2.02 Definition of the Crime. Instruction 8.03C provides a framework for application of the *Apprendi* unanimity requirements in the context of a particular crime, 21 U.S.C. § 841. Under § 841, the quantity of a controlled substance can increase the penalty beyond the prescribed statutory maximum and so require that the jury agree unanimously on the quantity involved in the offense. Because *Apprendi* issues arise most frequently in controlled substances cases, the Committee drafted an instruction for prosecutions under § 841 that can be adapted for use in other cases.

8.04 DUTY TO DELIBERATE

(1) Now that all the evidence is in and the arguments are completed, 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. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.

(2) 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.

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

(4) 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.

Use Note

This instruction is designed for use before deliberations begin as part of the court's final instructions to the jury.

Committee Commentary 8.04
(current through December 1, 2009)

Case law on a related issue, the *Allen* charge, is discussed in the Commentary to Instruction 9.04.

This instruction is for use before deliberations begin as part of the court's final instructions to the jury. Its content is heavily dependent on cases dealing with post-deliberation *Allen* charges. In United States v. Sawyers, 902 F.2d 1217, 1220-21 (6th Cir.1990), the Sixth Circuit said that an *Allen* charge "probably would have its least coercive effect if given along with the rest of the instructions before the jury ever start(s) deliberating."

In Allen v. United States, 164 U.S. 492, 501-502 (1896), the district court gave some lengthy supplemental instructions which, as paraphrased by the Supreme Court in its opinion, included the following concepts:

1) that in a large proportion of cases absolute certainty could not be expected;

2) that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other;

3) that it was their duty to decide the case if they could conscientiously do so;

4) that they should listen, with a disposition to be convinced, to each other's arguments;

5) that, if the much larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one given that it had made no impression upon the minds of so many equally honest and intelligent persons; and

6) that if, on the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

The Supreme Court analyzed these supplemental instructions as follows:

> While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions.

The Supreme Court noted that these instructions were "taken literally" from instructions approved by the Massachusetts Supreme Court in Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1, 2-3 (1851). The *Tuey* instructions included the following additional concepts, not noted by the Supreme Court in its *Allen* opinion:

7) that in order to make a decision more practicable, the law imposes the burden of proof on one party or the other;

8) that in a criminal case the burden of proof is on the government to prove every element of the charge beyond a reasonable doubt; and

9) that if the jurors are left in doubt as to any element, then the defendant is entitled to the benefit of that doubt and must be acquitted.

The records in the *Allen* case indicate that the actual instruction given by the district court only included a shortened version of these additional concepts. In the course of giving the supplemental instructions, the district court in *Allen* included the following from *Tuey*:

"In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the government."

See Records and Briefs, United States Supreme Court, Vol. 829, October Term 1896, Allen v. United States, Docket No. 371, Transcript of Record pp. 137-38. Except for one First Circuit decision, Pugliano v. United States, 348 F.2d 902, 903-04 (1st Cir. 1965), no cases appear to have noticed or discussed this omission from the Supreme Court's opinion in *Allen*.

Despite substantial judicial and scholarly criticism of *Allen* in the years since it was decided, the Supreme Court reaffirmed *Allen*'s constitutional validity in Lowenfield v. Phelps, 484 U.S. 231 (1988). Referring to the *Allen* Court's analysis quoted above, the Court said that "[t]he continuing validity of this Court's observations in Allen are beyond dispute." *Lowenfield,*

supra at 237.

Sixth Circuit decisions have repeatedly emphasized that the instructions approved by the Supreme Court in *Allen* "approach 'the ultimate permissible limits' for a verdict urging instruction." *See, e.g.*, United States v. Harris, 391 F.2d 348, 354 (6th Cir. 1968) (*quoting* Green v. United States, 309 F.2d 852, 855 (5th Cir.1962)). "Our . . . circuit has determined that the wording approved at the turn of the century represents, at best, 'the limits beyond which a trial court should not venture in urging a jury to reach a verdict'." United States v. Scott, 547 F.2d 334, 337 (6th Cir. 1977) (*quoting Harris, supra* at 354). "Any variation upon the precise language approved in Allen imperils the validity of the trial." *Scott, supra* at 337. *Accord* Williams v. Parke, 741 F.2d 847, 850 (6th Cir. 1984); United States v. Giacalone, 588 F.2d 1158, 1166 (6th Cir. 1978); United States v. LaRiche, 549 F.2d 1088, 1092 (6th Cir. 1977).

Among the more important variations that the Sixth Circuit has criticized or disapproved are the following: 1) statements regarding the expense and burden of conducting a trial, United States v. Harris, *supra*, 391 F.2d at 354 ("questionable extension"); 2) statements that the case must be decided at some time by some jury, *id.* at 355 ("coercive . . . [and] misleading"); 3) omitting statements reminding jurors that they should not surrender an honest belief about the outcome of the case simply because other jurors disagree, United States v. Scott, *supra*, 547 F.2d at 337 ("one of the most important parts of the Allen charge"); and 4) statements that juror intransigence would delay the trial of other cases and add to the court's backlog, *Scott, supra* at 337 ("impermissibly coercive").

These and other Sixth Circuit cases provide further guidance regarding the appropriate content of an *Allen* charge. In United States v. Barnhill, 305 F.2d 164, 165 (6th Cir. 1962), the district court's supplemental instructions stressed the importance of reaching a verdict, and the duty of each individual juror to listen to the views expressed by the other jurors and to give those views due weight and consideration in attempting to arrive at a verdict. These statements were balanced with a reminder that each juror had the right to his own beliefs, and that if it developed that they could not agree, a mistrial would be declared and the case would be submitted to another jury. The Sixth Circuit affirmed, stating that these instructions "complied with the standards approved ... in Allen."

In United States v. Markey, 693 F.2d 594, 597 (6th Cir. 1982), the district court concluded its instructions to the jury with the comment that the courthouse would be available the next morning, which was Christmas Eve day, if the jury was not able to reach a consensus that afternoon. The Sixth Circuit affirmed, stating that this comment "was not 'likely to give the jury the impression that it was more important to be quick than to be thoughtful'."

In United States v. Harris, *supra*, 391 F.2d at 355, the Sixth Circuit explained as follows why instructions indicating that the case must be decided at some time by some jury were coercive and misleading:

> The constitutional safeguards of trial by jury (Article III, Section 2, Clause 3, and the Sixth Amendment) have always been held to confer upon every citizen the right ... to remain free from the stigma and penalties of a criminal conviction until he has been

> found guilty by a unanimous verdict of a jury of twelve of his peers. The possibility of disagreement by the jury and the lack of a unanimous verdict is a protection conferred upon a defendant in a criminal case by the Constitution. For the judge to tell a jury that a case must be decided is therefore not only coercive in nature but is misleading in fact. It precludes the right of a defendant to rely on the possibility of disagreement by the jury.

The Sixth Circuit then noted that in Thaggard v. United States, 354 F.2d 735, 739 (5th Cir. 1965), the Fifth Circuit had said that, "[An] *Allen* charge should be approved only so long as it 'avoids creating the impression that there is anything improper, questionable, or contrary to good conscience for a juror to cause a mistrial'."

Harris and subsequent Sixth Circuit cases have said that there is a clear distinction between language stating that the case "must be decided at some time," which is improper, and language stating that the case "must be disposed of at some time," which is not. *Harris, supra* at 356. "The latter phrase merely restates the obvious proposition that all cases must come to an end at some point, whether by verdict or otherwise." United States v. LaRiche, *supra*, 549 F.2d at 1092.

In Williams v. Parke, *supra*, 741 F.2d at 850-52, the Sixth Circuit upheld the defendant's state court conviction against constitutional attack. In rejecting the argument that the state trial court's supplemental instructions violated due process, the Sixth Circuit emphasized that the instructions had not included the criticized language from *Allen* singling out minority jurors. *Id.* at 850. *See also* Lowenfield v. Phelps, *supra*, 484 U.S. at 237-38 (noting same omission in the course of affirming a state court conviction). The Sixth Circuit also emphasized that the trial court's instructions implicitly advised the jurors of their "right to continue disagreeing" by alluding to the possibility that a new jury might be necessary, and by telling them that they should return to court if they could not agree. *Williams, supra* at 850. *See also* Hyde v. United States, 225 U.S. 347, 383 (1912) (district court's instruction that it was not the court's intention to unduly prolong the deliberations, and that if the jurors could not conscientiously agree, they would be discharged, eliminated potential coercive effect of other instructions).

In United States v. LaRiche, *supra*, 549 F.2d at 1092-93, the Sixth Circuit rejected the defendant's argument that the district court's *Allen* charge constituted plain error because it did not remind the jurors of the government's burden of proof. But in doing so the Sixth Circuit did say that "it may be desirable for a judge to restate the beyond a reasonable doubt standard in an Allen charge." *Id.* at 1093. *See also* United States v. Lewis, 651 F.2d 1163, 1165 (6th Cir. 1981) (given the weakness of the evidence against the defendant, and the jury's difficulty in weighing the evidence, it was improper not to reinstruct on the government's burden of proving guilt beyond a reasonable doubt).

In United States v. Giacalone, *supra*, 588 F.2d at 1166-67, the Sixth Circuit noted that in Kawakita v. United States, 343 U.S. 717 (1952), the Supreme Court implicitly approved an *Allen* charge which later became the basis for Devitt and Blackmar Instruction 18.14. That instruction, which is intended for use as a supplemental instruction when the jurors fail to agree, states:

> The Court wishes to suggest a few thoughts which you may desire to consider in your

deliberations, along with the evidence in the case, and all the instructions previously given.

This is an important case. The trial has been expensive in time, and effort, and money, to both the defense and the prosecution. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of some time. There appears no reason to believe that another trial would not be costly to both sides. Nor does there appear any reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before you. Any future jury must be selected in the same manner and from the same source as you have been chosen. So, there appears no reason to believe that the case would ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced on behalf of either side.

Of course these things suggest themselves, upon brief reflection, to all of us who have sat through this trial. The only reason they are mentioned now is because some of them may have escaped your attention, which must have been fully occupied up to this time in reviewing the evidence in the case. They are matters which, along with other and perhaps more obvious ones, remind us how desirable it is that you unanimously agree upon a verdict.

As stated in the instructions given at the time the case was submitted to you for decision, you should not surrender your honest convictions as to the weight or effect of evidence, solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

However, 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 you should do so only after a consideration of the evidence in the case with your fellow jurors. And in the course of your deliberations, you should not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous.

In order to bring twelve minds to an unanimous result, you must examine the questions submitted to you with candor and frankness, and with proper deference to and regard for the opinions of each other. That is to say, in conferring together, each of you should pay due attention and respect to the views of the others, and listen to each other's arguments with a disposition to reexamine your own views.

If much the greater number of you are for a conviction, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one, since it makes no effective impression upon the minds of so many equally honest, equally conscientious fellow jurors, who bear the same responsibility, serve under the same oath, and have heard the same evidence with, we may assume, the same attention and an equal desire to arrive at the truth. On the other hand, if a majority or even a lesser number of you are for acquittal, other jurors ought seriously to ask themselves again, and most thoughtfully, whether they do not have reason to doubt the correctness of a judgment, which is not concurred in by many of their fellow jurors, and whether they should not distrust the weight and sufficiency of evidence, which fails to convince the minds of several of their fellows beyond a reasonable doubt.

You are not partisans. You are judges--judges of the facts. Your sole interest here is to seek the truth from the evidence in the case. You are the exclusive judges of

the credibility of all the witnesses, and of the weight and effect of all the evidence. In the performance of this high duty, you are at liberty to disregard all comments of both court and counsel, including of course the remarks I am now making.

Remember, at all times, that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence. But remember also that, after full deliberation and consideration of all the evidence in the case, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and your conscience. Remember too, if the evidence in the case fails to establish guilt beyond a reasonable doubt, the accused should have your unanimous verdict of "NOT GUILTY".

In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is on the government.

Above all, keep constantly in mind that, unless your final conscientious appraisal of the evidence in the case clearly requires it, the accused should never be exposed to the risk of having to run twice the gauntlet of a criminal prosecution; and to endure a second time the mental, emotional and financial strain of a criminal trial.

You may conduct your deliberations as you choose, but I suggest that you now carefully reexamine and reconsider all the evidence in the case bearing upon the questions before you.

You may be as leisurely in your deliberations as the occasion may require; and you shall take all the time which you may feel is necessary. (The bailiffs have been instructed to take you to your meals at your pleasure, and to take you to your hotel whenever you may be ready to go.)

You may now retire and continue your deliberations, in such manner as shall be determined by your good and conscientious judgment as reasonable men and women.

In United States v. Nickerson, 606 F.2d 156, 158-59 (6th Cir. 1979), the Sixth Circuit concluded that an instruction similar to Devitt and Blackmar Instruction 18.15 was not coercive. *See also* United States v. Lewis, supra, 651 F.2d at 1165 (characterizing Devitt and Blackmar Instruction 18.15 as having been "approved" in *Nickerson*). Instruction 18.15 is a milder and shorter version of the Allen charge. It states:

I am going to ask you that you resume your deliberations in an attempt to return a verdict.

As I have told you, each of you must agree in order to return a verdict. You have the duty to consult with one another and to deliberate with a view to reaching an agreement, if this can be done without violence to individual judgment. Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors. During the course of your deliberations, each of you should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous. No juror, however, should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

The instruction recommended by the Commentary to ABA Standards for Criminal Justice, Trial

by Jury Standard 15-4.4, states:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> 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 with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine 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.
>
> You are not partisans. You are judges--judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Instruction 8.04 incorporates the best parts of these various instructions in plain English form.

The "every reasonable effort" language in paragraph (1) is essentially a plain English restatement of the language in other instructions that the jurors have a duty to deliberate with a view to reaching an agreement if they can do so without violence to individual judgment.

The "keep an open mind" language in paragraph (1) is patterned after the "open mind" language found in other pattern instructions.

The "try your best" language at the end of paragraph (1) summarizes the "every reasonable effort" theme stated in the first sentence for emphasis.

The "do not ever change your mind" language at the beginning of paragraph (2) is a plain English restatement of the "do not surrender" language found in other instructions. The adverb "ever" was included to provide an appropriate balance to the "do not hesitate" language and the other strong language in the first paragraph encouraging jurors to reach agreement.

The "just because other jurors see things differently" language, and the "just to get it over with language," in paragraph (2) is a plain English restatement of language in other instructions. See Federal Judicial Center Instruction 10.

The "your own vote" language in paragraph (2) is a plain English restatement of the language in other instructions that the verdict must represent the considered judgment of each juror. The "only if you can do so honestly and in good conscience" language is drawn from the 1985 version of Ninth Circuit Instruction 7.01.

Paragraph (3) tells the jurors that no one will be allowed to hear their deliberations and that no record will be made of what they say. It is based on concepts included in Federal Judicial Center Instruction 9.

Paragraph (4) summarizes the deliberation process and relates it to the government's burden of proof. This approach is consistent with the concluding sentences recommended by Federal Judicial Center Instruction 10. It rejects the "seek the truth" language found in other instructions for the reasons more fully explained in the Committee Commentary to Instruction 1.02. Such language incorrectly assumes that the "truth" is somewhere in the evidence presented, overlooks the possibility that the proofs do not satisfactorily establish the truth one way or the other, and thereby shifts attention away from the government's obligation to convince the jury beyond a reasonable doubt. *But see* United States v. LaRiche, *supra*, 549 F.2d at 1093 (rejecting the defendant's argument that such language distorts the jury's function and dilutes the government's burden of proof).

8.05 PUNISHMENT

(1) If you decide that the government has proved the defendant guilty, then it will be my job to decide what the appropriate punishment should be.

(2) Deciding what the punishment should be is my job, not yours. It would violate your oaths as jurors to even consider the possible punishment in deciding your verdict.

(3) Your job is to look at the evidence and decide if the government has proved the defendant guilty beyond a reasonable doubt.

Committee Commentary 8.05
(current through December 1, 2009)

It is standard practice to include an instruction telling the jurors that if they find the defendant guilty, it is the judge's job to determine the appropriate punishment, and that they cannot consider what the possible punishment might be in deciding their verdict.

The Sixth Circuit cited this instruction and quoted paragraph (2) in support of its conclusion on an issue involving cross-examination on penalties in United States v. Bilderbeck, 163 F.3d 971, 978 (6th Cir. 1999).

This instruction remains appropriate in cases involving a verdict of not guilty by reason of insanity in the wake of Shannon v. United States, 512 U.S. 573 (1994). That decision is discussed in detail in the Commentary to Pattern Instruction 6.04 on the insanity defense.

8.06 VERDICT FORM

(1) I have prepared a verdict form that you should use to record your verdict. The form reads as follows: _____.

(2) If you decide that the government has proved the charge against the defendant 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 the charge against him beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Your foreperson [Each of you] should then sign the form, put the date on it, and return it to me.

Use Note

The bracketed language in the last sentence of paragraph (2) should be used in place of "Your foreperson" if the court follows the practice of having all jurors sign the verdict form.

Committee Commentary 8.06

(current through December 1, 2009)

Many pattern instructions include an explanation to the jurors about how to use the verdict form, either as part of a general instruction on deliberations or as a separate instruction.

Some judges prefer to have all jurors sign the verdict form. The bracketed language in the last sentence of paragraph (2) should be used in place of "Your foreperson" when this approach is preferred.

In United States v. Escobar-Garcia, 893 F.2d 124, 126 (6th Cir. 1990), in a prosecution for illegal entry to the United States under 8 U.S.C. § 1326, the Sixth Circuit noted that exigent circumstances may arise to justify using special interrogatories to the jury but cautioned against using them in the interest of judicial economy. Subsequent cases have established that special interrogatories are proper to satisfy the Sixth Amendment right to jury trial. *See, e.g.,* Instruction 8.03C Unanimity Required: Statutory Maximum Penalty Increased (Controlled Substances: 21 U.S.C. § 841), which recommends the use of special verdict forms to satisfy the requirements of Apprendi v. New Jersey, 530 U.S. 466 (2000).

8.07 LESSER OFFENSE, ORDER OF DELIBERATIONS, VERDICT FORM

(1) As I explained to you earlier, the charge of _____ includes the lesser charge of _____.

(2) If you find the defendant not guilty of _____ [or if after making every reasonable effort to reach a unanimous verdict on that charge, you find that you cannot agree], then you must go on to consider whether the government has proved the lesser charge of _____.

(3) If you decide that the government has proved this lesser charge beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the verdict form. If you decide that the government has not proved this lesser charge beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Your foreperson [Each of you] should then sign the form, put the date on it and return it to me.

Use Note

The bracketed language in paragraph (2) should be added if the court believes that the jurors should be permitted to consider a lesser offense even though they have not unanimously acquitted the defendant of the charged offense.

The bracketed language in the last sentence of paragraph (3) should be used in place of "Your foreperson" if the court follows the practice of having all jurors sign the verdict form.

Committee Commentary 8.07

(current through December 1, 2009)

This instruction explains the order and manner in which greater and lesser offenses should be considered. Lesser included offenses are defined in Pattern Instruction 2.03.

One issue is whether the jury should be allowed to consider a lesser offense only after it agrees unanimously the defendant is not guilty of the greater offense, or whether it may also consider a lesser offense if it is unable to reach agreement on the greater offense. The "every reasonable effort" language in brackets in paragraph (2) is included as an option so the district court may in its discretion use either approach. No Supreme Court or Sixth Circuit authority compels one approach over the other. A panel of the Sixth Circuit has held that it was not error for the district judge to omit the "every reasonable effort" language in the paragraph (2) brackets. In United States v. Amey, 1995 WL 696680, 1995 U.S. App. LEXIS 35527 (6th Cir. 1995) (unpublished), the district court instructed the jury on lesser included offenses using an instruction substantially similar to Pattern Instruction 8.07 but omitting the bracketed language on "every reasonable effort" in paragraph (2). A panel of the Sixth Circuit affirmed the decision, explaining:

> We note, first, that the defendant's requested "reasonable efforts" instruction, if given in this case would not have constituted error. See, e.g., United States v. Tsanas, 572 F.2d at 346 ("we cannot say either form of instruction is wrong as a matter of law"); Sixth

> Circuit District Judges Association, Pattern Criminal Jury Instructions section 8.07, Committee Commentary (1991 ed.) ("the Committee takes no position on which approach should be used"). However, given what even Tsanas recognizes to be the speculative advantages to be gained by a defendant from a "reasonable efforts" instruction, we conclude that the failure to give that instruction also cannot be held to constitute error. We thus decline to reverse the conviction.

Amey, 1995 WL at 5, 1995 U.S. App. LEXIS at 14-15.

Case law in other circuits indicates that neither of the options is legally incorrect, and that the district court may choose between them as the court sees fit, unless the defendant objects, in which case the court should give whichever option the defendant elects. *See* United States v. Jackson, 726 F.2d 1466, 1469-70 (9th Cir.1984).

Giving the defendant the right to elect the option to be given is based on the Second Circuit's decision in United States v. Tsanas, 572 F.2d 340 (2d Cir. 1978). In his opinion for the Court in *Tsanas*, Judge Friendly explained that the two available options had advantages and disadvantages for both the prosecution and the defense. With regard to the option that requires the jury to unanimously find the defendant not guilty of the greater offense before moving on to consider a lesser offense, he first described its advantages:

> [This] instruction . . . has the merit, from the Government's standpoint, of tending to avoid the danger that the jury will not adequately discharge its duties with respect to the greater offense, and instead will move too quickly to the lesser one. From the defendant's standpoint, it may prevent any conviction at all; a jury unable either to convict or acquit on the greater charge will not be able to reach a lesser charge on which it might have been able to agree.[7]
>
> 7. It might be thought to have the further advantage of producing a clear acquittal on the greater charge which would plainly forbid reprosecution on that charge after a successful appeal from the conviction on the lesser charge. But, here again, such a reprosecution apparently is barred by the double jeopardy clause regardless of the form of instruction. See Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970).

Tsanas, supra at 346.

He then went on to describe the disadvantages of such an instruction:

> But it entails disadvantages to both sides as well: By insisting on unanimity with respect to acquittal on the greater charge before the jury can move to the lesser, it may prevent the Government from obtaining a conviction on the lesser charge that would otherwise have been forthcoming and thus require the expense of a retrial. It also presents dangers to the defendant. If the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave

> the defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge.

Id. at 346.

With regard to the option that allows the jury to move on to consider a lesser offense if the jury is unable to unanimously agree on a verdict on the greater offense, Judge Friendly said:

> An instruction permitting the jury to move on to the lesser offense if after all reasonable efforts it is unable to reach a verdict on the greater likewise has advantages and disadvantages to both sides--the mirror images of those associated with the (option discussed above). It facilitates the Government's chances of getting a conviction for something, although at the risk of not getting the one that it prefers. And it relieves the defendant of being convicted on the greater charge just because the jury wishes to avoid a mistrial, but at the risk of a conviction on the lesser charge which might not have occurred if the jury, by being unable to agree to acquit on the greater, had never been able to reach the lesser.

Id.

He then concluded as follows:

> With the opposing considerations thus balanced, we cannot say that either form of instruction is wrong as a matter of law. The court may give the one that it prefers if the defendant expresses no choice. If he does, the court should give the form of instruction which the defendant seasonably elects. It is his liberty that is at stake, and the worst that can happen to the Government under the less rigorous instruction is his readier conviction for a lesser rather than a greater crime. As was said in Bell v. United States, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955), albeit in a different context: It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.

Id.

In United States v. Jackson, *supra*, 726 F.2d at 1469-70, the Ninth Circuit found this reasoning persuasive, and joined the Second Circuit in holding that the district court should give whichever option the defendant elects. In addition to the reasons advanced by Judge Friendly, the Ninth Circuit argued that this approach "ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard." The Ninth Circuit explained that if the jury must unanimously agree on a not guilty verdict on the greater offense before moving on to a lesser, there is a risk that jurors who have a doubt that the defendant is guilty of the greater offense, but who are convinced the defendant is guilty of some offense, will likely resolve their doubts in favor of convicting the defendant of the greater offense, rather than holding out and not convicting the defendant of anything at all. *See also* Catches v. United States, 582 F.2d 453, 459 (8th Cir. 1978) (referring to Judge Friendly's opinion in *Tsanas* as a "well-reasoned rule").

The bracketed language in paragraph (2) allows the district court to use either approach. If the district court believes that the jurors may move on to consider a lesser offense even if they cannot unanimously agree on a verdict on the greater charge, the bracketed language should be added to the unbracketed language used in paragraph (2). If the court believes that this concept is not appropriate, the bracketed language should be omitted. The Committee takes no position on which approach should be used.

Some judges prefer to have all jurors sign the verdict form. The bracketed language in the last sentence should be used instead of "Your foreperson" when this approach is preferred.

8.08 VERDICT LIMITED TO CHARGES AGAINST THIS DEFENDANT

(1) Remember that the defendant is only on trial for the particular crime charged in the indictment [and the lesser charges which I described]. Your job is limited to deciding whether the government has proved the crime charged [or one of those lesser charges].

[(2) Also remember that whether anyone else should be prosecuted and convicted for this crime is not a proper matter for you to consider. The possible guilt of others is no defense to a criminal charge. Your job is to decide if the government has proved this defendant guilty. Do not let the possible guilt of others influence your decision in any way.]

Use Note

Any changes made in paragraphs (1) and (2) should be made in paragraphs (2) and (3) of Instruction 2.01 as well.

Bracketed paragraph (2) should be included if the possible guilt of others has been raised as an issue during the trial. Modifications of this paragraph may be necessary in conspiracy, aiding and abetting, alibi or mistaken identification cases, where the possible guilt of others may be a legitimate issue.

Committee Commentary 8.08

(current through December 1, 2009)

The purpose of this instruction is twofold. The first purpose is to remind the jurors that their verdict is limited to the particular charge made against the defendant. The second is to remind them that their verdict is limited to the particular defendant who has been charged. The instruction is a plain English restatement of various concepts found in comparable instructions.

Paragraph (2) should not be given in every case. If the possible guilt of others has not been raised during trial, this paragraph is unnecessary and should be omitted to avoid confusion. Note also that this paragraph may require modification in cases where vicarious criminal liability is alleged, such as conspiracy or aiding and abetting cases. In such cases the jury may be required to decide the guilt of other persons not charged in the indictment. Paragraph (2) may also require modification in cases in which the defendant has raised an alibi defense or has argued mistaken identification. Where the defendant claims that someone else committed crime, it may be confusing to instruct the jurors that they should not be concerned with anyone else's guilt.

The concepts covered in paragraphs (1) and (2) are also covered in Instruction 2.01. Corresponding deletions or modifications should be made there as well.

8.09 COURT HAS NO OPINION

Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the government has proved the defendant guilty beyond a reasonable doubt.

Committee Commentary 8.09
(current through December 1, 2009)

A panel of the Sixth Circuit has suggested that giving this instruction may help avoid error if the district judge questions the witnesses. In United States v. Voyles, 1993 WL 272448, 1993 U.S. App. LEXIS 19381 (6th Cir. 1993) (unpublished), the panel concluded that the questions the district judge asked witnesses during the trial were within the judge's authority and did not require the conviction to be reversed. In support of this conclusion, the panel noted that the district judge gave Pattern Instruction 8.09. *Voyles*, 1993 WL at 4, 1993 U.S. App. LEXIS at 11.

Similarly, a panel of the Sixth Circuit found no error in comments the judge made to the jury, in part because the district court gave an instruction identical to Pattern Instruction 8.09. In United States v. Frye, 2000 WL 32029, 2000 U.S. App. LEXIS 446 (6th Cir. 2000) (unpublished), the district court told the jury during voir dire that the court had approved the wire-tap used in the case. A panel of the Sixth Circuit found no error in refusing to strike the jury venire because of the comment and explained, "Due to the innocuous nature of the comment made to the jury, and based upon the curative instruction given by the court, it cannot be said that Frye was harmed to such an extent that reversal of the conviction is warranted." *Frye,* 2000 WL at 3, 2000 U.S. App. LEXIS at 8-9, *citing* United States v. Mosely, 810 F.2d 93, 99 (6th Cir. 1987).

8.10 JUROR NOTES

(1) Remember that 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.

(2) Whether you took notes or not, each of you must form and express your own opinion as to the facts of the case.

Use Note

If note-taking is permitted, the court should also give a preliminary instruction on juror note-taking.

Committee Commentary

(current through December 1, 2009)

In United States v. Johnson, 584 F.2d 148 (6th Cir. 1978), the Sixth Circuit held that it was within the sound discretion of the trial court to allow the jury to take notes during the course of trial and use them in deliberations. *Id*. at 157. The Sixth Circuit particularly noted that allowing the jury to take notes during the course of trial is appropriate where numerous defendants are charged in a multi-count indictment. *Id*. at 158. The Committee recognizes the common practice of allowing the jury to take notes, especially in complex cases. This instruction is designed to accommodate that practice.

The language of the first paragraph is based upon the last two paragraphs of Eleventh Circuit Trial Instruction 2.1 (1997 ed.). The language of the second paragraph is based upon language in Fifth Circuit Pattern Instruction 1.02, Alternative B (2001 ed.).

Chapter 9.00

SUPPLEMENTAL INSTRUCTIONS

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9.01 SUPPLEMENTAL INSTRUCTIONS IN RESPONSE TO JUROR QUESTIONS

(1) Members of the jury, I have received a note from you that says _____.

(2) Let me respond by instructing you as follows: _____.

(3) 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.

(4) I would ask that you now return to the jury room and resume your deliberations.

Use Note

This instruction should be used when the court gives supplemental instructions in response to juror questions.

Committee Commentary 9.01
(current through December 1, 2009)

This instruction provides a standardized response to juror questions which includes a reminder that all the instructions should be considered together as a whole.

For a summary of when supplemental instructions should be given, *see* United States v. Nunez, 889 F.2d 1564, 1568 (6th Cir. 1989). *See also* United States v. Brown, 915 F.2d 219, 223 (6th Cir.1990).

In United States v. Combs, 33 F.3d 667 (6th Cir. 1994), the Sixth Circuit held that the trial court's supplemental instructions were inadequate but did not rise to the level of plain error. The court identified two problems with the content of the supplemental instructions: they answered jurors' questions with a categorical yes or no, and they referred jurors to the previous instructions without elaborating on them. The Sixth Circuit stated that generally, standards regarding supplemental instructions were "well-settled." The court explained, "In United States v. Giacalone, we made clear that a supplemental instruction is one that goes beyond reciting what has previously been given; it is not merely repetitive. Reiterating the rule . . . that a trial court has a duty 'to clear up uncertainties which the jury brings to the court's attention,' we stated that the propriety of a supplemental instruction must be measured 'by whether it fairly responds to the jury's inquiry without creating . . . prejudice.'" *Combs*, 33 F.3d at 669-70 (citations omitted), *quoting* United States v. Giacalone, 588 F.2d 1158, 1166 (6th Cir. 1978) and United States v. Nunez, 889 F.2d 1564, 1568 (6th Cir. 1989).

The Sixth Circuit also stated that ordinarily, a categorical yes or no in response to a jury question does not discharge the court's duty: "Upon receipt of questions from a deliberating jury, it is incumbent upon the district court to assume that at least some jurors are harboring confusion, which the original instructions either created or failed to clarify. Therefore, the trial judge must be meticulous in preparing supplemental instructions, taking pains adequately to

explain the point that obviously is troubling the jury. To be sure, the court must ensure that, in responding, it does not stray beyond the purpose of jury instructions, but the jury's questions here did not seek collateral or inappropriate advice." *Combs*, 33 F.3d at 670.

Finally, the *Combs* court also explained the procedures to be used for supplemental instructions: "The district court is required to follow the same procedure in giving supplemental instructions as in giving original instructions. (citation omitted.) '[I]t [i]s error for the trial judge to respond to the jury's question other than in open court and in the presence of counsel for both sides.' (Citation omitted)." *Id.* *See also* Fed. R. Crim. P. 43(a), which provides that "The defendant must be present at ... every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." The exceptions are listed in Rule 43(b) and (c).

9.02 REREADING OF TESTIMONY

(1) Members of the jury, the court reporter will now read _____'s testimony.

(2) Keep in mind that you should consider this testimony together with all the other evidence. Do not consider it by itself, out of context. Consider all the evidence together as a whole.

Use Note

This instruction must be used when testimony is reread to the jury.

Committee Commentary 9.02
(current through December 1, 2009)

In United States v. Rodgers, 109 F.3d 1138 (6th Cir. 1997), the court stated, "[W]e hold that if a district court chooses to give a deliberating jury transcribed testimony, or chooses to reread testimony to a deliberating jury, the district court must give an instruction cautioning the jury on the proper use of that testimony." *Id.* at 1145. Thus, if testimony is reread or a transcript provided to the jury, a cautionary instruction is required.

As the Sixth Circuit stated in *Rodgers*, it had consistently relied on the giving of a cautionary instruction like Pattern Instruction 9.02 in finding that rereading testimony was not error. *Rodgers, supra. See, e.g.,* United States v. Epley, 52 F.3d 571, 579 (6th Cir. 1995), where the court held that it was not error for the trial court to reread one witness's testimony upon request of jury, in part because the trial court gave a cautionary instruction both before and after the reading encouraging jurors to consider the testimony as a whole and not to emphasize this piece of evidence over the others. In addition, the jury heard the entire testimony of the witness, so it was not taken out of context, and the testimony turned out to be cumulative.

On rereading testimony generally, the Sixth Circuit relies on guidelines established in United States v. Padin, 787 F.2d 1071, 1076-77 (6th Cir. 1986). *See, e.g., Rodgers, supra* at 1142; *Epley, supra* at 579. In *Padin*, the Sixth Circuit identified two inherent dangers in reading testimony to a jury during deliberations. First, undue emphasis may be accorded the testimony. Second, the limited testimony that is reviewed may be taken out of context. These concerns escalate after a jury reports it is unable to reach a verdict. *Padin*, 787 F.2d at 1077, *citing* Henry v. United States, 204 F.2d 817 (6th Cir. 1953); *see also Rodgers, supra* at 1143-44; United States v. Epley, *supra*.

In *Rodgers*, the Sixth Circuit stated that in addition to the inherent dangers identified in *Padin*, more general concerns also exist in allowing a jury to read a transcript of testimony. These concerns are that "(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." *Rodgers, supra* at 1143 (internal quotations omitted).

The decision whether selected testimony should be reread to the jury at all is left to the trial court's sound discretion. *See, e.g.*, United States v. Thomas, 875 F.2d 559, 562 (6th Cir. 1989).

9.03 PARTIAL VERDICTS

(1) 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.

(2) If you do 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.

(3) Your other option is to wait until the end of your deliberations, and return all your verdicts then. The choice is yours.

(4) I would ask that you now return to the jury room and resume your deliberation.

Use Note

This instruction should be used if the jurors ask about, attempt to return or otherwise indicate that they may have reached a partial verdict. It may also be appropriate if the jury has deliberated for an extensive period of time.

Committee Commentary 9.03

(current through December 1, 2009)

Fed.R.Crim.P. 31(b) states that at any time during the deliberations in a multi-defendant case, the jury "may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed."

The Sixth Circuit held it was not an abuse of discretion to refuse a supplemental instruction on partial verdicts under the circumstances in United States v. Ford, 987 F.2d 334 (6th Cir. 1992). The trial court had given a partial verdict instruction in its initial instructions, and the verdict forms examined by the district judge during deliberations at the request of all the defendants showed that the jury had not reached unanimous verdicts on any defendants or any charges. The court stated, “Before declaring a mistrial and dismissing a hung jury, a trial judge may inquire whether the jury has reached a partial verdict with respect to any of the defendants or any of the charges, but such an inquiry is not required where the trial judge has already given clear instructions on the point.” *Ford*, 987 F.2d at 340, *citing* United States v. MacQueen, 596 F.2d 76, 82 (2d Cir. 1979).

An instruction on partial verdicts can be included in the general instructions given before the jury retires to deliberate, or it can be included in a special instruction to be given only after the jury has indicated that it wants to return a partial verdict or after the jury has deliberated for an extensive period of time. The Committee believes that the latter approach is preferable. Initially, at least, the jury should be encouraged to try and reach unanimous agreement on all counts.

Even if the jury has not specifically asked about or attempted to return a partial verdict, an instruction like this may be appropriate if the jury has deliberated for an extensive period of time. What constitutes an extensive period of time will depend on the nature and complexity of the particular case.

9.04 DEADLOCKED JURY

(1) Members of the jury, I am going to ask that you 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 sometimes after further discussion, jurors are able to work out their differences and agree.

(2) Please keep in mind how very important it is for you to reach unanimous agreement. If you cannot agree, and if this case is tried again, there is no reason to believe that any new evidence will be presented, or that the next twelve jurors will be any more conscientious and impartial than you are.

(3) Let me remind you that it is your duty as jurors to talk with each other about the case; to listen carefully and respectfully to each other's views; and to keep an open mind as you listen to what your fellow jurors have to say. And let me remind you that it is your duty to make every reasonable effort you can to reach unanimous agreement. Each of you, whether you are in the majority or the minority, ought to seriously reconsider your position in light of the fact that other jurors, who are just as conscientious and impartial as you are, have come to a different conclusion.

(4) Those of you who believe that the government has proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the evidence is really convincing enough, given that other members of the jury are not convinced. And those of you who believe that the government has not proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the doubt you have is a reasonable one, given that other members of the jury do not share your doubt. None of you should hesitate to change your mind if, after reconsidering things, you are convinced that other jurors are right and that your original position was wrong.

(5) But remember this. Do not ever change your mind just because other jurors see things differently, or just to get the case over with. As I told you before, in the end, your vote must be exactly that--your own vote. As important as it is for you to reach unanimous agreement, it is just as important that you do so honestly and in good conscience.

(6) 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.

(7) I would ask that you now return to the jury room and resume your deliberations.

Use Note

This instruction is designed for use when the court concludes that the jury has reached an impasse and that an *Allen* charge is appropriate.

A stronger, more explicit reminder regarding the government's burden of proof than the implicit one contained in paragraph (4) may be appropriate in unusual cases.

Committee Commentary 9.04
(current through December 1, 2009)

This instruction is for use when the court concludes that the jury has reached an impasse and that an *Allen* charge is appropriate. When such an instruction should be given is left to the trial court's sound discretion. *See, e.g.*, United States v. Sawyers, 902 F.2d 1217, 1220 (6th Cir.1990).

The Sixth Circuit endorsed the wording of this instruction in United States v. Clinton, 338 F.3d 483, 487-88 (6th Cir. 2003), quoting the instruction in full and stating:

> In this circuit, while we have generally approved use of the Sixth Circuit Pattern Instruction, we have never explicitly mandated the use of that or any instruction to the exclusion of others. We decline to do so now, although we take the occasion to express a strong preference for the pattern instruction and to point out that its use will, in most instances, insulate a resulting verdict from the type of appellate challenge that we now face in this case.

See also United States v. Reed, 167 F.3d 984, 991 (6th Cir. 1999); United States v. Frost, 125 F.3d 346, 374-75 (6th Cir. 1997); United States v. Tines, 70 F.3d 891, 896-97 (6th Cir. 1995).

A related issue is whether giving this instruction is error even when the content is correct because it is coercive under the circumstances of the case. Although the Sixth Circuit has stated that it is possible that giving Instruction 9.04 can be error as coercive even though the content is correct, the Sixth Circuit has never reached that conclusion in the cases decided since the promulgation of Instruction 9.04. Rather, it has concluded that giving Instruction 9.04 was not coercive and was not error. *See* United States v. Reed, *supra* (instruction given on twelfth day of deliberations); United States v. Frost, *supra*; United States v. Tines, *supra*. As the Sixth Circuit explained, "Although circumstances alone can render an Allen charge coercive, we traditionally have found an Allen charge coercive when the instructions themselves contained errors or omissions, not when a defendant alleges that the circumstances surrounding an otherwise correct charge created coercion." *Frost*, 125 F.3d at 375.

Instruction 9.04 is a modified version of the instruction approved by the United States Supreme Court in Allen v. United States, 164 U.S. 492, 501-502 (1896). The *Allen* decision and its progeny are analyzed in the Committee Commentary to Instruction 8.04.

9.05 QUESTIONABLE UNANIMITY AFTER POLLING

(1) It appears from the poll we just took that your verdict may not be unanimous. So I am going to ask that you return to the jury room.

(2) If you are unanimous, tell the jury officer that you want to return to the courtroom, and we will poll you again. If you are not unanimous, please resume your deliberations. Talk to each other, and make every reasonable effort you can to reach unanimous agreement, if you can do so honestly and in good conscience.

Use Note

This instruction should be used when a poll of the jury indicates that a proffered verdict may not be unanimous.

Depending on the circumstances, the court may wish to expand on the concepts contained in the last sentence of paragraph (2).

Committee Commentary 9.05

(current through December 1, 2009)

This instruction is patterned after Federal Judicial Center Instruction 59. Depending on the circumstances, the district court may wish to expand on the last sentence which briefly summarizes the concepts contained in Instructions 8.04 Duty to Deliberate and 9.04 Deadlocked Jury.

Chapter 10.00

FRAUD OFFENSES

Introduction to Fraud Instructions

(current through December 1, 2009)

The pattern instructions cover three fraud offenses with elements instructions:

Instruction 10.01 Mail Fraud (18 U.S.C. § 1341);
Instruction 10.02 Wire Fraud (18 U.S.C. § 1343); and
Instruction 10.03 Bank Fraud (18 U.S.C. § 1344).

In addition, Instruction 10.04 Fraud – Good Faith Defense is included to use in conjunction with the fraud instructions.

The elements of mail, wire and bank fraud are similar except for the jurisdictional elements. The Committee drafted separate instructions for the three offenses as the most efficient way to reflect the different jurisdictional bases. Beyond the jurisdictional bases, the mail, wire and bank fraud offenses are read in tandem and case law on the three is largely interchangeable. *See* Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); United States v. McAuliffe, 490 F.3d 526, 532 n.3 (6th Cir. 2007) ("The bank, mail and wire fraud statutes all employ identical 'scheme to defraud' language and thus are to be interpreted *in pari materia*.") (citations omitted); United States v. Daniel, 329 F.3d 480, 486 n.1 (6th Cir. 2003); Hofstetter v. Fletcher, 905 F.2d 897, 902 (6th Cir. 1988) ("This court has held that the wire fraud statutory language should be interpreted with the same breadth as the analogous language in the mail fraud statute.") (citations omitted); Neder v. United States, 527 U.S. 1, 20-21 (1999) (bank fraud statute was modeled on and is similar to the mail and wire fraud statutes).

These instructions do not cover fraud based on a deprivation of the intangible right to honest services as provided in 18 U.S.C. § 1346.

10.01 MAIL FRAUD (18 U.S.C. § 1341)

(1) The defendant is charged with the crime of mail fraud. For you to find the defendant guilty of mail fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [knowingly participated in] [devised] [intended to devise] a scheme to defraud in order to obtain money or property, that is _____ [describe scheme from indictment];

(B) Second, that the scheme included a material misrepresentation or concealment of a material fact;

(C) Third, that the defendant had the intent to defraud; and

(D) Fourth, that the defendant [used the mail] [caused another to use the mail] in furtherance of the scheme.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A "scheme to defraud" includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

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

(C) An act is "knowingly" done if done voluntarily and intentionally, and not because of mistake or some other innocent reason.

(D) A misrepresentation or concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

(E) To act with "intent to defraud" means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself [to another person].

(F) To "cause" the mail to be used is to do an act with knowledge that the use of the mail will follow in the ordinary course of business or where such use can reasonably be foreseen.

(3) [It is not necessary that the government prove [all of the details alleged concerning the precise nature and purpose of the scheme] [that the material transmitted by mail was itself

false or fraudulent] [that the alleged scheme actually succeeded in defrauding anyone] [that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud] [that someone relied on the misrepresentation or false statement].]

(4) If you are convinced that the government has proved all of the elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of the elements, then you must find the defendant not guilty of this charge.

Use Note

Brackets indicate options for the court.

Throughout the instruction, the word "mail" should be replaced by the term "private or commercial interstate carrier" if the facts warrant.

Paragraph (1)(D) should be amended to include the receipt of mail if the facts warrant.

In paragraph (2)(D), the word "person" should be replaced with entity or corporation or agency as the facts warrant.

The provisions of paragraph (3) should be used only if relevant.

See also Instruction 2.09 Deliberate Ignorance.

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud – Good Faith Defense.

Committee Commentary Instruction 10.01
(current through December 1, 2009)

This instruction does not cover mail fraud based on a deprivation of the intangible right to honest services as provided in 18 U.S.C. § 1346.

To define the elements of mail fraud, the Committee relied primarily on Neder v. United States, 527 U.S.1 (1999); United States v. Gold Unlimited, Inc., 177 F.3d 472 (6th Cir. 1999) and United States v. Frost, 125 F.3d 346 (6th Cir. 1997).

The specific language used in paragraph (1) of the instruction is drawn from two cases. Paragraphs (1)(A), (1)(C) and (1)(D) are based on United States v. Gold Unlimited, Inc., *supra* at 478-79. Paragraph (1)(B), which covers materiality, is based on Neder v. United States, *supra*.

In paragraph (1)(A), the statement that the "scheme to defraud" must be a "scheme to defraud in order to obtain money or property" is based on Cleveland v. United States, 531 U.S. 12 (2000) and McNally v. United States, 483 U.S. 350 (1987). In McNally, the Court noted that based on the disjunctive phrasing of the mail fraud statute, which refers to "a scheme to defraud,

or for obtaining money or property," it was arguable that the two phrases should be construed independently. However, the Court then rejected this construction, explaining that the second phrase merely modifies the first. *McNally*, 483 U.S. at 358-59. In *Cleveland*, the Court reiterated this interpretation of the statute:

> We reaffirm our reading of § 1341 in McNally. . . . Were the Government correct that the second phrase of § 1341 defines a separate offense, the statute would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities. . . . [W]e decline to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear.

Cleveland, 531 U.S. at 25-26.

In paragraph (1)(A) the reference to participation is based on other circuits' pattern instructions, including the Seventh Circuit instruction on the elements of mail fraud ("defendant ... [devised] [or] [participated in] the scheme"); Eleventh Circuit Instruction 50.1 ("defendant ... devised or participated in a scheme...."') and First Circuit Instruction 4.12 ("defendant's ... participation in this scheme...."). The Seventh Circuit instruction is presumably based on United States v. Wilson, 506 F.2d 1252, 1258 (7th Cir. 1974), where the court affirmed an instruction stating that "the Government must prove beyond a reasonable doubt that defendants or any one or more of them participated in a scheme to defraud."

The definition of "scheme to defraud" in paragraph (2)(A) is based on United States v. Daniel, 329 F.3d 480, 485-86 (6th Cir. 2003), *citing* United States v. Gold Unlimited, Inc., *supra* at 479. In the instruction, the words "by deception" were omitted because that requirement is adequately covered in paragraph (2)(E) defining intent to defraud. In *Daniel*, the court further states, "The scheme to defraud element required under 18 U.S.C. § 1341 is not defined according to a technical standard. The standard is a 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Daniel*, 329 F.3d at 486 (brackets and some internal quotation marks omitted), *quoting* United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979).

The definition of "false or fraudulent pretenses, representations or promises" in paragraph (2)(B) is based on the definition of "false or fraudulent pretenses" in First Circuit Instruction 4.12 Mail Fraud. In the instruction, the Committee omitted a reference to the intent to defraud because that element is covered in paragraph (2)(E). The Sixth Circuit has approved similar definitions, *see* United States v. Stull, 743 F.2d 439, 446 (6th Cir. 1984) and United States v. O'Boyle, 680 F.2d 34, 36 (6th Cir. 1982). *See also* Instruction 2.09 Deliberate Ignorance.

The definition of "knowingly" in paragraph (2)(C) is drawn from the jury instructions given in United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984).

The definition of "material" in paragraph (2)(D) is based on Neder v. United States, *supra* at 16, *quoting* United States v. Gaudin, 515 U.S. 506, 509 (1995).

The "intent to defraud" definition in paragraph (2)(E) is a restatement of the language in *Frost*, 125 F.3d at 371. The court quoted this definition with approval in United States v. McAuliffe, 490 F.3d 526, 531 (6th Cir. 2007). For other phrasing of the definition, *see* United States v. Daniel, *supra* at 487, *quoting* United States v. DeSantis, 134 F.3d 760, 764 (6th Cir. 1998).

The definition of "cause" in paragraph (2)(F) is based on *Frost*, 125 F.3d at 354, *citing* United States v. Oldfield, 859 F.2d 392, 400 (6th Cir. 1988).

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. This language is patterned after First Circuit Instruction 4.12; Fifth Circuit Instruction 2.59; Eighth Circuit Instruction 6.18.1341; and Eleventh Circuit Instruction 50.1. These provisions should be used only if relevant.

To define the mens rea for mail fraud, some authority requires that the defendant knowingly devised or intended to devise a scheme to defraud, and that the defendant acted with the intent to defraud. The court endorses these terms several times in *Gold Unlimited, Inc*., 177 F.3d at 478-79, 485, 488. *See also* United States v. Reaume, 338 F.3d 577, 580 (6th Cir. 2003) (bank fraud requires "intent to defraud"); United States v. Everett, 270 F.3d 986, 989 (6th Cir. 2001) (same). In other cases, the court has referred to the mens rea as the "specific" intent to defraud, *see, e.g., Daniel*, 329 F.3d at 487; *Frost*, 125 F.3d at 354 ("A defendant does not commit mail fraud unless he possesses the specific intent to deceive or defraud...."); United States v. Smith, 39 F.3d 119, 121-22 (6th Cir. 1994). The instruction omits the word "specific." *See also* Committee Commentary to Instruction 2.07 Specific Intent.

Intent and knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge.

In Neder v. United States, *supra* at 25, the Court held that materiality is an element of a "scheme or artifice to defraud" under mail, wire and bank fraud. Although this element is not found in a "natural reading" of the statute, the court relied on the rule of construction " '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' " 527 U.S. at 21. At common law, the word "fraud" required proof of materiality. Because Congress did not indicate otherwise, the Court presumed that Congress intended to incorporate "materiality."

The definition of materiality is as follows: "In general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.'" *Id*. at 16, *quoting Gaudin*, 515 U.S. at 509.

As to whether the fraud must be capable of deceiving persons based on a subjective ("however gullible") standard or an objective ("person of ordinary prudence") standard, in most cases the objective standard provided in paragraph (2)(D) of the instruction is appropriate. The Sixth Circuit has stated that the standard to be used is an objective one. *See, e.g*., United States

v. Jamieson, 427 F.3d 394, 415-16 (6th Cir. 2005); Berendt v. Kemper Corp., 973 F.2d 1291, 1294 (6th Cir. 1992); Blount Fin. Servs., Inc. v. Walter E. Heller and Co., 819 F.2d 151, 153 (6th Cir. 1987); United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979); and United States v. Bohn, 2008 WL 2332226 at 9, 2008 U.S. App. LEXIS 12474 at 26 (6th Cir. 2008) (unpublished). *But see* Norman v. United States, 100 F.2d 905, 907 (6th Cir. 1939) (using a subjective standard, explaining that: "the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artifice."). In *Frost, supra*, the court affirmed an instruction with an objective standard, but the issue of objective-vs.-subjective standard was not raised. *Frost*, 125 F.3d at 371 (affirming instruction which provided, "There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension."). However, none of these cases involved vulnerable victims who were targeted by the defendant specifically because of their vulnerability. If this situation arises, the parties should address whether the appropriate standard is objective or subjective based on the facts of the case.

Outside the Sixth Circuit, there is a split of authority on this issue. In United States v. Svete, 556 F.3d 1157 (11th Cir. 2009) (en banc), the district court gave the Eleventh Circuit pattern instruction on mail fraud, which incorporated a subjective standard and thus did not require that the fraudulent scheme be calculated to deceive a reasonably prudent person. The en banc court affirmed the use of this instruction, rejecting prior circuit precedent after a detailed review of authority in other circuits and the Supreme Court. The court concluded that "[m]ail fraud does not require proof that a scheme to defraud would deceive persons of ordinary prudence." *Id*. at 1169. In discussing the Sixth Circuit decisions in *Norman* (using a subjective standard) and *Jamieson* (stating an objective standard, but not citing or distinguishing *Norman*), the Eleventh Circuit found *Norman* more persuasive because in *Jamieson*, the "'ordinary prudence' language was invoked to . . . affirm [a] conviction . . . ." *Svete* at 1168-69. The subjective standard enunciated by the Sixth Circuit in *Norman* is consistent with other older Sixth Circuit precedent. *See* Henderson v. United States, 218 F.2d 14, 19 (6th Cir. 1955); Tucker v. United States, 224 F. 833, 837 (6th Cir. 1915); O'Hara v. United States, 129 F. 551, 555 (6th Cir. 1904).

Jurisdiction for a mail fraud conviction requires the defendant to deposit, receive, or cause to be deposited any matter or thing to be sent or delivered by the United States Postal Service or any private or commercial interstate carrier for the purpose of executing a scheme to defraud. 18 U.S.C. § 1341.

As to the required connection between the scheme to defraud or obtain property and the use of the mails, the Supreme Court has stated: "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud . . . ." Schmuck v. United States, 489 U.S. 705, 710 (1989). The Court explained: "To be a part of the execution of the fraud . . . the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be 'incident to an essential part of the scheme,' or 'a step in [the] plot.'" *Schmuck*, 489 U.S. at 710 (internal citations and quotation marks omitted). The Court then stated: "The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been

counterproductive and return to haunt the perpetrator of the fraud." *Id*. at 715.

A mail fraud conviction can be based on mailings that were legally required. As the court explains, "Further, 'the mailings may be innocent or even legally necessary.'" *Frost*, 125 F.3d at 354, *quoting* United States v. Oldfield, 859 F.2d 392, 400 (6th Cir. 1988), *in turn quoting* United States v. Decastris, 798 F.2d 261, 263 (7th Cir. 1986).

It is not necessary that the defendant actually mail the material. *See* 18 U.S.C. § 1341 (mail fraud committed where defendant causes the mails to be used). The Supreme Court has explained that one causes a mailing when "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." Pereira v. United States, 347 U.S. 1, 8-9 (1954); *accord*, Frost, 125 F.3d at 354 (mailing need only be reasonably foreseeable).

A pyramid scheme is a scheme to defraud. *See United States v. Gold Unlimited, Inc., supra* at 484-85.

10.02 WIRE FRAUD (18 U.S.C. § 1343)

(1) The defendant is charged with the crime of wire fraud. For you to find the defendant guilty of wire fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [knowingly participated in] [devised] [intended to devise] a scheme to defraud in order to obtain money or property, that is _____ [describe scheme from indictment];

(B) Second, that the scheme included a material misrepresentation or concealment of a material fact;

(C) Third, that the defendant had the intent to defraud; and

(D) Fourth, that the defendant [used wire, radio or television communications] [caused another to use wire, radio or television communications] in interstate [foreign] commerce in furtherance of the scheme.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A "scheme to defraud" includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

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

(C) An act is "knowingly" done if done voluntarily and intentionally, and not because of mistake or some other innocent reason.

(D) A misrepresentation or concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

(E) To act with "intent to defraud" means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself [to another person].

(F) To "cause" wire, radio or television communications to be used is to do an act with knowledge that the use of the communications will follow in the ordinary course of business or where such use can reasonably be foreseen.

(G) The term "interstate [foreign] commerce" includes wire, radio or television communications which crossed a state line.

(3) [It is not necessary that the government prove [all of the details alleged concerning the precise nature and purpose of the scheme] or [that the material transmitted by wire, radio or television communications was itself false or fraudulent] or [that the alleged scheme actually succeeded in defrauding anyone] or [that the use of the wire, radio or television communications] was intended as the specific or exclusive means of accomplishing the alleged fraud] or [that someone relied on the misrepresentation or false statement].]

(4) If you are convinced that the government has proved all of the elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of the elements, then you must find the defendant not guilty of this charge.

Use Note

Brackets indicate options for the court.

In paragraph (2)(D), the word "person" should be replaced with entity or corporation or agency as the facts warrant.

In paragraph (2)(D), the bracketed sentence should be given if the court decides to use the objective standard for the definition of materiality; this issue is discussed in detail infra in the Committee Commentary.

The provisions of paragraph (3) should be used only if relevant to the case.

See also Instruction 2.09 Deliberate Ignorance.

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud – Good Faith Defense.

Committee Commentary Instruction 10.02
(current through December 1, 2009)

This instruction does not cover wire fraud based on a deprivation of the intangible right to honest services as provided in 18 U.S.C. § 1346.

The wire fraud statute was modeled after the mail fraud statute, and therefore the same analysis should be used for both. Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987). "The wire fraud statutory language should be interpreted with the same breadth as the analogous language in the mail fraud statute." Hofstetter v. Fletcher, 905 F.2d 897, 902 (6th Cir. 1988). The only difference in the two offenses is the jurisdictional base.

To define the elements of wire fraud, the Committee relied primarily on Neder v. United

States, 527 U.S.1 (1999); United States v. Gold Unlimited, Inc., 177 F.3d 472 (6th Cir. 1999) and United States v. Frost, 125 F.3d 346 (6th Cir. 1997). In the context of wire fraud, the Sixth Circuit identified the elements in United States v. Smith, 39 F.3d 119, 122 (6th Cir. 1994) and United States v. Ames Sintering Company, 927 F.2d 232, 234 (6th Cir. 1990).

The specific language of the instruction is drawn from three sources. Paragraphs (1)(A) and (1)(C) are based on United States v. Gold Unlimited, Inc., *supra* at 478. Paragraph (1)(B), which describes materiality, is based on the language from Neder v. United States, *supra*. Paragraph (1)(D) is based on United States v. Smith, *supra* at 122.

In paragraph (1)(A), the statement that the "scheme to defraud" must be a "scheme to defraud in order to obtain money or property" is based on Cleveland v. United States, 531 U.S. 12 (2000) and McNally v. United States, 483 U.S. 350 (1987). In McNally, the Court noted that based on the disjunctive phrasing of the mail fraud statute, which refers to "a scheme to defraud, or for obtaining money or property," it was arguable that the two phrases should be construed independently. However, the Court then rejected this construction, explaining that the second phrase merely modifies the first. *McNally*, 483 U.S. at 358-59. In *Cleveland*, the Court reiterated this interpretation of the statute:

> We reaffirm our reading of § 1341 in McNally . . . . Were the Government correct that the second phrase of § 1341 defines a separate offense, the statute would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities . . . . [W]e decline to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear.

Cleveland, 531 U.S. at 25-26.

In paragraph (1)(D), the phrase "wire, radio or television communications" is drawn from the statute. Some Sixth Circuit cases use the term "electronic communications," *see, e.g.*, United States v. Daniel, 329 F.3d 480, 489 (6th Cir. 2003); VanDenBroeck v. CommonPoint Mortgage Co., 210 F.3d 696, 701 (6th Cir. 2000), *overruled on other grounds*, Bridge v. Phoenix Bond & Indemnity Co., 128 S.Ct. 2131 (2008); United States v. Smith, *supra* at 122.

The definition of "scheme to defraud" in paragraph (2)(A) is based on United States v. Daniel, *supra* at 485-86, *citing* Gold Unlimited, Inc., 177 F.3d at 479. In the instruction, the words "by deception" were omitted because that requirement is adequately covered in paragraph (2)(E) defining intent to defraud. In *Daniel*, the court further states, "The scheme to defraud element required under 18 U.S.C. § 1341 is not defined according to a technical standard. The standard is a 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Daniel*, 329 F.3d at 486 (6th Cir. 2003) (brackets and some internal quotation marks omitted), *quoting* United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979).

The definition of "false or fraudulent pretenses, representations or promises" in paragraph (2)(B) is based on the definition of "false or fraudulent pretenses" in First Circuit Instruction 4.12 Mail Fraud. In the instruction, the Committee omitted a reference to the intent

to defraud because that element is covered in paragraph (2)(E). The Sixth Circuit has approved similar definitions, *see* United States v. Stull, 743 F.2d 439, 446 (6th Cir. 1984) and United States v. O'Boyle, 680 F.2d 34, 36 (6th Cir. 1982). *See also* Instruction 2.09 Deliberate Ignorance.

The definition of "knowingly" in paragraph (2)(C) is drawn from the jury instructions given in United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984).

The definition of "material" in paragraph (2)(D) is based on Neder v. United States, *supra* at 16, *quoting* United States v. Gaudin, 515 U.S. 506, 509 (1995).

The "intent to defraud" definition in paragraph (2)(E) is a restatement of the language in Frost, 125 F.3d at 371. The court quoted this definition with approval in United States v. McAuliffe, 490 F.3d 526, 531 (6th Cir. 2007). For other phrasing of the definition, *see* United States v. Daniel, *supra* at 487, *quoting* United States v. DeSantis, 134 F.3d 760, 764 (6th Cir. 1998).

The "cause" language in paragraph (2)(F) is drawn from United States v. Frost, 125 F.3d 346, 354 (6th Cir. 1997), *citing* United States v. Oldfield, 859 F.2d 392, 400 (6th Cir. 1988).

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. This language is patterned after the language used in First Circuit Instruction 4.12; Fifth Circuit Instruction 2.61; Eighth Circuit Instruction 6.18; and Eleventh Circuit Instruction 50.1. These provisions should be used only if relevant.

To define the mens rea for wire fraud, some authority requires that the defendant knowingly devised or intended to devise a scheme to defraud, and that the defendant acted with the intent to defraud. The court endorses these terms several times in *Gold Unlimited, Inc*., 177 F.3d at 478-79, 485, 488. *See also* United States v. Reaume, 338 F.3d 577, 580 (6th Cir. 2003) (bank fraud requires "intent to defraud"); United States v. Everett, 270 F.3d 986, 989 (6th Cir. 2001) (same). In other cases, the court has referred to the mens rea as the "specific" intent to defraud, *see, e.g*., United States v. Daniel, *supra* at 487 (6th Cir. 2003); United States v. Frost, *supra* at 354 ("A defendant does not commit mail fraud unless he possesses the specific intent to deceive or defraud...."); United States v. Smith, *supra* at 121-22. The instruction omits the word "specific." *See also* Committee Commentary to Instruction 2.07 Specific Intent.

Intent and knowledge need not be proved directly. Pattern Instruction 2.08, Inferring Required Mental State, states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance describes one approach to proving knowledge.

In Neder v. United States, *supra*, the Court held that materiality is an element of a "scheme or artifice to defraud" under mail, wire and bank fraud. Although this element is not found in a "natural reading" of the statute, the court relied on the rule of construction " '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' " 527 U.S. at 21. At common law, the word "fraud"

required proof of materiality. Because Congress did not indicate otherwise, the Court presumed that Congress intended to incorporate "materiality."

The definition of materiality is as follows: "In general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.'" *Id*. at 16, *quoting Gaudin*, 515 U.S. at 509.

As to whether the fraud must be capable of deceiving persons based on a subjective ("however gullible") standard or an objective ("person of ordinary prudence") standard, in most cases the objective standard provided in paragraph (2)(D) of the instruction is appropriate. The Sixth Circuit has stated that the standard to be used is an objective one. *See, e.g.*, United States v. Jamieson, 427 F.3d 394, 415-16 (6th Cir. 2005); Berendt v. Kemper Corp., 973 F.2d 1291, 1294 (6th Cir. 1992); Blount Fin. Servs., Inc. v. Walter E. Heller and Co., 819 F.2d 151, 153 (6th Cir. 1987); United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979); and United States v. Bohn, 2008 WL 2332226 at 9, 2008 U.S. App. LEXIS 12474 at 26 (6th Cir. 2008) (unpublished). *But see* Norman v. United States, 100 F.2d 905, 907 (6th Cir. 1939) (using a subjective standard, explaining that: "the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artifice."). In *Frost, supra*, the court affirmed an instruction with an objective standard, but the issue of objective-vs.-subjective standard was not raised. *Frost*, 125 F.3d at 371 (affirming instruction which provided, "There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension."). However, none of these cases involved vulnerable victims who were targeted by the defendant specifically because of their vulnerability. If this situation arises, the parties should address whether the appropriate standard is objective or subjective based on the facts of the case.

Outside the Sixth Circuit, there is a split of authority on this issue. In United States v. Svete, 556 F.3d 1157 (11th Cir. 2009) (en banc), the district court gave the Eleventh Circuit pattern instruction on mail fraud, which incorporated a subjective standard and thus did not require that the fraudulent scheme be calculated to deceive a reasonably prudent person. The en banc court affirmed the use of this instruction, rejecting prior circuit precedent after a detailed review of authority in other circuits and the Supreme Court. The court concluded that "[m]ail fraud does not require proof that a scheme to defraud would deceive persons of ordinary prudence." *Id*. at 1169. In discussing the Sixth Circuit decisions in *Norman* (using a subjective standard) and *Jamieson* (stating an objective standard, but not citing or distinguishing *Norman*), the Eleventh Circuit found *Norman* more persuasive because in *Jamieson*, the "'ordinary prudence' language was invoked to . . . affirm [a] conviction . . . ." *Svete* at 1168-69. The subjective standard enunciated by the Sixth Circuit in *Norman* is consistent with other older Sixth Circuit precedent. *See* Henderson v. United States, 218 F.2d 14, 19 (6th Cir. 1955); Tucker v. United States, 224 F. 833, 837 (6th Cir. 1915); O'Hara v. United States, 129 F. 551, 555 (6th Cir. 1904).

As to the required connection between the scheme to defraud and the use of the wires, in the context of mail fraud the Supreme Court has stated: "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part

of the execution of the fraud . . . ." Schmuck v. United States, 489 U.S. 705, 710 (1989). The Court explained: "To be a part of the execution of the fraud . . . the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be 'incident to an essential part of the scheme,' or 'a step in [the] plot.'" *Id*. at 710-11 (internal citations and quotation marks omitted). The Court then stated: "The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud." *Id*. at 715.

In paragraph (1)(A) the reference to participation is based on the Seventh Circuit instruction on the elements of mail fraud, which includes the phrase "[or] [participated in] the scheme" and on Eleventh Circuit Instruction 50.1, which includes the phrase "devised or participated in a scheme." The Seventh Circuit instruction is presumably based on United States v. Wilson, 506 F.2d 1252, 1258 (7th Cir. 1974), where the court affirmed an instruction stating that "the Government must prove beyond a reasonable doubt that defendants or any one or more of them participated in a scheme to defraud."

A pyramid scheme is a scheme to defraud. *See Gold Unlimited, Inc*., 177 F.3d at 484-85.

10.03 BANK FRAUD (18 U.S.C. § 1344)

(1) The defendant is charged with the crime of bank fraud. For you to find the defendant guilty of bank fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [knowingly executed] [attempted to execute] a scheme [to defraud a financial institution][to obtain money or other property owned by or in the control of a financial institution by means of false or fraudulent pretenses, representations or promises];

(B) Second, that the scheme [related to a material fact][included a material misrepresentation or concealment of a material fact];

(C) Third, that the defendant had the intent to defraud; and

(D) Fourth, that the financial institution was federally insured.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A "scheme to defraud" includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

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

(C) An act is "knowingly" done if done voluntarily and intentionally, and not because of mistake or some other innocent reason.

(D) A misrepresentation or concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

(E) To act with "intent to defraud" means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself [to another person].

(3) [It is not necessary that the government prove [all of the details alleged concerning the precise nature and purpose of the scheme] [that the alleged scheme actually succeeded in defrauding anyone] [that someone relied on the misrepresentation or false statement] [that the defendant benefitted personally from the scheme to defraud the financial institution] [that the financial institution suffered a loss].]

(4) If you are convinced that the government has proved all of the elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of the elements, then you must find the defendant not guilty of this charge.

Use Note

Brackets indicate options for the court.

In paragraph (1)(A), some of the types of property listed in § (2) of the bank fraud statute, i.e., "funds, credits, assets, securities," were omitted because they are adequately covered by the simpler phrase "money or other property."

In paragraph (1)(B), use language in the first bracket for prosecutions based solely on § 1344(1); use language in the second bracket for prosecutions based solely on § 1344(2); use language in both brackets if the prosecution is based on both sections.

Paragraph (1)(D) fits most cases but a particular definition of financial institution may be selected from the list in 18 U.S.C. § 20 to fit the facts of each case.

In paragraph (2)(D), the word “person” should be replaced with entity or corporation or agency as the facts warrant.

In paragraph (2)(D), the bracketed sentence should be given if the court decides to use the objective standard for the definition of materiality; this issue is discussed in detail infra in the Committee Commentary.

The provisions of paragraph (3) should be used only if relevant.

See also Instruction 2.09 Deliberate Ignorance.

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud – Good Faith Defense.

Committee Commentary Instruction 10.03
(current through December 1, 2009)

The elements of bank fraud are defined in Neder v. United States, 527 U.S.1 (1999); United States v. Everett, 270 F.3d 986, 989 (6th Cir. 2001); and United States v. Hoglund, 178 F.3d 410, 412-13 (6th Cir. 1999). The specific language in paragraphs (1)(A), (1)(C), and (1)(D) is drawn from *Everett*, 270 F.3d at 989. The language in paragraph (1)(B) describing materiality is based on *Neder*, 527 U.S. at 16.

In paragraph (1)(A), some of the types of property listed in § (2) of the bank fraud statute, *i.e.*, "funds, credits, assets, securities," were omitted because they are adequately covered by the simpler phrase "money or other property."

In paragraph (1)(D), the term "federally insured" is based on the statutory definition of financial institution as one which is insured by, *inter alia*, the F.D.I.C. or the National Credit Union Share Insurance Fund, *see* 18 U.S.C. § 20(1) and (2). The court has held that it is an element of bank fraud that the financial institution be federally insured. *See, e.g.*, United States v. Reaume, 338 F.3d 577, 580 (6th Cir. 2003); *Everett*, 270 F.3d at 989; *Hoglund*, 178 F.3d at 413.

The definition of "scheme to defraud" in paragraph (2)(A) is based on United States v. Daniel, 329 F.3d 480, 485-86 (6th Cir. 2003), *citing* United States v. Gold Unlimited, Inc., 177 F.3d 472, 479 (6th Cir. 1999). In the instruction, the words "by deception" were omitted because that requirement is adequately covered in paragraph (2)(E) defining intent to defraud. In *Daniel*, the court further states, "The scheme to defraud element required under 18 U.S.C. § 1341 is not defined according to a technical standard. The standard is a 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" United States v. Daniel, *supra* at 486 (brackets and some internal quotation marks omitted), *quoting* United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979).

The definition of "false or fraudulent pretenses, representations or promises" in paragraph (2)(B) is based on the definition of "false or fraudulent pretenses" in First Circuit Instruction 4.14 Bank Fraud. In the instruction, the Committee omitted a reference to the intent to defraud because that element is covered in paragraph (2)(E). The Sixth Circuit has approved similar definitions, *see* United States v. Stull, 743 F.2d 439, 446 (6th Cir. 1984) and United States v. O'Boyle, 680 F.2d 34, 36 (6th Cir. 1982). *See also* Instruction 2.09 Deliberate Ignorance.

The definition of "knowingly" in paragraph (2)(C) is drawn from the jury instructions given in United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984).

The definition of "material" in paragraph (2)(D) is based on *Neder*, 527 U.S. at 16, *quoting* United States v. Gaudin, 515 U.S. 506, 509 (1995).

The "intent to defraud" definition in paragraph (2)(E) is a restatement of the language in *Frost*, 125 F.3d at 371. The court quoted this definition with approval in United States v. McAuliffe, 490 F.3d 526, 531 (6th Cir. 2007). For other phrasing of the definition, *see* United States v. Daniel, *supra* at 487, *quoting* United States v. DeSantis, 134 F.3d 760, 764 (6th Cir. 1998).

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. This language is based on United States v. Everett, *supra* at 991; and First Circuit Instruction 4.12; Fifth Circuit Instruction 2.61; Eighth Circuit Instruction 6.18.1341; and Eleventh Circuit Instruction 50.1. These provisions should be used only if relevant.

Generally, the bank fraud statute was modeled on and is similar to the mail and wire fraud statutes. *Neder*, 527 U.S. at 20-21. As noted in the Introduction to the fraud instructions, the mail, wire and bank fraud offenses are read in tandem and case law on the three is largely

interchangeable. *See* Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); United States v. McAuliffe, 490 F.3d 526, 532 n.3 (6th Cir. 2007) ("The bank, mail and wire fraud statutes all employ identical 'scheme to defraud' language and thus are to be interpreted in pari materia.") (citations omitted); Hofstetter v. Fletcher, 905 F.2d 897, 902 (6th Cir. 1988) ("This court has held that the wire fraud statutory language should be interpreted with the same breadth as the analogous language in the mail fraud statute.") (citations omitted).

To define the mens rea for bank fraud, some authority requires that the defendant knowingly devised or intended to devise a scheme to defraud, and that the defendant acted with the intent to defraud. The court endorses these terms several times in *Gold Unlimited, Inc*., 177 F.3d at 478-79, 485, 488. *See also Reaume*, 338 F.3d at 580 (bank fraud requires "intent to defraud"); *Everett*, 270 F.3d at 989 (same). In other cases, the court has referred to the mens rea as the "specific" intent to defraud, *see, e.g., Daniel*, 329 F.3d at 487; *Frost*, 125 F.3d at 354 ("A defendant does not commit mail fraud unless he possesses the specific intent to deceive or defraud...."); United States v. Smith, 39 F.3d 119, 121-22 (6th Cir. 1994). The instruction omits the word "specific." *See also* Committee Commentary to Instruction 2.07 Specific Intent.

Intent and knowledge need not be proved directly. Pattern Instruction 2.08, Inferring Required Mental State, states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance describes one approach to proving knowledge.

In *Neder*, 527 U.S. at 25, the Court held that materiality is an element of a "scheme or artifice to defraud" under mail, wire and bank fraud. Although this element is not found in a "natural reading" of the statute, the Court relied on the rule of construction " '[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' " *Id*. at 21. At common law, the word "fraud" required proof of materiality. Because Congress did not indicate otherwise, the Court presumed that Congress intended to incorporate "materiality."

The definition of materiality is as follows: "In general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.'" *Id*. at 16, *quoting* United States v. Gaudin, 515 U.S. at 509.

As to whether the fraud must be capable of deceiving persons based on a subjective ("however gullible") standard or an objective ("person of ordinary prudence") standard, in most cases the objective standard provided in paragraph (2)(D) of the instruction is appropriate. The Sixth Circuit has stated that the standard to be used is an objective one. *See, e.g*., United States v. Jamieson, 427 F.3d 394, 415-16 (6th Cir. 2005); Berendt v. Kemper Corp., 973 F.2d 1291, 1294 (6th Cir. 1992); Blount Fin. Servs., Inc. v. Walter E. Heller and Co., 819 F.2d 151, 153 (6th Cir. 1987); United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979); and United States v. Bohn, 2008 WL 2332226 at 9, 2008 U.S. App. LEXIS 12474 at 26 (6th Cir. 2008)

(unpublished). *But see* Norman v. United States, 100 F.2d 905, 907 (6th Cir. 1939) (using a subjective standard, explaining that: "the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artifice."). In *Frost, supra*, the court affirmed an instruction with an objective standard, but the issue of objective-vs.-subjective standard was not raised. *Frost*, 125 F.3d at 371 (affirming instruction which provided, "There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension."). However, none of these cases involved vulnerable victims who were targeted by the defendant specifically because of their vulnerability. If this situation arises, the parties should address whether the appropriate standard is objective or subjective based on the facts of the case.

Outside the Sixth Circuit, there is a split of authority on this issue. In United States v. Svete, 556 F.3d 1157 (11th Cir. 2009) (en banc), the district court gave the Eleventh Circuit pattern instruction on mail fraud, which incorporated a subjective standard and thus did not require that the fraudulent scheme be calculated to deceive a reasonably prudent person. The en banc court affirmed the use of this instruction, rejecting prior circuit precedent after a detailed review of authority in other circuits and the Supreme Court. The court concluded that "[m]ail fraud does not require proof that a scheme to defraud would deceive persons of ordinary prudence." *Id*. at 1169. In discussing the Sixth Circuit decisions in *Norman* (using a subjective standard) and *Jamieson* (stating an objective standard, but not citing or distinguishing *Norman*), the Eleventh Circuit found *Norman* more persuasive because in *Jamieson*, the "'ordinary prudence' language was invoked to . . . affirm [a] conviction . . . ." *Svete* at 1168-69. The subjective standard enunciated by the Sixth Circuit in *Norman* is consistent with other older Sixth Circuit precedent. *See* Henderson v. United States, 218 F.2d 14, 19 (6th Cir. 1955); Tucker v. United States, 224 F. 833, 837 (6th Cir. 1915); O'Hara v. United States, 129 F. 551, 555 (6th Cir. 1904).

Check kiting constitutes a "scheme to defraud" under the bank fraud statute. United States v. Stone, 954 F.2d 1187, 1190 (6th Cir. 1992).

The defendant need not benefit personally from the scheme to defraud the financial institution. United States v. Knipp, 963 F.2d 839, 846 (6th Cir. 1992).

The government need not prove that the financial institution suffered a loss. *Everett*, 270 F.3d at 991. The government need not prove that the defendant exposed the financial institution to a risk of loss. United States v. Hoglund, *supra* at 413. Going one step further, the court has held that to constitute bank fraud,

> [T]he defendant need not have put the bank at risk of loss in the usual sense or intended to do so. It is sufficient if the defendant in the course of committing fraud on *someone* causes a federally insured bank to transfer funds under its possession and control.
> . . . .
> Thus, even if the [defendant] did not intend to defraud the bank, causing a bank to transfer funds pursuant to a fraudulent scheme reduces the funds the bank has available for its loans and other activities and almost inevitably causes it some loss.

Everett, 270 F.3d at 991 (emphasis in original). *See also Reaume*, 338 F.3d at 581-82.

10.04 FRAUD – GOOD FAITH DEFENSE

(1) The good faith of the defendant is a complete defense to the charge of _____ contained in [Count ___ of] the indictment because good faith on the part of the defendant is, simply, inconsistent with an intent to defraud.

(2) A person who acts, or causes another person to act, on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct.

(3) A defendant does not act in good faith if, even though he honestly holds a certain opinion or belief, that defendant also knowingly makes false or fraudulent pretenses, representations, or promises to others.

(4) While the term "good faith" has no precise definition, it encompasses, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another.

(5) The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in this case. It is the government's burden to prove to you, beyond a reasonable doubt, that the defendant acted with an intent to defraud.

(6) If the evidence in this case leaves you with a reasonable doubt as to whether the defendant acted with an intent to defraud or in good faith, you must acquit the defendant.

Use Note

Brackets indicate options for the court.

Committee Commentary Instruction 10.04
(current through December 1, 2009)

This instruction is based on Kevin F. O'Malley et al., Federal Jury Practice and Instructions (5th ed. 2000), § 19.06 The Good Faith Defense – Explained.

Several Sixth Circuit cases endorse instructions including good faith provisions. *See* United States v. Frost, 125 F.3d 346, 372 (6th Cir. 1997) (endorsing an instruction that stated, *inter alia*, "good faith on the part of a defendant is inconsistent with an intent to defraud."); United States v. McGuire, 744 F.2d 1197, 1200-02 (6th Cir. 1984); United States v. Stull, 743 F.2d 439, 445-46 (6th Cir. 1984).

In *Stull*, 743 F.2d at 446, the court approved a good faith instruction that stated, *inter*

alia, "Good faith does not include the defendant's belief or faith that the venture will eventually meet his or her expectations." This provision can be added to the instruction if relevant in the case.

The good faith instruction should be given if there is any evidence at all to support the charge. United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984), *quoting* United States v. Curry, 681 F.2d 406, 416 (5th Cir. 1982).

Chapter 11.00

MONEY LAUNDERING OFFENSES

Introduction to Money Laundering Instructions

(current through December 1, 2009)

The main money laundering statute, 18 U.S.C. § 1956, defines the crime in three subsections. Subsection (a)(1) covers domestic financial transactions; subsection (a)(2) covers international transportations; subsection (a)(3) covers undercover investigations. Diagrams of the three subsections appear in the appendix.

The instructions describe the crimes of § 1956 in five instructions. Instructions 11.01 and 11.02 cover subsection (a)(1)(domestic financial transactions). Instructions 11.03 and 11.04 cover subsection (a)(2)(international transportations). Instruction 11.05 applies to subsection (a)(3)(undercover investigations).

The Committee drafted two instructions for each of the first two subsections, (a)(1) and (a)(2), mainly because of different mens rea options within each subsection. Under (a)(1), Instructions 11.01 and 11.02 (which reflect subsections (a)(1)(A) and (a)(1)(B) respectively) are similar; the only difference is in the mens rea element. For (a)(1)(A), the mens rea is intent, either to promote the carrying on of specified unlawful activity (characterized as "promotional money laundering" in United States v. McGahee, 257 F.3d 520, 526 (6th Cir. 2001)) or to violate certain tax laws. For (a)(1)(B), the mens rea is knowledge that the transaction was designed either to conceal the proceeds of specified unlawful activity (characterized as "concealment money laundering," *id.*) or to avoid a reporting requirement.

Under § 1956(a)(2), Instructions 11.03 and 11.04 (which cover subsections (a)(2)(A) and (a)(2)(B) respectively) again reflect differences in the two subsections. The first difference is the mens rea. For (a)(2)(A), the mens rea is intent to promote the carrying on of specified unlawful activity; for (a)(2)(B), the mens rea is knowing that the funds are proceeds of crime and knowing that the transaction was designed either to conceal the proceeds of specified unlawful activity or to avoid a reporting requirement. A second possible difference between the two subsections is less clear. This difference between (a)(2)(A) and (a)(2)(B) is that subsection (a)(2)(B) arguably requires that the funds involved be proceeds of unlawful activity whereas subsection (a)(2)(A) clearly does not. These distinctions are discussed in more detail in the commentaries to the instructions.

Section 1956(a)(3) is covered in Instruction 11.05.

The Committee also drafted Instruction 11.06 to cover the money laundering crime of Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity (18 U.S.C. § 1957).

Chapter 11.00

MONEY LAUNDERING OFFENSES

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11.01 MONEY LAUNDERING – Domestic Financial Transaction (18 U.S.C. § 1956(a)(1)(A)(intent to promote the carrying on of specified unlawful activity))

(1) Count ___ of the indictment charges the defendant with [conducting] [attempting to conduct] a financial transaction in violation of federal law. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [conducted] [attempted to conduct] a financial transaction.

(B) Second, that the financial transaction involved property that represented the proceeds of [*insert the specified unlawful activity from § 1956(c)(7)*].

(C) Third, that the defendant knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity.

(D) Fourth, that the defendant had the intent [to promote the carrying on of [*insert the specified unlawful activity from § 1956(c)(7)*]] [to engage in conduct violating §§ 7201 or 7206 of the Internal Revenue Code of 1986].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "financial transaction" means [*insert definition from § 1956(c)(4)*].

(B) [The term "financial institution" means [*insert definition from 31 U.S.C. § 5312(a)(2) or the regulations promulgated thereunder*]].

(C) The word "conducts" includes initiating, concluding, or participating in initiating or concluding a transaction.

(D) The word "proceeds" means any property [derived from] [obtained] [retained], directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

(E) The phrase "knew that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the defendant knew the property involved in the transaction represented the proceeds of some form, though not necessarily which form, of activity that constitutes a felony under state or federal [foreign] law. [The government does not have to prove the defendant knew the property involved represented proceeds of a felony as long as he knew the property involved represented proceeds of some form of unlawful activity.]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

Brackets indicate options for the court.

The definition of financial institution in paragraph (2)(B) should be given only when a financial institution is used to prove the presence of a financial transaction.

The final bracketed sentence in paragraph (2)(E) should be given only when the defendant raises as an issue whether he knew that the unlawful activity which generated the proceeds was a felony or a misdemeanor.

Committee Commentary Instruction 11.01

(current through December 1, 2009)

The purpose of this instruction is to outline the elements of the crime of money laundering through a domestic financial transaction based on a mens rea of intent, which is characterized as "promotional money laundering." United States v. McGahee, 257 F.3d 520, 526 (6th Cir. 2001). The intent can be either to promote the carrying on of specified unlawful activity or to violate 26 U.S.C. §§ 7201 or 7206 of the tax code. *See generally* 18 U.S.C. § 1956(a)(1). Subsections (a)(1)(A) and (a)(1)(B) of § 1956 have been interpreted as alternative means of committing the same offense. United States v. Navarro, 145 F.3d 580, 592 (3d Cir. 1998). *See also* United States v. Westine, 1994 WL 88831, 1994 U.S.App. LEXIS 5144 (6th Cir. 1994) (unpublished). Thus, the instructions for subsections (a)(1)(A) and (a)(1)(B) are similar; the difference is in the mens rea element. For (a)(1)(A), the mens rea is intent, either to promote the carrying on of specified unlawful activity or to violate certain tax laws. For (a)(1)(B), which is covered in the next instruction, the mens rea is knowledge that the transaction is designed either to conceal the proceeds of specified unlawful activity or to avoid a reporting requirement.

If the defendant is charged with intent to violate §§ 7201 or 7206 of the Internal Revenue Code, 26 U.S.C. §§ 7201, 7206, a supplemental instruction on these provisions should be given.

The definition of the term proceeds in paragraph (2)(D) is taken verbatim from the definition in § 1956(c)(9), effective May 20, 2009. Congress added this definition to the statute following the Supreme Court's decision in United States v. Santos, 128 S.Ct. 2020 (2008) which stated in a plurality opinion that the term "proceeds" is limited to profits in a case where gambling was the specified unlawful activity.

In cases arising from conduct prior to May 20, 2009, the trial court must determine whether *Santos* applies to the specified unlawful activity at issue. *See, e.g.*, United States v. Kratt, 2009 U.S.App.Lexis 19798, 2009 WL 2767152 (6th Cir. September 2, 2009), discussing *Santos* in a § 1957 money laundering case with bank fraud as the specified unlawful activity. The Sixth Circuit held that *Santos* applies to § 1957 money laundering cases, and that there is a rule of general applicability derived from *Santos* based on the "outcomes" upon which the

plurality in Santos and Justice Stevens, who wrote a concurring opinion, would agree. Specifically, in any case in which there is a "merger" problem and that merger problem results in the underlying crime being punishable by a significantly increased sentence because the money laundering statute was used, then "proceeds" must be construed to mean "profit." The Sixth Circuit affirmed the conviction in *Kratt* because the statutory maximum sentence for bank fraud was actually higher than for money laundering. Since use of the money laundering statute did not expose the defendant to a significantly higher sentence for the underlying conduct, there was no *Santos* problem and circuit precedent construing "proceeds" to mean "gross receipts" controlled. *See* United States v. Prince, 214 F.3d 740, 747 (6th Cir. 2000); United States v. Haun, 90 F.3d 1096, 1101 (6th Cir. 1996).

The government does not have to trace the origin of all the proceeds involved in the financial transactions to determine precisely which proceeds were used for which transactions. United States v. Jamieson, 427 F.3d 394, 403-04 (6th Cir. 2005); United States v. Bencs, 28 F.3d 555, 562 (6th Cir. 1994). Also, the statute does not require that the entire property involved represent the proceeds of specified unlawful activity. United States v. Conner, 1991 WL 213756 at 4, 1991 U.S. App. LEXIS 25370 at 10 (6th Cir. 1991) (unpublished). As long as the jury can infer that a portion of the funds involved represented the proceeds of the specified unlawful activity, there is no minimum percentage requirement. *Westine*, 1994 WL at 2, 1994 U.S.App. LEXIS at 8.

It is an element of all crimes under subsection (a)(1) that the property involved in fact represent the proceeds of specified unlawful activity. See § 1956(a)(1). However, the defendant need only know that the property involved represents proceeds of some form of unlawful activity. The statute defines this mens rea in subsection (c)(1): "[T]he 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) [as specified unlawful activity]." This definition of the mens rea makes clear that although the property must actually represent proceeds of certain listed unlawful activities, the defendant need not know this. The government does not have to prove that the defendant knew the property represented proceeds of a particular type of unlawful activity as long as the defendant knew it represented proceeds of "some form of unlawful activity."

The statute requires that the defendant know that the property involved in the financial transaction represented the proceeds of "some form of unlawful activity." The statutory definition of this phrase is quoted *supra*. Subsection (a)(1) "does not require the government to prove that the defendant knew that the alleged unlawful activity was a felony . . ., as opposed to a misdemeanor, so long as the defendant knew that the laundered proceeds were derived from unlawful activity." United States v. Hill, 167 F.3d 1055, 1065 (6th Cir. 1999).

In United States v. Santos, 128 S.Ct. 2020, 2029 (2008), the plurality elaborated on methods of proving knowledge for the money laundering statute:

> As for the knowledge element of the money-laundering offense— knowledge that

> the transaction involves profits of unlawful activity—that will be provable (as knowledge must almost always be proved) by circumstantial evidence. For example, someone accepting receipts from what he knows to be a long-continuing drug-dealing operation can be found to know that they include some profits. And a jury could infer from a long-running launderer-criminal relationship that the launderer knew he was hiding the criminal's profits. Moreover, the Government will be entitled to a willful blindness instruction if the professional money launderer, aware of a high probability that the laundered funds were profits, deliberately avoids learning the truth about them—as might be the case when he knows that the underlying crime is one that is rarely unprofitable.

See also United States v. Bohn, 2008 U.S. App. Lexis 12474 at 28, 2008 WL 2332226 at 10 (6th Cir. 2008) (unpublished) ("In this Circuit the knowledge requirements of § 1956 are construed to include instances of willful blindness.") (*citing* United States v. Hill, 167 F.3d 1055, 1067 (6th Cir. 1999)).

Conviction under this subsection of § 1956 can be based on an intent to promote the carrying on of specified unlawful activity. Several Sixth Circuit cases have defined intent to promote the carrying on of specified unlawful activity. In United States v. McGahee, *supra*, the court held that paying for personal goods, alone, was not sufficient to establish that the funds were used to promote an illegal activity. The court further stated that payment of the general business expenditures of a business that is used to defraud is not sufficient to establish promotion of the underlying crime; rather, the transaction "must be explicitly connected to the mechanism of the crime." *McGahee*, 257 F.3d at 527, *citing* United States v. Brown, 186 F.3d 661, 669-70 (5th Cir. 1999). *See also Haun*, 90 F.3d 1096 (evidence of promotion sufficient when checks for proceeds of fraudulent car sales were cashed or deposited into company's bank account); United States v. Reed, 167 F.3d 984, 992-93 (6th Cir. 1999) (evidence of promotion sufficient when money used to pay antecedent drug debt and ease payer/defendant's position); United States v. King, 169 F.3d 1035 (6th Cir. 1999) (evidence of promotion sufficient when proceeds used to pay for drugs).

The presence of four options for proving mens rea under subsection (a)(1) has raised unanimity issues. The Sixth Circuit has not addressed the question of whether an augmented unanimity instruction is required, but it has characterized subsections (a)(1)(A) and (a)(1)(B) as alternative bases for a conviction either of which is sufficient. *Westine*, 1994 WL at 2, 1994 U.S. App. Lexis at 7. Other circuits have found that a specific unanimity instruction is not required; rather, a general unanimity instruction is sufficient. These courts have concluded that the alternative mental states of subsection (a)(1) do not constitute multiple crimes but rather separate means of committing a single crime. *Navarro*, 145 F.3d at 592 n.6 (3d Cir. 1998) *citing* United States v. Holmes, 44 F.3d 1150, 1155–56 (2d Cir. 1995) ((B)(i) and (B)(ii) are alternative improper purposes for single crime under (a)(1)). The Third Circuit reasoned that the fact that multiple purposes could satisfy the end of money laundering did not mean that Congress intended to create multiple offenses. Thus the absence of a specific unanimity instruction was not plain error. (This holding was limited in two ways: although a specific unanimity instruction was not given, a general one was; and the court was reviewing only for plain error. Whether the court would decide the same way without these two conditions is unclear.) The Eighth Circuit has reached the same conclusion, finding that subsections (A)(i) and (B)(i) are two mens rea

options under the one crime stated in (a)(1), so giving a general unanimity instruction rather than a specific one was not error. United States v. Nattier, 127 F.3d 655 (8th Cir. 1997). These cases suggest that giving Pattern Instruction 8.03 Unanimous Verdict is sufficient and that giving an augmented unanimity instruction is not required in § 1956(a)(1) prosecutions involving multiple mental states. *See also* Instruction 8.03B Unanimity Not Required – Means.

Attempted money laundering is also a crime under § 1956. If the crime of attempt is charged, the instructions should be supplemented by the instructions in Chapter 5.00 on Attempts.

The Committee recommends against giving an instruction recounting the statutory language because it would be difficult for the jury to absorb. See the Committee Commentary to Instruction 2.02.

11.02 MONEY LAUNDERING – Domestic Financial Transaction (18 U.S.C. § 1956(a)(1)(B)(knowing the transaction is designed to conceal facts related to proceeds))

(1) Count _____ of the indictment charges the defendant with [conducting] [attempting to conduct] a financial transaction in violation of federal law. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [conducted] [attempted to conduct] a financial transaction.

(B) Second, that the financial transaction involved property that represented the proceeds of [*insert the specified unlawful activity from § 1956(c)(7)*].

(C) Third, that the defendant knew that the property involved in the financial transaction represented the proceeds from some form of unlawful activity.

(D) Fourth, that the defendant knew that the transaction was designed in whole or in part

-- [to conceal or disguise the [nature] [location] [source] [ownership] [control] of the proceeds of [insert the specified unlawful activity from § 1956(c)(7)]]

-- [to avoid a transaction reporting requirement under state or federal law].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "financial transaction" means [insert the definition from § 1956(c)(4)].

(B) [The term "financial institution" means [*insert definition from 31 U.S.C. § 5312(a)(2) or the regulations promulgated thereunder*]].

(C) The word "conducts" includes initiating, concluding, or participating in initiating or concluding a transaction.

(D) The word "proceeds" means any property [derived from] [obtained] [retained], directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

(E) The phrase "knew that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the defendant knew the funds involved in the transaction represented the proceeds of some form, though not necessarily which form, of activity that constitutes a felony under state or federal [foreign] law. [The government does not have to prove the defendant knew the property involved represented proceeds of a felony as long as he knew the property involved represented proceeds of some form of unlawful activity.]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these

elements, then you must find the defendant not guilty of this charge.

Use Note

Brackets indicate options for the court.

The definition of financial institution in paragraph (2)(B) should be given only when a financial institution is used to prove the presence of a financial transaction.

The final bracketed sentence in paragraph (2)(E) should be given only when the defendant raises an issue on whether he knew that the unlawful activity which generated the proceeds was a felony or misdemeanor.

Committee Commentary Instruction 11.02

(current through December 1, 2009)

The purpose of this instruction is to outline the elements of the crime of money laundering through a domestic financial transaction based on a mens rea of knowledge that the transaction is designed to conceal facts related to proceeds. *See generally* § 1956(a)(1). The court has characterized this as "concealment money laundering," *see* United States v. McGahee, 257 F.3d 520, 526 (6th Cir. 2001). Subsections (a)(1)(A) and (a)(1)(B) of § 1956 have been interpreted as alternative means of committing the same offense. United States v. Navarro, 145 F.3d 580, 592 (3rd Cir. 1998). *See also* United States v. Westine, 1994 WL 88831, 1994 U.S.App. LEXIS 5144 (6th Cir. 1994) (unpublished). Thus, the instructions for subsections (a)(1)(A) and (a)(1)(B) are similar; the difference is in the mens rea element. For subsection (a)(1)(A), covered in the preceding instruction, the statutory mens rea is intent to promote the carrying on of specified unlawful activity. For subsection (a)(1)(B), the statutory mens rea is knowledge that the transaction has particular purposes. The Sixth Circuit has acknowledged the mens rea for subsection (a)(1)(B) as knowledge, *see* United States v. Moss, 9 F.3d 543, 551 (6th Cir. 1993), *but see* United States v. Loehr, 966 F.2d 201, 204 (6th Cir. 1992) (mens rea for (a)(1)(B) is intent) and United States v. Beddow, 957 F.2d 1130, 1134-35 (6th Cir. 1992) (same). The pattern instruction tracks the statutory language.

The term "financial transaction" is defined in subsection 1956(c)(4). Some examples of covered transactions include transactions at financial institutions (e.g., deposits, withdrawals, check cashings); transfers of title to real estate, cars, boats and aircraft; and wire transfers. The Committee recommends that the court define financial transaction by quoting only the specific portion of the definition involved in the case.

The definition of the term proceeds in paragraph (2)(D) is taken verbatim from the definition in § 1956(c)(9), effective May 20, 2009. Congress added this definition to the statute following the Supreme Court's decision in United States v. Santos, 128 S.Ct. 2020 (2008) which stated in a plurality opinion that the term "proceeds" is limited to profits in a case where gambling was the specified unlawful activity.

In cases arising from conduct prior to May 20, 2009, the trial court must determine whether *Santos* applies to the specified unlawful activity at issue. *See, e.g.*, United States v. Kratt, 2009 U.S.App.Lexis 19798, 2009 WL 2767152 (6th Cir. September 2, 2009), discussing *Santos* in a § 1957 money laundering case with bank fraud as the specified unlawful activity. The Sixth Circuit held that *Santos* applies to § 1957 money laundering cases, and that there is a rule of general applicability derived from *Santos* based on the "outcomes" upon which the plurality in Santos and Justice Stevens, who wrote a concurring opinion, would agree. Specifically, in any case in which there is a "merger" problem and that merger problem results in the underlying crime being punishable by a significantly increased sentence because the money laundering statute was used, then "proceeds" must be construed to mean "profit." The Sixth Circuit affirmed the conviction in *Kratt* because the statutory maximum sentence for bank fraud was actually higher than for money laundering. Since use of the money laundering statute did not expose the defendant to a significantly higher sentence for the underlying conduct, there was no *Santos* problem and circuit precedent construing "proceeds" to mean "gross receipts" controlled. *See* United States v. Prince, 214 F.3d 740, 747 (6th Cir. 2000); United States v. Haun, 90 F.3d 1096, 1101 (6th Cir. 1996).

The government does not have to trace the origin of all the proceeds involved in the financial transactions to determine precisely which proceeds were used for which transactions. United States v. Jamieson, 427 F.3d 394, 403-04 (6th Cir. 2005); United States v. Bencs, 28 F.3d 555, 562 (6th Cir. 1994). Also, the statute does not require that the entire property involved represent the proceeds of specified unlawful activity. United States v. Conner, 1991 WL 213756 at 4, 1991 U.S. App. LEXIS 25370 at 10 (6th Cir. 1991) (unpublished). As long as the jury can infer that a portion of the funds involved represented the proceeds of the specified unlawful activity, there is no minimum percentage requirement. United States v. Westine, 1994 WL 88831, 2, 1994 U.S.App. LEXIS 5144, 8 (6th Cir. 1994) (unpublished).

It is an element of all crimes under (a)(1) that the property involved in fact represent the proceeds of specified unlawful activity. *See* § 1956(a)(1). However, the defendant need only know that the property involved represents proceeds of some form of unlawful activity. The statute defines this mens rea in subsection (c)(1): "[T]he 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) [as specified unlawful activity]." This definition of the mens rea makes clear that although the property must actually represent proceeds of certain listed unlawful activities, the defendant need not know this. The government does not have to prove that the defendant knew the property represented proceeds of a particular type of unlawful activity as long as the defendant knew it represented proceeds of "some form of unlawful activity."

The statute requires that the defendant know that the property involved in the financial transaction represented the proceeds of "some form of unlawful activity." The statutory definition of this phrase is quoted in the preceding paragraph. Subsection (a)(1) "does not require the government to prove that the defendant knew that the alleged unlawful activity was a felony . . ., as opposed to a misdemeanor, so long as the defendant knew that the laundered

proceeds were derived from unlawful activity." United States v. Hill, 167 F.3d 1055, 1065 (6th Cir. 1999).

In United States v. Santos, 128 S.Ct. 2020, 2029 (2008), the plurality elaborated on proving knowledge for the money laundering statute:

> As for the knowledge element of the money-laundering offense— knowledge that the transaction involves profits of unlawful activity—that will be provable (as knowledge must almost always be proved) by circumstantial evidence. For example, someone accepting receipts from what he knows to be a long-continuing drug-dealing operation can be found to know that they include some profits. And a jury could infer from a long-running launderer-criminal relationship that the launderer knew he was hiding the criminal's profits. Moreover, the Government will be entitled to a willful blindness instruction if the professional money launderer, aware of a high probability that the laundered funds were profits, deliberately avoids learning the truth about them—as might be the case when he knows that the underlying crime is one that is rarely unprofitable.

See also United States v. Bohn, 2008 U.S. App. Lexis 12474 at 28, 2008 WL 2332226 at 10 (6th Cir. 2008) (unpublished) ("In this Circuit the knowledge requirements of § 1956 are construed to include instances of willful blindness.") (*citing* United States v. Hill, 167 F.3d 1055, 1067 (6th Cir. 1999)).

Under § 1956(a)(1)(B), the government must prove that the defendant engaged in a financial transaction in addition to the acquisition of the unlawful proceeds. United States v. Hamrick, 983 F.2d 1069 (6th Cir. 1992). The financial transaction must go beyond the defendant's involvement in the underlying specified unlawful activity. *Id*.

Proof that the defendant knew that a transaction was designed to conceal or disguise facts related to the proceeds requires the government to introduce more evidence than the simple fact of a retail purchase using illegally obtained money. United States v. Marshall, 248 F.3d 525, 538 (6th Cir. 2001). The Sixth Circuit declined to infer evidence of a design to disguise proceeds solely because the defendant bought items with investment value and the defendant bought items from a pool of money derived from another illegal transaction. *Marshall*, 248 F.3d at 539-41. The court commented, "We are also of the opinion that a few isolated purchases of wearable or consumable items directly by the wrongdoer is not the type of money-laundering transaction that Congress had in mind when it enacted § 1956(a)(1)(B)(i), especially where the value of the items is relatively small in relation to the amount stolen by the defendant." *Id*. at 541. *See also McGahee*, 257 F.3d at 527-28.

The transaction reporting requirements under federal law referred to in paragraph (D) of the instruction include at least the three reporting requirements of the Bank Secrecy Act, 31 U.S.C. §§ 5313, 5314, 5316 and the trade or business transaction reporting requirement under 26 U.S.C. § 6050I. Of course, the statutory language, which refers only to "a transaction reporting requirement under state or federal law," may also include other reporting requirements.

The presence of four options for proving mens rea under subsection (a)(1) has raised

unanimity issues. The Sixth Circuit has not addressed the question of whether an augmented unanimity instruction is required, but it has characterized subsections (a)(1)(A) and (a)(1)(B) as alternative bases for a conviction either of which is sufficient. *Westine*, 1994 WL at 2, 1994 U.S. App. LEXIS at 7. Other circuits have found that a specific unanimity instruction is not required; rather, a general unanimity instruction is sufficient. These courts have concluded that the alternative mens reas of subsection (a)(1) do not constitute multiple crimes but rather separate means of committing a single crime. *Navarro*, 145 F.3d at 592 n.6 (3d Cir. 1998), *citing* United States v. Holmes, 44 F.3d 1150, 1155–56 (2d Cir. 1995) ((B)(i) and (B)(ii) are alternative improper purposes for single crime under (a)(1)). The Third Circuit reasoned that the fact that multiple purposes could satisfy the end of money laundering did not mean that Congress intended to create multiple offenses. Thus the absence of a specific unanimity instruction was not plain error. (This holding was limited in two ways: although a specific unanimity instruction was not given, a general one was; and the court was reviewing only for plain error. Whether the court would decide the same way without these two conditions is unclear.) The Eighth Circuit has reached the same conclusion, finding that subsections (A)(i) and (B)(i) are two mens rea options under the one crime stated in (a)(1), so giving a general unanimity instruction rather than a specific one was not error. United States v. Nattier, 127 F.3d 655 (8th Cir. 1997). These cases suggest that giving Pattern Instruction 8.03 Unanimous Verdict is sufficient and that giving an augmented unanimity instruction is not required in § 1956(a)(1) prosecutions involving multiple mental states. *See also* Instruction 8.03B Unanimity Not Required – Means.

11.03 MONEY LAUNDERING – International Transportation (18 U.S.C. § 1956(a)(2)(A)(intent to promote the carrying on of specified unlawful activity))

(1) Count ____ of the indictment charges the defendant with [attempting to] [transport[ing]] [transmit[ting]] [transfer[ring]] a monetary instrument or funds in violation of federal law. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [attempted to] [transport[ed]] [transmit[ted]] [transfer[red]] a monetary instrument or funds.

(B) Second, that the defendant's [attempted] [transportation] [transmission] [transfer] was [from a place in the United States to or through a place outside the United States] [to a place in the United States from or through a place outside the United States].

(C) Third, that the defendant's [attempted] [transportation] [transmission] [transfer] of the monetary instrument or funds was done with the intent to promote the carrying on of [insert the specified unlawful activity from § 1956(c)(7)].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "monetary instruments" means

--[coin or currency of the United States, or of any other country]

--[travelers' checks]

--[personal checks]

--[bank checks]

--[money orders]

--[investment securities or negotiable instruments, in bearer form or otherwise in such form that title passes upon delivery].

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

Brackets indicate options for the court.

Committee Commentary Instruction 11.03
(current through December 1, 2009)

The purpose of this instruction is to outline the elements of the crime of money laundering through international transportation of monetary instruments or funds with the intent to promote specified unlawful activity as defined in 18 U.S.C. § 1956(a)(2)(A). Subsection (a)(2)(A) has two important characteristics. First, it is based on a mens rea of intent to promote the carrying on of specified unlawful activity, as contrasted with the other part of (a)(2) which is based on a mens rea of knowledge. Second, subsection (a)(2)(A) contains no requirement that the funds be the proceeds of specified unlawful activity. In other words, the monetary instrument or funds need not be dirty; the money used by the defendant under this subsection can be from a completely legitimate source. It is how the money was used, not how it was generated, that defines the defendant's conduct as criminal. *See generally* United States v. Hamilton, 931 F.2d 1046 (5th Cir. 1991); United States v. Piervinanzi, 23 F.3d 670 (2d Cir. 1994).

In order to prove that the defendant transported the funds with the intent to promote the carrying on of specified unlawful activity under § 1956(a)(2)(A), it is sufficient to prove that the defendant transferred checks generated by the underlying fraud scheme. United States v. Bohn, 2008 U.S. App. Lexis 12474 at 29-31, 2008 WL 2332226 at 10 (6th Cir. 2008) (unpublished) (noting that the Sixth Circuit has followed the line of cases holding that transferring or cashing a check is sufficient evidence of promoting the prior unlawful activity) (*quoting* United States v. Reed, 167 F.3d 984, 992 (6th Cir. 1999) and *citing* United States v. Haun, 90 F.3d 1096, 1100 (6th Cir. 1996)).

Subsection 1956(a)(2) can be prosecuted with either of two mental states, *see* subsections (a)(2)(A) (intent) and (a)(2)(B) (knowing). A panel of the Sixth Circuit has characterized these as alternative bases for a conviction either of which is sufficient. United States v. Bohn, 2008 U.S. App. Lexis 12474 at 31-32, 2008 WL 2332226 at 11 (6th Cir. 2008) (unpublished). This case suggests that giving Instruction 8.03 Unanimous Verdict is sufficient and that giving an augmented unanimity instruction is not required in § 1956(a)(2) prosecutions where the government alleges multiple mental states. *See also* Instruction 8.03B Unanimity Not Required – Means.

11.04 MONEY LAUNDERING – International Transportation (18 U.S.C. § 1956(a)(2)(B)(knowing that the transportation involves proceeds of some form of unlawful activity and that it is designed to conceal facts related to proceeds))

(1) Count _____ of the indictment charges the defendant with [attempting to] [transport[ing]] [transmit[ting]] [transfer[ring]] a monetary instrument or funds in violation of federal law. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [attempted to] [transport[ed]] [transmit[ted]] [transfer[red]] a monetary instrument or funds.

(B) Second, that the defendant's [attempted] [transportation] [transmission] [transfer] was [from a place in the United States to or through a place outside the United States] [to a place in the United States from or through a place outside the United States].

(C) Third, that the defendant knew that the monetary instrument or funds involved in the [transportation] [transmission] [transfer] represented the proceeds of some form of unlawful activity.

(D) Fourth, that the defendant knew that the [transportation] [transmission] [transfer] was designed in whole or in part

--[to conceal or disguise the [nature] [location] [source] [ownership] [control] of the proceeds of [*insert the specified unlawful activity from § 1956(c)(7)*]]

--[to avoid a transaction reporting requirement under state or federal law].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "monetary instruments" means

--[coin or currency of the United States, or of any other country]

--[travelers' checks]

--[personal checks]

--[bank checks]

--[money orders]

--[investment securities or negotiable instruments, in bearer form or otherwise in such form that title passes upon delivery].

(B) The word "proceeds" means any property [derived from] [obtained] [retained],

directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

Brackets indicate options for the court.

Committee Commentary Instruction 11.04
(current through December 1, 2009)

The purpose of this instruction is to outline the elements of the crime of money laundering through international transportation of monetary instruments or funds based on a mens rea of knowledge under subsection (a)(2)(B). In Cuellar v. United States, 128 S.Ct. 1994 (2008), the Court identified three elements the government was required to prove for a conviction under § 1956(a)(2)(B)(i): (1) that defendant attempted international transport of the funds; (2) that defendant knew that the funds represented the proceeds of some form of unlawful activity; and (3) that defendant knew that the transportation was designed to conceal or disguise the nature, the location, the source, the ownership, or the control of the funds. *Id*. at 2002. The elements of the crime identified in paragraph (1) of the instruction repeat these elements with a minor variation (in the instruction, the requirement of international transportation is subdivided into two elements).

Beyond the transportation or attempted transportation, the government must prove that the defendant had two types of knowledge. *See Cuellar, supra* at 2002 (listing the two types of knowledge involved in that case). First, the defendant must know that the instruments or funds represent the proceeds of some form of unlawful activity. Second, the defendant must know that the transportation, transmission or transfer was designed in whole or in part either (i) to conceal or disguise the nature, location, source, ownership or control of the proceeds of specified unlawful activity, or (ii) to avoid a transaction reporting requirement. In order to prove the second type of knowledge under subsection (i) (that defendant knew the transportation was designed at least in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds), the government must prove that the purpose of the transportation was to conceal or disguise. This element (that the defendant knew the transportation was designed to conceal or disguise) cannot be satisfied solely by evidence that the defendant concealed funds during transport. *Cuellar, supra* at 2005-06.

In the Sixth Circuit, "the knowledge requirements of § 1956 are construed to include instances of willful blindness." United States v. Bohn, 2008 U.S. App. Lexis 12474 at 28, 2008 WL 2332226 at 10 (6th Cir. 2008) (unpublished) (*citing* United States v. Hill, 167 F.3d 1055, 1067 (6th Cir. 1999)).

In *Cuellar*, the Court further held that in order to prove the transportation was "designed . . . to conceal . . . the nature, the location, the source, the ownership, or the control of the proceeds," the government was not required to prove that the transportation was designed to create the appearance of legitimate wealth. *Cuellar, supra* at 2000-2001.

The definition of the term proceeds in paragraph (2)(B) is taken verbatim from the definition in § 1956(c)(9), effective May 20, 2009. Congress added this definition to the statute following the Supreme Court's decision in United States v. Santos, 128 S.Ct. 2020 (2008) (interpreting subsection (a)(1) of the statute) which stated in a plurality opinion that the term "proceeds" is limited to profits in a case where gambling was the specified unlawful activity.

In cases arising from conduct prior to May 20, 2009, the trial court must determine whether *Santos* applies to the specified unlawful activity at issue. *See, e.g.*, United States v. Kratt, 2009 U.S.App.Lexis 19798, 2009 WL 2767152 (6th Cir. September 2, 2009), discussing *Santos* in a § 1957 money laundering case with bank fraud as the specified unlawful activity. The Sixth Circuit held that *Santos* applies to § 1957 money laundering cases, and that there is a rule of general applicability derived from *Santos* based on the "outcomes" upon which the plurality in Santos and Justice Stevens, who wrote a concurring opinion, would agree. Specifically, in any case in which there is a "merger" problem and that merger problem results in the underlying crime being punishable by a significantly increased sentence because the money laundering statute was used, then "proceeds" must be construed to mean "profit." The Sixth Circuit affirmed the conviction in *Kratt* because the statutory maximum sentence for bank fraud was actually higher than for money laundering. Since use of the money laundering statute did not expose the defendant to a significantly higher sentence for the underlying conduct, there was no *Santos* problem and circuit precedent construing "proceeds" to mean "gross receipts" controlled. *See* United States v. Prince, 214 F.3d 740, 747 (6th Cir. 2000); United States v. Haun, 90 F.3d 1096, 1101 (6th Cir. 1996).

The government does not have to trace the origin of all the proceeds involved in the financial transactions to determine precisely which proceeds were used for which transactions. United States v. Jamieson, 427 F.3d 394, 403-04 (6th Cir. 2005); United States v. Bencs, 28 F.3d 555, 562 (6th Cir. 1994). Also, the statute does not require that the entire property involved represent the proceeds of specified unlawful activity. United States v. Conner, 1991 WL 213756 at 4, 1991 U.S. App. LEXIS 25370 at 10 (6th Cir. 1991) (unpublished). As long as the jury can infer that a portion of the funds involved represented the proceeds of the specified unlawful activity, there is no minimum percentage requirement. United States v. Westine, 1994 WL 88831, 2, 1994 U.S.App. LEXIS 5144, 8 (6th Cir. 1994) (unpublished).

Subsection 1956(a)(2) can be prosecuted with either of two mental states, *see* subsections (a)(2)(A) (intent) and (a)(2)(B) (knowing). A panel of the Sixth Circuit has characterized these as alternative bases for a conviction either of which is sufficient. United States v. Bohn, 2008 U.S. App. Lexis 12474 at 31-32, 2008 WL 2332226 at 11 (6th Cir. 2008) (unpublished). This case suggests that giving Instruction 8.03 Unanimous Verdict is sufficient and that giving an augmented unanimity instruction is not required in § 1956(a)(2) prosecutions where the government alleges multiple mental states. *See also* Instruction 8.03B Unanimity Not Required – Means.

11.05 MONEY LAUNDERING –Undercover Investigation (18 U.S.C. § 1956(a)(3))

(1) Count ____ of the indictment charges the defendant with [conducting] [attempting to conduct] a financial transaction in violation of federal law. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [conducted] [attempted to conduct] a financial transaction.

(B) Second, that the property involved in the financial transaction was represented to be [the proceeds of *[insert the specified unlawful activity from § 1956(c)(7)]*] [property used to conduct or facilitate *[insert the specified unlawful activity from § 1956(c)(7)]*].

(C) Third, that the defendant had the intent

[to promote the carrying on of specified unlawful activity]

[to conceal or disguise the [nature] [location] [source] [ownership] [control] of property believed to be the proceeds of specified unlawful activity]

[to avoid a transaction reporting requirement under state or federal [or foreign] law].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "financial transaction" means *[insert definition from § 1956(c)(4)]*.

(B) [The term "financial institution" means *[insert definition from 31 U.S.C. § 5312(a)(2) or the regulations promulgated thereunder]*].

(C) The word "conducts" includes initiating, concluding, or participating in initiating or concluding a transaction.

(D) The word "proceeds" means any property [derived from] [obtained] [retained], directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

Brackets indicate options for the court.

The definition of financial institution in paragraph (2)(B) should be given only when a financial institution is used to prove the presence of a financial transaction.

Committee Commentary Instruction 11.05
(current through December 1, 2009)

The purpose of this instruction is to outline the elements of the crime of money laundering through a government undercover investigation as defined in 18 U.S.C. § 1956(a)(3). Subsection (a)(3) combines parts of subsections (a)(1)(A) and (a)(1)(B). One difference in subsection (a)(3) is that the property involved need only be "represented" to be the proceeds of the specified unlawful activity. The funds used by law enforcement officials to pursue the undercover investigation need not be unlawfully generated. It is only necessary that the defendant "believed" the funds to be the proceeds of other crimes. United States v. Palazzolo, 1995 WL 764416 at 4, 1995 U.S. App. LEXIS 36853 at 10-11 (6th Cir. 1995) (unpublished). The representations made by law enforcement officials must relate to the specified unlawful activity. United States v. Loehr, 966 F.2d 201, 204 (6th Cir. 1992).

A second difference between § 1956(a)(3) and (a)(1) is that subsection (a)(3) requires a mens rea of intent whereas some parts of subsection (a)(1) allow the lesser mens rea of knowing. *See* subsection (a)(1)(B). Congress intended this difference to "fine tune" the sting provision. *See* 134 Cong. Rec. § S17,365 (daily ed. Nov. 10, 1988).

The involvement of a financial institution may be used to establish the presence of a financial transaction. See § 1956(c)(4). The term "financial institution" is defined in § 1956(c)(6) by reference to 31 U.S.C. § 5312 (a)(2) or the regulations thereunder.

The definition of the term proceeds in paragraph (2)(D) is taken verbatim from the definition in § 1956(c)(9), effective May 20, 2009. Congress added this definition to the statute following the Supreme Court's decision in United States v. Santos, 128 S.Ct. 2020 (2008) which stated in a plurality opinion that the term "proceeds" is limited to profits in a case where gambling was the specified unlawful activity.

In cases arising from conduct prior to May 20, 2009, the trial court must determine whether *Santos* applies to the specified unlawful activity at issue. *See, e.g.*, United States v. Kratt, 2009 U.S.App.Lexis 19798, 2009 WL 2767152 (6th Cir. September 2, 2009), discussing *Santos* in a § 1957 money laundering case with bank fraud as the specified unlawful activity. The Sixth Circuit held that *Santos* applies to § 1957 money laundering cases, and that there is a rule of general applicability derived from *Santos* based on the "outcomes" upon which the plurality in Santos and Justice Stevens, who wrote a concurring opinion, would agree. Specifically, in any case in which there is a "merger" problem and that merger problem results in the underlying crime being punishable by a significantly increased sentence because the money laundering statute was used, then "proceeds" must be construed to mean "profit." The Sixth Circuit affirmed the conviction in *Kratt* because the statutory maximum sentence for bank fraud was actually higher than for money laundering. Since use of the money laundering statute did not expose the defendant to a significantly higher sentence for the underlying conduct, there was no *Santos* problem and circuit precedent construing "proceeds" to mean "gross receipts" controlled. *See* United States v. Prince, 214 F.3d 740, 747 (6th Cir. 2000); United States v. Haun, 90 F.3d 1096, 1101 (6th Cir. 1996).

The government does not have to trace the origin of all the proceeds involved in the financial transactions to determine precisely which proceeds were used for which transactions. United States v. Jamieson, 427 F.3d 394, 403-04 (6th Cir. 2005); United States v. Bencs, 28 F.3d 555, 562 (6th Cir. 1994). Also, the statute does not require that the entire property involved represent the proceeds of specified unlawful activity. United States v. Conner, 1991 WL 213756 at 4, 1991 U.S. App. LEXIS 25370 at 10 (6th Cir. 1991)(unpublished). As long as the jury can infer that a portion of the funds involved represented the proceeds of the specified unlawful activity, there is no minimum percentage requirement. United States v. Westine, 1994 WL 88831, 2, 1994 U.S.App. LEXIS 5144, 8 (6th Cir. 1994)(unpublished).

11.06 MONEY LAUNDERING – Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity (18 U.S.C. § 1957)

(1) Count ___ of the indictment charges the defendant with [engaging] [attempting to engage] in a monetary transaction in violation of federal law. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant knowingly [engaged] [attempted to engage] in a monetary transaction.

(B) Second, that the monetary transaction was in property derived from specified unlawful activity.

(C) Third, that the property had a value greater than $10,000.

(D) Fourth, that the defendant knew that the transaction was in criminally derived property.

(E) Fifth, that the monetary transaction took place [within the United States] [within the United States' jurisdiction] [outside the United States but the defendant is a United States person].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "monetary transaction" means [*insert definition from § 1957(f)(1)*].

(B) The term "specified unlawful activity" means [*insert definition from § 1956(c)(7)]*.

(C) The term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense.

(D) [The term "United States person" includes [*insert definition from 18 U.S.C. § 3077*]].

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

Brackets indicate options for the court.

Committee Commentary Instruction 11.06
(current through December 1, 2009)

The purpose of this instruction is to outline the elements of the crime of engaging in monetary transactions in property derived from specified unlawful activity. The instruction is based primarily on United States v. Rayborn, 491 F.3d 513, 517 (6th Cir. 2007).

The term "specified unlawful activity" is defined in § 1957(f)(3) by reference to § 1956(c)(7).

The term "criminally derived property" is defined in § 1957(f)(2).

It is an element that the property in the monetary transaction must in fact be the proceeds of *specified unlawful activity*. See § 1957(a). However, the defendant need only know that the property involved was *criminally derived.* The statute makes this clear in § 1957(c), which states: "In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity." Thus, although the property must in fact be derived from the certain listed crimes constituting specified unlawful activity, the defendant need not know this. The government does not have to prove that the defendant knew the property was derived from a particular type of unlawful activity as long as the government proves that defendant knew it was criminally derived.

In order for property to qualify as criminally derived under § 1957, the underlying criminal activity must have been completed and the defendant must have obtained or controlled the tainted funds. The court explained, "[B]oth the plain language of § 1957 and the legislative history behind it suggest that Congress targeted only those transactions occurring *after* the proceeds have been obtained from the underlying unlawful activity." United States v. Rayborn, 491 F.3d 513, 517 (6th Cir. 2007), *quoting* United States v. Butler, 211 F.3d 826, 829 (4th Cir. 2000). To meet this element, the funds need not be in the defendant's physical possession or in a personal bank account, as long as he exercised control over the funds. *Rayborn, supra* at 517-18. This element was established in *Rayborn* when the defendant signed documents directing a bank to transfer the funds to another agent. *See also* United States v. Griffith, 17 F.3d 865, 878-79 (6th Cir. 1994) (affirming defendant's § 1957 conviction because he was in control of the criminally derived property before he engaged in the illegal monetary transaction).

Jurisdiction for § 1957 is based on the monetary transaction affecting interstate or foreign commerce. See § 1957(f)(1). The government need show only a *de minimus* effect upon commerce; this standard for § 1957 was not affected by United States v. Lopez, 514 U.S. 549 (1995). United States v. Ables, 167 F.3d 1021, 1029-30 (6th Cir. 1999). However, "the government still must prove that the transaction involved had at least some impact on interstate commerce." United States v. Peterson, 1999 WL 685917, 10, 1999 U.S. App. LEXIS 20336, 28 (6th Cir. 1999)(unpublished)(convictions reversed because no participation in or effect on commerce).

Attempted money laundering is also a crime under § 1957. If the crime of attempt is charged, the instructions should be supplemented by the instructions in Chapter 5.00 on Attempts.

The Committee recommends against giving an instruction recounting the statutory

language because it would be difficult for the jury to absorb. See the Committee Commentary to Instruction 2.02.

Chapter 12.00

FIREARMS OFFENSES

Introduction to Firearms Instructions

(current through December 1, 2009)

This chapter includes an instruction for the firearms crime defined in 18 U.S.C. § 922(g)(1) (possession of firearm by convicted felon). If the crime charged is based on § 922(g)(3) (possession of firearm by unlawful user of controlled substance), the instruction can be easily modified by substituting the term unlawful user and using the definition provided in the commentary. If the crime charged is based on the other disabilities affecting firearms established in subsection (g)(2) or subsections (g)(4) through (g)(9), the instruction can be modified as necessary.

This chapter also includes two instructions for the crimes under 18 U.S.C. § 924(c)(1)(A)(i) (using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime; possessing a firearm in furtherance of a crime of violence or drug trafficking crime).

Title 18 U.S.C. § 922(g)(1) and (g)(3) provide:

> (g) 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;
>
> . . .
>
> (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));
>
> . . .
>
> 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.

The Committee drafted Instruction 12.01 to cover the offense of possessing a firearm because it is the conduct most frequently prosecuted. If the conduct charged is shipping or transporting a firearm or receiving a firearm, the instruction should be modified.

Title 18 U.S.C. § 924(c) provides:

> (c) (1) (A) ... [A]ny person who, during and in relation to any crime of violence or drug trafficking crime ... 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 [be sentenced to the mandatory terms provided in the statute].

The Committee drafted two instructions to cover the offenses of 18 U.S.C. § 924(c) based on United States v. Combs, 369 F.3d 925 (6th Cir. 2004). Instruction 12.02 covers using or

carrying a firearm during and in relation to a crime of violence or drug trafficking crime under subsection (c)(1)(A)(i), and Instruction 12.03 covers possessing a firearm in furtherance of a crime of violence or drug trafficking crime under the same subsection, (c)(1)(A)(i).

The Committee did not draft instructions specifically to cover subsections (c)(1)(A)(ii) (brandishing a firearm) or (c)(1)(A)(iii) (discharging a firearm), but the pattern instructions can be easily modified to fit these provisions.

Chapter 12.00

FIREARMS OFFENSES

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12.01 FIREARMS – Possession of Firearm by Convicted Felon (18 U.S.C. § 922(g)(1))

(1) Count ___ of the indictment charges the defendant with violating federal law by being a convicted felon in possession of a firearm.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant has been convicted of a crime punishable by imprisonment for more than one year. [The government and the defendant have agreed that defendant has previously been convicted of a crime punishable by imprisonment for more than one year.]

(B) Second: That the defendant, following his conviction, knowingly possessed a firearm specified in the indictment.

(C) Third: That the specified firearm crossed a state line prior to [during] the alleged possession. [It is sufficient for this element to show that the firearm was manufactured in a state other than [*name state in which offense occurred*].]

(2) Now I will give you more detailed instructions on some of these elements.

(A) The term "possession" means [*insert applicable definition from Instructions 2.10, 2.10A and 2.11*]. [The defendant does not have to own the firearm in order to possess the firearm.]

(B) The term "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. [The term firearm also means the frame or receiver of any such weapon, any firearm muffler or firearm silencer, any ammunition or any destructive device.] [The term firearm does not include an antique firearm.] [The term firearm includes starter guns.]

(C) The term "knowingly" means voluntarily and intentionally, and not because of mistake or accident.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

This instruction covers only the conduct of possession; if the prosecution is based on the conduct of shipping, transporting or receiving a firearm or ammunition, the instruction should be modified.

This instruction refers only to firearms; if the prosecution is based on possession of ammunition, the instruction should be modified.

This instruction covers only subsection 922(g)(1). If the crime charged is based on subsection 922(g)(3) (possession of firearm by unlawful user of controlled substance), the instruction can be easily modified by substituting the term unlawful user in paragraph (1) and using the definition of unlawful user (provided below in the commentary) in paragraph (2). If the crime charged is based on the other disabilities affecting firearms established in subsection (g)(2) or subsections (g)(4) through (g)(9), the instruction can be modified as necessary.

Brackets indicate options for the court.

In paragraph (2)(A), the second bracketed sentence should be used only if relevant.

In paragraph (2)(B), the bracketed options should be used only if relevant.

Committee Commentary Instruction 12.01
(current through December 1, 2009)

The language of § 922(g)(1) relating to the conduct of possession provides, "It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm or ammunition; . . . ."

A panel of the court has stated that Instruction 12.01 "properly reflect[s] the law of the Sixth Circuit. . . ." United States v. Holloway, 2007 U.S. App. Lexis 29075, 2007 WL 4395579 at 5 (6th Cir. 2007) (unpublished).

The Sixth Circuit has characterized this offense as having three elements. *See, e.g.*, United States v. Daniel, 134 F.3d 1259, 1263 (6th Cir. 1998). These elements are (1) the defendant was convicted of a crime punishable by imprisonment for more than one year; (2) following his conviction, the defendant knowingly possessed the firearm specified in the indictment; and (3) the possession was in or affecting interstate commerce. *See also* United States v. Kincaide, 145 F.3d 771, 782 (6th Cir. 1998) (characterizing the three elements as "(1) that the defendant had a previous felony conviction, (2) that the defendant possessed a firearm, and (3) that the firearm had traveled in or affected interstate commerce.") (*quoting* United States v. Moreno, 933 F.3d 362, 372 n.1 (6th Cir. 1991)).

As to the element that the defendant have a conviction for a crime punishable by imprisonment for a term exceeding one year, § 921(a)(20) provides that a "crime punishable for a term exceeding one year" does not include any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulations of business practices, or any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less. The laws of the jurisdiction in which the proceedings are held determine what constitutes a conviction. The phrase in § 922(g)(1) "convicted in any court" refers only to domestic, not foreign, courts, Small v. United States, 544 U.S. 385 (2005), so the element in paragraph (1)(A) that the defendant be convicted of a crime includes only domestic convictions.

Section 921(a)(20) further provides, "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." This restoration of rights provision is a difficult area that has generated many opinions. *See, e.g*, United States v. Cassidy, 899 F.2d 543 (6th Cir.1990); United States v. Driscoll, 970 F.2d 1472 (6th Cir. 1992); United States v. Gilliam, 979 F.2d 436 (6th Cir. 1992); United States v. Morgan, 216 F.3d 557 (6th Cir. 2000). The meaning of this restoration of rights provision is a question of law, so it is not implicated in the instruction, but it is an area of caution for the district judge.

When a defendant offers to concede a prior judgment, and the name or nature of the prior crime raises the risk of a verdict tainted by improper considerations and the purpose of the evidence is solely to prove the element of prior conviction, the court should use the bracketed language in paragraph (1)(A). Old Chief v. United States, 519 U.S. 172 (1997).

If the defendant is charged under § 922(g)(3) with possession of a firearm by an unlawful user of a controlled substance, the instruction should be modified to include the following definition of "unlawful user":

> The term "unlawful user of a controlled substance" contemplates the regular and repeated use of a controlled substance in a manner other than as prescribed by a licensed physician. The one time or infrequent use of a controlled substance is not sufficient to establish the defendant as an "unlawful user." Rather, the defendant must have been engaged in use that was sufficiently consistent and prolonged as to constitute a pattern of regular and repeated use of a controlled substance. The government need not show that defendant used a controlled substance at the precise time he possessed a firearm. It must, however, establish that he was engaged in a pattern of regular and repeated use of a controlled substance during a period that reasonably covers the time a firearm was possessed.

United States v. Burchard, 580 F.3d 341, 352 (6th Cir. 2009). *See also* United States v. Roberge, 565 F.3d 1005 (6th Cir. 2009).

In paragraph (2)(A), possession is defined by reference to Instructions 2.10, 2.10A and 2.11. For convictions under § 922(g)(1), both actual and constructive possession are sufficient. United States v. Murphy, 107 F.3d 1199, 1208 (6th Cir. 1997), *citing* United States v. Craven, 478 F.2d 1329, 1329-33 (6th Cir. 1973). Actual possession occurs when a party has "immediate possession or control" over the firearm. *Craven*, 478 F.2d at 1333; *see also* United States v. Beverly, 750 F.2d 34, 37 (6th Cir. 1984). Constructive possession exists when "a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others." *Moreno*, 933 F.2d at 373, *citing Craven*, 478 F.2d at 1333. Constructive possession also exists when the person has dominion over the premises where the firearm is located. United States v. Clemis, 11 F.3d 597, 601 (6th Cir. 1993). Actual and constructive possession are discussed further in commentary to Pattern Instructions 2.10 and 2.10A.

Aside from possession, § 922(g)(1) also prohibits persons from receiving or shipping or transporting firearms. The instruction is drafted only to cover possession, but if receipt, shipping or transporting are charged, the instruction can be modified. In United States v. Manni, 810 F.2d 80, 84 (6th Cir. 1987), the court stated that the term receipt included any knowing acceptance or possession of a firearm. Proof of possession is equivalent to proof of receipt for most purposes. *See also Beverly*, 750 F.2d at 36 ("To prove 'receipt' beyond a reasonable doubt, the government may establish 'receipt' by inference after proving constructive possession."). The Sixth Circuit has "equated circumstantial proof of constructive possession with circumstantial proof of constructive receipt under § 922." *Id., citing Craven*, 478 F.2d at 1336.

The definition of "firearm" in paragraph (2)(B) is based on the statute, which defines firearm 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." 18 U.S.C. § 921(a)(3). Subsection 921(a)(4) defines destructive device in detail, and subsection 921(a)(16) defines antique firearm in detail. As to the antique firearms exception, *see* United States v. Smith, 981 F.2d 887, 891-92 (6th Cir.1992)("antique firearms" exception is an affirmative defense which must be raised by defendant before the burden shifts to the government to disprove its applicability).

The firearm need not be operable to support a conviction. United States v. Yannott, 42 F.3d 999, 1006 (6th Cir. 1994). In *Yannott*, the court further held that it does not matter that the defendant may not have known how to alter the weapon to make it operable. The broken firing pin only temporarily altered the weapon's capability and did not alter the design so that it no longer served the purpose for which it was originally designed. The determination of what constitutes a firearm under the statute is a question of law; however, whether a particular weapon fits in the legal definition of a firearm is a question of fact. *Id.* at 1005-07.

Section 922(g)(1) also prohibits the possession of ammunition by a convicted felon. *See* 18 U.S.C. § 922(g)(1); United States v. Johnson, 62 F.3d 849, 850 (6th Cir. 1995).

The mens rea requirement for § 922(g)(1) is set forth in § 924(a)(2), which states, "Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both." In United States v. Odom, 13 F.3d 949 (6th Cir. 1994), the Sixth Circuit approved an instruction defining knowingly under § 922(g)(1) as "voluntarily and intentionally, and not because of mistake or accident." *Id.* at 961. The definition of knowingly in paragraph (2)(C) is based on this case.

The mens rea of knowingly applies to the possession of the firearm; it does not require that the defendant knew the conduct was illegal. United States v. Beavers, 206 F.3d 706, 708 (6th Cir. 2000)("In an analogous context, other circuits have held that the term 'knowingly' only requires that the accused know that he possessed a firearm, not that he knew that such possession was illegal."), *citing* United States v. Bostic, 168 F.3d 718, 722-23 (4th Cir. 1999) and United States v. Capps, 77 F.3d 350, 352 (10th Cir. 1996).

The court has sometimes discussed the mens rea in terms of intent. Only general intent, not specific intent, is required for a firearms possession charge under § 922(g)(1). United States

v. Jobson, 102 F.3d 214, 221 (6th Cir. 1996).

As to the third element, jurisdiction, the statute provides that the defendant must possess the firearm "in or affecting commerce...." 18 U.S.C. § 922(g)(1). The statute defines "interstate or foreign commerce" to include "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." 18 U.S.C. § 921(a)(2).

In Scarborough v. United States, 431 U.S. 563, 566-67 (1977), the Court interpreted the phrase "in commerce or affecting commerce" in 18 U.S.C.App. § 1202(a), a predecessor statute of § 922(g)(1). It approved an instruction which provided that jurisdiction was established by proof that the firearm "previously traveled in interstate commerce." *Id.* In the wake of *Scarborough*, the court has concluded that the commerce element is met if the defendant possessed the firearm outside its state of manufacture. *See, e.g.*, United States v. Pedigo, 879 F.2d 1315, 1319 (6th Cir. 1989), *citing* Scarborough v. United States, *supra*. *See also* United States v. Fish, 928 F.2d 185, 186 (6th Cir. 1991). A firearm that has moved in interstate commerce at any time provides a sufficient nexus between defendant's conduct and interstate commerce. United States v. Chesney, 86 F.3d 564, 571 (6th Cir. 1996), *citing Scarborough*, 431 U.S. at 566-67. *See also* United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir. 1991)(even if firearm possessed by defendant had been brought into country by serviceman, that transportation would still satisfy the interstate commerce nexus offense as to anyone who later possessed the weapon). *Cf.* United States v. Lopez, 514 U.S. 549 (1995) (18 U.S.C. § 922(q) prohibiting possession of firearm in school zone contains no requirement that the possession be connected in any way to interstate commerce, so the statute exceeds the authority of Congress and is unconstitutional).

The instruction reflects this case law by requiring for the third element that the specified firearm at some time crossed state lines. If a particular case involves possession of a firearm that did not travel in interstate commerce but in some other way "affected" commerce, the instruction should be modified.

The court has held that "the particular firearm possessed is not an element of the crime under § 922(g), but instead the means used to satisfy the element of 'any firearm.'" United States v. DeJohn, 368 F.3d 533, 542 (6th Cir. 2004). *See also* reference to *DeJohn* in Commentary to Instruction 8.03B Unanimity Not Required – Means.

In 1990, the Sixth Circuit held that a defense of justification for possession of a firearm by a convicted felon may arise in rare situations. United States v. Singleton, 902 F.2d 471, 472-73 (6th Cir. 1990). This defense is covered in Instruction 6.07 Justification. *See also* Instruction 6.05 Coercion/Duress.

12.02 FIREARMS – Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1)(A)(i))

(1) Count ___ of the indictment charges the defendant with violating federal law by using or carrying a firearm during and in relation to a crime of violence or a drug trafficking crime.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant committed the crime charged in Count ___. _____ is a [crime of violence] [drug trafficking crime] which may be prosecuted in a court of the United States.

(B) Second: That the defendant knowingly used or carried a firearm.

(C) Third: That the use or carrying of the firearm was during and in relation to the crime charged in Count ____.

(2) Now I will give you more detailed instructions on some of these terms.

(A) To establish “use,” the government must prove active employment of the firearm during and in relation to the crime charged in Count ____ . “Active employment” means activities such as brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. “Use” also includes a person’s reference to a firearm in his possession for the purpose of helping to commit the crime charged in Count ____. “Use” requires more than mere possession or storage. [The term "use" includes receiving drugs in exchange for giving a firearm.] [The term "use" does not include receiving a firearm in exchange for giving drugs.]

(B) “Carrying” a firearm includes carrying it on or about one’s person. [“Carrying” also includes knowingly possessing and conveying a firearm in a vehicle which the person accompanies including in the glove compartment or trunk.]

(C) The term “firearm” means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. [The term "firearm" also includes the frame or receiver of any such weapon, and any firearm muffler or firearm silencer, and any destructive device.] [The term firearm does not include an antique firearm.] [The term firearm includes starter guns.][The firearm need not be loaded.]

(D) The term “during and in relation to” means that the firearm must have some purpose or effect with respect to the crime charged in Count ____; in other words, the firearm must facilitate or further, or have the potential of facilitating or furthering the crime charged in Count ___, and its presence or involvement cannot be the result of accident or coincidence.

(E) The term “knowingly” means voluntarily and intentionally, and not because of mistake or accident.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any of these elements, then you must find the defendant not guilty of this charge.

Use Note

Brackets indicate options for the judge.

In paragraph (2)(B), the bracketed sentence should be used only if relevant.

In paragraph (2)(C), the four bracketed sentences should be used only if relevant.

Committee Commentary Instruction 12.02
(current through December 1, 2009)

Title 18 U.S.C. § 924(c)(1)(A) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime . . . 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 [be sentenced to the mandatory terms provided in the statute]."

This instruction is designed to cover the use-or-carry-during-and-in-relation-to offense in subsection (c)(1)(A)(i). The possession-in-furtherance offense from the same subsection is covered *infra* in a separate instruction.

This instruction assumes that the defendant is charged in the same indictment with both the predicate crime of violence or drug trafficking crime and the § 924(c) firearms crime, and that the evidence of both is sufficient. The Committee took this approach because the underlying crime and the firearms crime are usually charged in the same indictment. But the law does not require the two offenses to be charged together; indeed, the predicate crime may not ever be charged. *See* United States v. Smith, 182 F.3d 452, 457 (6th Cir. 1999) (§ 924(c) "does not even require that the [predicate] crime be charged; a fortiori, it does not require that [the defendant] be convicted."). So if the § 924(c) firearms count is charged separately, the instruction should be modified. Specifically, if the predicate crime is not charged in the same indictment, the court must instruct the jury on its duty to find the elements of the predicate offense beyond a reasonable doubt. United States v. Kuehne, 547 F.3d 667, 680-81 (6th Cir. 2008) (failure to separately instruct jury regarding elements of underlying drug trafficking offense was error but harmless).

This instruction assumes that the defendant is charged with both using and carrying a firearm. If the defendant is charged with both, sufficient evidence under either element will sustain a § 924(c) conviction. United States v. Layne, 192 F.3d 556, 569 (6th Cir. 1999), *citing* Fair v. United States, 157 F.3d 427, 430 (6th Cir. 1998). *See also* United States v. Kuehne, 547 F.3d 667, 683-85 (6th Cir. 2008) (instruction permitting jurors to convict defendant of either "using or carrying" although the indictment alleged only "using" a firearm was error but not reversible because instructing on two different methods of committing the same crime was variance that did not affect defendant's substantial rights).

The definition of "use" in paragraph (2)(A) is derived from Bailey v. United States, 516 U.S. 137 (1995) and United States v. Combs, 369 F.3d 925, 932 (6th Cir. 2004) (*quoting Bailey*'s definition of use). In *Bailey*, the Court held that under § 924(c)(1), use of a firearm requires more than mere possession of the firearm. The correct definition of use "requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 516 U.S. at 143. The Court explained further:

> To illustrate the activities that fall within the definition of "use" provided here, we briefly describe some of the activities that fall within "active employment" for a firearm, and those that do not.
>
> The active-employment understanding of "use" certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. ... [E]ven an offender's reference to a firearm in his possession could satisfy § 924(c)(1). Thus, a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a "use," just as the silent but obvious and forceful presence of a gun on a table can be a "use."
>
> . . . .
>
> "[U]se" takes on different meanings depending on context. ... [M]ere possession of a firearm by a drug offender, at or near the site of a drug crime or its proceeds or paraphernalia, is [not sufficient]. ... [T]he inert presence of a firearm, without more, is not enough to trigger § 924(c)(1). Perhaps the nonactive nature of this asserted "use" is clearer if a synonym is used: storage. A defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds. Storage of a firearm, without its more active employment, is not reasonably distinguishable from possession.
>
> A possibly more difficult question arises where an offender conceals a gun nearby to be at the ready for an imminent confrontation [citation omitted]. ... In our view, "use" cannot extend to encompass this action. If the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not "used." ... Placement for later active use does not constitute "use."

Bailey, 516 U.S. at 148-49.

The bracketed sentence at the end of paragraph (2)(A) stating that "use" does not include receiving a firearm in exchange for giving drugs is based on Watson v. United States, 128 S. Ct. 579 (2007). In explaining why use of a firearm during and in relation to a drug trafficking crime is not met when a defendant receives a firearm in exchange for giving drugs, the Court reaffirmed its conclusion in Smith v. United States, 508 U.S. 223 (1993) that use is established in the converse situation, *i.e.*, when a defendant receives drugs in exchange for giving firearms.

In the aftermath of *Bailey*, the Sixth Circuit has interpreted use under § 924(c)(1) to be established in the following circumstances: reaching for a gun under a mattress, United States v. Anderson, 89 F.3d 1306, 1315 (6th Cir. 1996); orally referring to a gun in such a way as to

influence others, Darnell v. United States, 1999 WL 1281773 at 2, 1999 U.S. App. LEXIS 34587 at 7 (6th Cir. 1999) (unpublished), *quoting* United States v. Anderson, *supra*; admitting in plea agreement that defendant used a gun to protect himself while selling cocaine, United States v. Mitchell, 1997 WL 720435 at 2, 1997 U.S. App. LEXIS 32348 at 7 (6th Cir. 1997) (unpublished); actively negotiating an exchange of firearms for drugs, United States v. Jones, 102 F.3d 804, 809 (6th Cir. 1996).

The Sixth Circuit has held that use was not established in the following circumstances: inert presence of firearm without display, *Darnell*, 1999 WL at 3, 1999 U.S. App. LEXIS at 7-8; passively receiving a firearm from an undercover officer in exchange for drugs, *Layne*, 192 F.3d at 570 and United States v. Warwick, 167 F.3d 965, 975 (6th Cir. 1999); clandestinely placing an undetonated bomb nearby with intent to put firearm to a future active use, United States v. Stotts, 176 F.3d 880, 888-89 (6th Cir. 1999); carrying firearm in back pocket when it is not visible until exiting the car, Napier v. United States, 159 F.3d 956, 960 (6th Cir. 1998); transferring a firearm to co-conspirator days in advance of the time when the object of the conspiracy was to occur, United States v. Taylor, 176 F.3d 331, 339 (6th Cir. 1999); reaching for firearm in briefcase, United States v. Allen, 106 F.3d 695, 702 (6th Cir. 1997); storing firearm under the seat of a car, United States v. Myers, 102 F.3d 227, 237 (6th Cir. 1996); storing six firearms throughout residence where drug trafficking occurred, United States v. Deveaux, 1996 WL 683765, 3-4, 1996 U.S. App. Lexis 330877, 10-11 (6th Cir. 1996) (unpublished).

The language in paragraph (2)(A) "for the purpose of helping to commit the crime charged in Count ___" is a plain English version of the standard "calculated to bring about a change in the circumstances of the predicate offense" articulated in *Bailey* and quoted *supra*.

The definition of "carry" in paragraph (2)(B) is based on Muscarello v. United States, 524 U.S. 125 (1998) and Combs, 369 F.3d at 932 (*quoting Muscarello*'s definition of carry). In *Muscarello*, the Court held that under § 924(c), the word carry is not limited to the carrying of firearms directly on the person but also "applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies." 524 U.S. at 126-27. To come within the definition of carry, the firearm need not be immediately accessible to the defendant; as long as he meets the requirement of carrying the firearm both "during and in relation to" the predicate offense, the elements of § 924(c) are satisfied. *Id*. at 137. However, carrying requires more than mere transportation. The Court explained: "'Carry' implies personal agency and some degree of possession, whereas 'transport' does not have such a limited connotation.... Therefore, 'transport' is a broader category that includes 'carry' but also encompasses other activity." *Id*. at 134-35.

The Sixth Circuit or panels of the circuit have found carrying to be established in the following cases: Rose v. United States, 1999 WL 1000852, 2, 1999 U.S. App. LEXIS 28517, 6 (6th Cir. 1999) (unpublished) (firearm in front seat console of defendant's car); United States v. Gibbs, 182 F.3d 408 (6th Cir. 1999) (firearm tucked in defendant's pants); United States v. Clemons, 2001 WL 278596 at 4, 2001 U.S. App. LEXIS 4403 at 12 (6th Cir. 2001) (unpublished) (defendant had firearm on his person and threw firearm into car); United States v. Davis, 1999 WL 238664 at 2, 1999 U.S. App. LEXIS 7287 at 7 (6th Cir. 1999) (unpublished) (defendant aided and abetted another who physically transported firearm and had it immediately available for use); United States v. Mann, 2001 WL 302049 at 2, 2001 U.S. App. LEXIS at 6-7

(6th Cir. 2001) (unpublished) (defendant aided and abetted as getaway driver although he did not carry firearm personally); Clark v. United States, 2000 WL 282447 at 4, 2000 U.S. App. LEXIS 3642 at 13 (6th Cir. 2000) (unpublished) (defendant conspired with co-defendant who carried firearm personally); Carthorn v. United States, 1999 WL 644347 at 2, 1999 U.S. App. LEXIS 20366 at 6 (6th Cir. 1999) (unpublished) (firearm found under driver's seat of defendant's car); Hilliard v. United States, 157 F.3d 444 (6th Cir. 1998) (defendant fleeing scene of drug crime had firearm in his waistband).

The Sixth Circuit has found that carrying was not established in United States v. Sheppard, 149 F.3d 458 (6th Cir. 1998) (mere presence of firearm at scene of drug crime is not sufficient; "carry" requires more than the fact that the defendant at some time previously had carried the firearm to a particular location).

The second sentence of paragraph (2)(B) on the definition of carrying is bracketed because it is only relevant when a vehicle is involved.

"Firearm" is defined in paragraph (2)(C) based on the statute, which provides: "(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." 18 U.S.C. § 921(a)(3). Subsection 921(a)(4) further defines destructive device, and subsection 921(a)(16) defines antique firearm. As to the antique firearms exception, *see* United States v. Smith, 981 F.2d 887, 891-92 (6th Cir. 1992) ("antique firearms" exception is an affirmative defense which must be raised by defendant before the burden shifts to the government to disprove its applicability). The last bracketed sentence in paragraph (2)(C) stating that the firearm need not be loaded is based on United States v. Pannell, 1999 WL 685936 at 6 n.3, 1999 U.S. App. LEXIS 20629 at 17 n.3 (6th Cir. 1999) (unpublished) and United States v. Malcuit, 1999 WL 238672 at 2, 1999 U.S. App. LEXIS 7387 at 5 (6th Cir. 1999) (unpublished), *both citing* United States v. Turner, 157 F.3d 552, 557 (8th Cir. 1998). *See also* United States v. Bandy, 239 F.3d 802, 805 (6th Cir. 2001) (quoting with approval other circuits' conclusions that firearm need not be loaded). In addition, the firearm need not be operable. *Id*.

The definition of "during and in relation to" in paragraph (2)(D) is based on Smith v. United States, 508 U.S. 223 (1993). In *Smith*, the Supreme Court defined "in relation to" in these terms: "The phrase 'in relation to' thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. ... [T]he gun at least must 'facilitate, or have the potential of facilitating,' the drug trafficking offense." *Id*. at 238 (citations omitted).

Furthermore, in *Smith*, the Court stated that the in-relation-to language "does illuminate § 924(c)(1)'s boundaries." 508 U.S. at 237. The Court explained that the in-relation-to language "'allay[s] explicitly the concern that a person could be' punished under § 924(c)(1) . . . even though the firearm's presence is coincidental or entirely 'unrelated' to the crime." *Id*. at 238, *quoting* United States v. Stewart, 779 F.2d 538, 539 (9th Cir. 1985).

The Sixth Circuit has found the during-and-in-relation-to element satisfied in United States v. Malcuit, *supra* (in relation to element met even though firearm not within defendant's

immediate reach); United States v. Fair, *supra* at 430-31 (in relation to element met because inference clear that defendant carried gun to drug sale to ensure transfer completed without incident); United States v. McRae, 156 F.3d 708, 712 (6th Cir. 1998) (during and in relation element met where defendant had rifle and drugs together and close enough to grab when police entered).

The Sixth Circuit has found the element not met in United States v. Layne, 192 F.3d 556, 571 (6th Cir. 1999) (during and in relation to element not met when defendant carried firearm away from drug transaction because conduct occurred after the completion of the drug trafficking offense, not during it); United States v. Gibbs, 182 F.3d 408 (6th Cir. 1999) (attracting person with the allure of a drug sale and then robbing the person not enough to qualify as use of a firearm in relation to a drug sale).

In paragraph (2)(E), the definition of "knowingly" is based on United States v. Odom, 13 F.3d 949, 961 (6th Cir. 1994). Section 924(c) does not include any mens rea term in the language of the statute (*cf.* § 922(g), for which the mens rea of knowingly is supplied by § 924(a)), but courts have imposed a mens rea of knowingly. *See* Muscarello v. United States, 524 U.S. 125 (1998). In *Odom*, the Sixth Circuit defined the term knowingly in the context of a firearms offense under § 922(g)(1), and the Committee relied on that definition of knowingly for the § 924(c) firearms offense.

Conviction on the predicate offense is not required. United States v. Smith, *supra* at 458 ("We also hold that § 924(c) does not require a conviction for the predicate offense."); United States v. Ospina, 18 F.3d 1332, 1335-36 (6th Cir. 1994) (mandatory sentence of § 924(c)(1) can be imposed in absence of conviction on underlying drug offense), *citing, inter alia,* United States v. Hill, 971 F.2d 1461, 1467 (10th Cir. 1992) ("[A] conviction on an underlying drug trafficking offense is not a prerequisite to a substantive 924(c) conviction"). As *Smith* indicates, the § 924(c) conviction can stand even if the jury acquits the defendant on the predicate crime of violence or drug trafficking. United States v. Smith, *supra*. However, the § 924(c) conviction cannot stand if the conviction on the predicate crime is declared void for lack of jurisdiction. United States v. Wang, 222 F.3d 234, 240-41 (6th Cir. 2000) (§ 924(c) conviction must be reversed because underlying Hobbs Act robbery charge had no effect on interstate commerce and therefor did not qualify as a crime that could be prosecuted in federal court).

One caution area for district judges in § 924(c) cases is that the type of firearm must be proved to the trier of fact beyond a reasonable doubt. Castillo v. United States, 530 U.S. 120 (2000). The type of firearm involved, *i.e*, a "short-barreled rifle, short-barreled shotgun or semiautomatic assault weapon" under subsection 924(c)(1)(B)(i); or "a machinegun or a destructive device, or . . . [a firearm] equipped with a firearm silencer or firearm muffler" under subsection 924(c)(1)(B)(ii), is an element of the offense and must be proved beyond a reasonable doubt to the trier of fact. Castillo v. United States, *supra*; United States v. Davis, 306 F.3d 398 (6th Cir. 2002); United States v. Bandy, 239 F.3d 802 (6th Cir. 2001). *Castillo*, which interpreted the statute, was followed in the Sixth Circuit by United States v. Harris, 397 F.3d 404 (6th Cir. 2005), which reached the same conclusion based on Sixth Amendment grounds in the wake of *Booker*. *Cf.* United States v. Harris, 536 U.S. 545 (2002) (the conduct of brandishing is not an element of a separate statutory offense and need not be proved beyond a reasonable doubt). The type of firearm can be indicated in the verdict either by using special verdict forms or by

incorporating the type of firearm into the jury instructions.

12.03 FIREARMS – Possessing a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1)(A)(i))

(1) Count ___ of the indictment charges the defendant with violating federal law by possessing a firearm in furtherance of a crime of violence or a drug trafficking crime.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant committed the crime charged in Count ____. _____ is a [crime of violence] [drug trafficking crime] which may be prosecuted in a court of the United States.

(B) Second: That the defendant knowingly possessed a firearm.

(C) Third: That the possession of the firearm was in furtherance of the crime charged in Count ____.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. [The term "firearm" also includes the frame or receiver of any such weapon, and any firearm muffler or firearm silencer, and any destructive device.] [The term firearm does not include an antique firearm.] [The term firearm includes starter guns.] [The firearm need not be loaded.]

(B) The term "knowingly" means voluntarily and intentionally, and not because of mistake or accident.

(C) The term "possession" means [*insert applicable definition from Instructions 2.10, 2.10A and 2.11*].

(D) The term "in furtherance of" means that the firearm was possessed to advance or promote the crime charged in Count ____ and that the firearm was strategically located so that it was quickly and easily available for use.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any of these elements, then you must find the defendant not guilty of this charge.

Use Note

Brackets indicate options for the judge.

In paragraph (2)(A), the four bracketed sentences should be used only if relevant.

Committee Commentary Instruction 12.03
(current through December 1, 2009)

Title 18 U.S.C. § 924(c)(1)(A)(i) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime ... 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 [be sentenced to the mandatory terms provided in the statute]."

This instruction is designed to cover the possession-in-furtherance offense described last in subsection (c)(1)(A)(i), *i.e.*, the offense described by the language: "any person ... who, in furtherance of any such crime, possesses a firearm, shall [be sentenced to the mandatory terms provided in the statute]." Congress added this language to the statute in 1998 to respond to the *Bailey* holding that the term use did not include mere possession. See Public Law 105-386, November, 1998. In *Bailey*, the Court stated that, "Had Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided." Bailey v. United States, 516 U.S. 137, 143 (1995). Congress added the possession-in-furtherance offense to insure that possession triggered the mandatory sentences of § 924(c)(1)(A)(i).

This instruction assumes that the defendant is charged in the same indictment with both the predicate crime of violence or drug trafficking crime and the § 924(c) firearms crime, and that the evidence of both is sufficient. The Committee took this approach because the underlying crime and the firearms crime are usually charged in the same indictment. But the law does not require the two offenses to be charged together; indeed, the predicate crime may not ever be charged. *See* United States v. Smith, 182 F.3d 452, 457 (6th Cir. 1999)(§ 924(c) "does not even require that the [predicate] crime be charged; a fortiori, it does not require that [the defendant] be convicted."). So if the § 924(c) firearms count is charged separately, the instruction should be modified.

The definition of "firearm" in paragraph (2)(A) is based on the definition provided in the statute with no significant changes. *See* 18 U.S.C. § 921(a)(3). The last bracketed sentence stating that the firearm need not be loaded is based on United States v. Pannell, 1999 WL 685936 at 6 n.3, 1999 U.S. App. LEXIS 20629 at 17 n.3 (6th Cir. 1999) (unpublished) and United States v. Malcuit, 1999 WL 238672 at 2, 1999 U.S. App. LEXIS 7387 at 5 (6th Cir. 1999) (unpublished), *both citing* United States v. Turner, 157 F.3d 552, 557 (8th Cir. 1998). *See also* United States v. Bandy, 239 F.3d 802, 805 (6th Cir. 2001)(quoting with approval other circuits' conclusions that firearm need not be loaded). In addition, the firearm need not be operable. *Id.*

In paragraph (2)(B), the definition of "knowingly" is based on United States v. Odom, 13 F.3d 949, 961 (6th Cir. 1994).

Paragraph (2)(C) of the instruction defines the term "possession" by reference to Instructions 2.10, 2.10A and 2.11. In United States v. Paige, 470 F.3d 603 (6th Cir. 2006), the court stated that possession in the context of § 924(c) "may be either actual or constructive and it need not be exclusive but may be joint." *Id.* at 610 (interior quotation and citation omitted). This definition is consistent with Instructions 2.10, 2.10A and 2.11.

To define "in furtherance of" in paragraph (2)(D), the Committee relied on United States

v. Mackey, 265 F.3d 457 (6th Cir. 2001). The requirement that the firearm "advance or promote" the underlying crime is drawn from *Mackey*, 265 F.3d at 461, *quoting* H.R. Rep. No. 105-344 (1977). The requirement that the firearm be "strategically located so that it is quickly and easily available for use" is also based on *Mackey*, 265 F.3d at 462, *citing* United States v. Feliz-Cordero, 859 F.2d 250, 254 (2d Cir. 1988), *overruled on other grounds by Bailey*, 516 U.S. 137. In addition to identifying these two requirements, the *Mackey* court further stated:

> Other factors that may be relevant to a determination of whether the weapon was possessed in furtherance of the crime include whether the gun was loaded, the type of weapon, the legality of its possession, the type of drug activity conducted, and the time and circumstances under which the firearm was found.

Mackey, 265 F.3d at 462, *citing* United States v. Ceballos-Torres, 218 F.3d 409, 414-15 (5th Cir. 2000).

In United States v. Frederick, 406 F.3d 754, 759 (6th Cir. 2005), the court approved an instruction stating that the "in furtherance of" element was met if the defendant "acquired the gun by trading drugs or drug proceeds for the gun." The *Frederick* court distinguished United States v. Lawrence, 308 F.3d 623, 631 (6th Cir. 2002), which held that the "in furtherance of" element was not met if the defendant acquired the gun as an unsolicited gift. *Frederick*, 406 F.3d at 764.

Generally, the mere possession of a firearm on the same premises as a drug transaction would not, without a showing of a connection between the two, sustain a § 924(c) conviction. *Mackey*, 265 F.3d at 462. The court further explained, "[W]e conclude that 'in furtherance of' differs from 'during and in relation to' and requires the government to prove a defendant used the firearm with greater participation in the commission of the crime or that the firearm's presence in the vicinity of the crime was something more than mere chance or coincidence. Although the differences between the standards are 'subtle' and 'somewhat elusive,' they exist nonetheless." United States v. Combs, 369 F.3d 925, 933 (6th Cir. 2004)(footnotes omitted).

Conviction on the predicate offense is not required. United States v. Smith, *supra* at 458 ("We also hold that § 924(c) does not require a conviction for the predicate offense."); United States v. Ospina, 18 F.3d 1332, 1335-1336 (6th Cir.1994) (mandatory sentence of § 924(c)(1) can be imposed in absence of conviction on underlying drug offense), *citing, inter alia,* United States v. Hill, 971 F.2d 1461, 1467 (10th Cir. 1992) ("[A] conviction on an underlying drug trafficking offense is not a prerequisite to a substantive 924(c) conviction."). As *Smith, supra* indicates, the § 924(c) conviction can stand even if the jury acquits the defendant on the predicate crime of violence or drug trafficking. However, the § 924(c) conviction cannot stand if the conviction on the predicate crime is declared void for lack of jurisdiction. United States v. Wang, 222 F.3d 234, 240-41 (6th Cir. 2000) (§ 924(c) conviction must be reversed because underlying Hobbs Act robbery charge had no effect on interstate commerce and therefor did not qualify as a crime that could be prosecuted in federal court).

One caution area for district judges in § 924(c) cases is that the type of firearm must be proved to the trier of fact beyond a reasonable doubt. Castillo v. United States, 530 U.S. 120 (2000). This issue is discussed in detail in the Committee Commentary to the previous

instruction, Instruction 12.02 Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime.

Chapter 13.00

FALSE STATEMENTS TO THE UNITED STATES GOVERNMENT

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Introduction to False Statements Instructions
(current through December 1, 2009)

Title 18 U.S.C. § 1001 provides:

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to--

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

The pattern instructions cover the three subsections of 18 U.S.C. § 1001(a) with three elements instructions:

13.01 Concealing a Material Fact in a Matter within the Jurisdiction of the United States Government (18 U.S.C. § 1001(a)(1))
13.02 Making a False Statement in a Matter within the Jurisdiction of the United States Government (18 U.S.C. § 1001(a)(2))
13.03 Making or Using a False Writing in a Matter within the Jurisdiction of the United States Government (18 U.S.C. § 1001(a)(3))

The Committee defined the crime in three instructions because it is the most effective way to describe the three subsections, (a)(1), (a)(2), and (a)(3). The Sixth Circuit has made clear that these subsections are stated in the disjunctive and constitute alternative means of committing a

single crime. United States v. Hixon, 987 F.2d 1261, 1265 (6th Cir. 1993) (construing pre-1996 version of statute, but disjunctive language was carried forward in 1996 revision); United States v. Zalman, 870 F.2d 1047, 1054 (6th Cir. 1989) (same).

13.01 CONCEALING A MATERIAL FACT IN A MATTER WITHIN THE JURISDICTION OF THE UNITED STATES GOVERNMENT (18 U.S.C. § 1001(a)(1))

(1) The defendant is charged with the offense of [falsifying] [concealing] [covering up] a material fact in a matter within the jurisdiction of the United States government. For you to find the defendant guilty of this offense, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [falsified] [concealed] [covered up] a fact that he had a duty to disclose;

(B) Second, that the fact was material;

(C) Third, that the defendant [falsified] [concealed] [covered up] the fact by using a trick, scheme, or device;

(D) Fourth, that the defendant acted knowingly and willfully; and

(E) Fifth, that the fact pertained to a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A "material" fact or matter is one that has the natural tendency to influence or is capable of influencing a decision of [*insert name of government entity*].

(B) The term "using a trick, scheme, or device" means acting in a way intended to deceive others.

(C) An act is done "knowingly and willfully" if it is done voluntarily and intentionally, and not because of mistake or some other innocent reason.

(D) A matter is "within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government" if [*insert name of government entity*] has the power to exercise authority in that matter.

(3) [It is not necessary that the government prove [that the defendant knew the matter was within the jurisdiction of the United States government] [that the statements were made directly to, or even received by, the United States government]].

(4) If you are convinced that the government has proved all of the elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of the elements, then you must find the defendant not guilty of this charge.

Use Note

The court may need to modify the language if the charge is based on aiding and abetting or causing under 18 U.S.C. § 2.

Brackets indicate options for the court.

The provisions of paragraph (3) should be used only if relevant.

Committee Commentary Instruction 13.01
(current through December 1, 2009)

This instruction covers violations of § 1001 listed in subsection (a)(1) which prohibits falsifying, concealing or covering up a material fact.

Paragraph (1), which sets out the five elements for violating § 1001 by concealment, is based on United States v. Rogers, 118 F.3d 466, 470 (6th Cir. 1997) (*citing* United States v. Steele, 933 F.2d 1313, 1318-19 (6th Cir. 1991) (en banc)). For the legal duty element of concealment, the Committee relied on United States v. Gibson, 409 F.3d 325, 332 (6th Cir. 2005) (*citing* United States v. Zalman, 870 F.2d 1047, 1055 (6th Cir. 1989) and United States v. Curran, 20 F.3d 560, 566-67 (3d Cir. 1994)). In paragraph (1)(E), the term "pertained to" is from *Steele*, *supra* at 1319, and the phrase "a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of" the United States government is based on the language of § 1001(a).

The definition of "material" in paragraph (2)(A) is based on United States v. White, 270 F.3d 356, 365 (6th Cir. 2001) (*citing* United States v. Lutz, 154 F.3d 581, 588 (6th Cir. 1998)). The use of brackets for the name of the government entity is based on Tenth Circuit Pattern Instruction 2.46.

For the phrase "using a trick, scheme, or device" in paragraph (2)(B), neither the Supreme Court nor the Sixth Circuit has stated a definition. In the absence of specific authority, the definition in paragraph (2)(B) is based on Tenth Circuit Instruction 2.46.

As to the definition of "knowingly and willfully" in paragraph (2)(C), no Supreme Court or Sixth Circuit cases define either of these terms in the context of § 1001. In the absence of specific authority, the Committee relied on the definition of knowingly given in United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984) (prosecution under 18 U.S.C. § 1005 for making a false entry in a bank report). Beyond the general definition of knowingly, case law on § 1001 does establish particular elements to which the term "knowingly" applies. The government must prove that the defendant knew the statement was false. United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998); United States v. Arnous, 122 F.3d 321, 322-23 (6th Cir. 1997). The government need not prove that the defendant made the statement with knowledge of federal agency jurisdiction. United States v. Yermian, 468 U.S. 63 (1984).

For the term "willfully" in paragraph (2)(C), aside from the discussion of knowledge of federal jurisdiction in *Yermian, supra*, neither the Supreme Court nor the Sixth Circuit has defined the term in the context of § 1001. In the absence of such authority, the Committee adopted the approach taken in a plurality of the circuit courts of appeals. Other circuits have concluded that

"willfully" in § 1001 does not require the defendant to have specific knowledge that his conduct is criminal. *See* United States v. Hsia, 176 F.3d 517, 522 (D.C. Cir. 1999); United States v. Daughtry, 48 F.3d 829, 831-32 (4th Cir.), *vacated on other grounds*, 516 U.S. 984 (1995); United States v. Curran, 20 F.3d 560, 567-70 (3d Cir. 1994); United States v. Rodriguez-Rios, 14 F.3d 1040, 1048 n.21 (5th Cir. 1994). *But cf.* United States v. Whab, 355 F.3d 155, 159, 162 (2d Cir. 2004) (no plain error where the instruction provided: "[I]t is not necessary for the Government to establish that the defendant knew that he was breaking any particular law or particular rule. He need only have been aware of the generally unlawful nature of his actions.").

The definition of "within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government" in paragraph (2)(D) is based on United States v. Rodgers, 466 U.S. 475 (1984). The Court explained, "A department or agency has jurisdiction . . . when it has the power to exercise authority in a particular situation. . . . [T]he phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body." *Id.* at 479 (citation omitted). *See also* United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989) (quoting this definition from *Rodgers*). The Sixth Circuit has further explained that, "'[W]hen the federal agency has power to exercise its authority, even if the federal agency does not have complete control over the matter,' the matter is within the agency's jurisdiction." United States v. Grenier, 513 F.3d 632, 638 (6th Cir. 2008) (*quoting* United States v. Shafer, 199 F.3d 826, 829 (6th Cir. 1999)). The term "[executive] [legislative] [judicial] branch" was substituted for the term "department or agency" to reflect the statutory amendment in 1996.

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. These provisions should be used only if relevant. The bracketed provision stating that the government need not prove the defendant knew the matter was within the jurisdiction of the federal government is based on United States v. Yermian, 468 U.S. 63 (1984) and United States v. Gibson, 881 F.2d 318, 323 (6th Cir. 1989) (*citing* United States v. Lewis, 587 F.2d 854 (6th Cir. 1978)). The bracketed provision stating that the false statement need not be made directly to, or even received by, the United States government is based on United States v. Lutz, 154 F.3d 581, 587 (6th Cir. 1998) (*quoting* United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989)).

Intent and knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge under § 1001. *See, e.g.*, United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998) (*quoting* United States v. Arnous, 122 F.3d 321, 323 (6th Cir. 1997) (conviction affirmed based on evidence defendant deliberately ignored a high probability that food stamp application contained a material false statement)).

13.02 MAKING A FALSE STATEMENT IN A MATTER WITHIN THE JURISDICTION OF THE UNITED STATES GOVERNMENT (18 U.S.C. § 1001(a)(2))

(1) The defendant is charged with the offense of making a false [statement] [representation] in a matter within the jurisdiction of the United States government. For you to find the defendant guilty of this offense, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant made a [statement] [representation];

(B) Second, that the statement was [false] [fictitious] [fraudulent];

(C) Third, that the [statement] [representation] was material;

(D) Fourth, that the defendant acted knowingly and willfully; and

(E) Fifth, that the statement pertained to a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A statement is "false" or "fictitious" if it was untrue when it was made, and the defendant knew it was untrue at that time. A statement is "fraudulent" if it was untrue when it was made, the defendant knew it was untrue at that time, and the defendant intended to deceive.

(B) A "material" statement or representation is one that has the natural tendency to influence or is capable of influencing a decision of [*insert name of government entity*].

(C) An act is done "knowingly and willfully" if it is done voluntarily and intentionally, and not because of mistake or some other innocent reason.

(D) A matter is "within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government" if [*insert name of government entity*] has the power to exercise authority in that matter.

(3) [It is not necessary that the government prove [that the defendant knew the matter was within the jurisdiction of the United States government] [that the statements were made directly to, or even received by, the United States government]].

(4) If you are convinced that the government has proved all of the elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of the elements, then you must find the defendant not guilty of this charge.

Use Note

The court may need to modify the language if the charge is based on aiding and abetting or causing under 18 U.S.C. § 2.

Brackets indicate options for the court.

The provisions of paragraph (3) should be used only if relevant.

Committee Commentary Instruction 13.02
(current through December 1, 2009)

This instruction covers violations of § 1001 listed in subsection (a)(2) based on making a false statement to the United States government.

Paragraph (1), which characterizes the false statement violation of § 1001 as having five elements, is based on United States v. Lutz, 154 F.3d 581, 587 (6th Cir. 1998) and United States v. Rogers, 118 F.3d 466, 470 (6th Cir. 1997) (*both citing* United States v. Steele, 933 F.2d 1313, 1318-1319 (6th Cir. 1991) (en banc)). The Sixth Circuit has occasionally used a different formulation of the five elements. *See, e.g.,* United States v. Gatewood, 173 F.3d 983, 986 (6th Cir. 1999) (*citing* United States v. Hixon, 987 F.2d 1261, 1266 (6th Cir. 1993)). The Committee chose the formulation based on *Steele* because it is closer to the statutory language and because *Steele* was decided en banc. In paragraph (1)(E), the phrase "the statement pertained to" is from *Steele*, *supra* at 1319, and the phrase "a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of" the United States government is based on the language of § 1001(a).

In paragraph (2)(A), the definitions of false, fictitious and fraudulent are, in the absence of Sixth Circuit authority, based on the Seventh Circuit Pattern Instructions for § 1001. The definition of "false or fictitious" is substantially verbatim from the Seventh Circuit definition. The definition of "fraudulent" is based on the Seventh Circuit instruction; the Sixth Circuit implicitly approved the language in United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998) (*quoting* United States v. Shah, 44 F.3d 285, 289 (5th Cir. 1995)).

The definition of "material" in paragraph (2)(B) is based on United States v. White, 270 F.3d 356, 365 (6th Cir. 2001) (*citing* United States v. Lutz, 154 F.3d 581, 588 (6th Cir. 1998)). The use of brackets for the name of the government entity is drawn from Tenth Circuit Pattern Instruction 2.46.

As to the definition of "knowingly and willfully" in paragraph (2)(C), no Supreme Court or Sixth Circuit cases define either of these terms in the context of § 1001. In the absence of specific authority, the Committee relied on the definition of knowingly given in United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984) (prosecution under 18 U.S.C. § 1005 for making a false entry in a bank report). Beyond the general definition of knowingly, case law on § 1001 does establish particular elements to which the term "knowingly" applies. The government must prove that the defendant knew the statement was false. United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998); United States v. Arnous, 122 F.3d 321, 322-23 (6th Cir. 1997). The

government need not prove that the defendant made the statement with knowledge of federal agency jurisdiction. United States v. Yermian, 468 U.S. 63 (1984).

For the term "willfully" in paragraph (2)(C), aside from the discussion of knowledge of federal jurisdiction in *Yermian, supra*, neither the Supreme Court nor the Sixth Circuit has defined the term in the context of § 1001. In the absence of such authority, the Committee adopted the approach taken in a plurality of the circuit courts of appeals. Other circuits have concluded that "willfully" in § 1001 does not require the defendant to have specific knowledge that his conduct is criminal. *See* United States v. Hsia, 176 F.3d 517, 522 (D.C. Cir. 1999); United States v. Daughtry, 48 F.3d 829, 831-32 (4th Cir.), *vacated on other grounds*, 516 U.S. 984 (1995); United States v. Curran, 20 F.3d 560, 567-70 (3d Cir. 1994); United States v. Rodriguez-Rios, 14 F.3d 1040, 1048 n.21 (5th Cir. 1994). *But cf.* United States v. Whab, 355 F.3d 155, 159, 162 (2d Cir. 2004) (no plain error where the instruction provided: "[I]t is not necessary for the Government to establish that the defendant knew that he was breaking any particular law or particular rule. He need only have been aware of the generally unlawful nature of his actions.").

The definition of "within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government" in paragraph (2)(D) is based on United States v. Rodgers, 466 U.S. 475 (1984). The Court explained, "A department or agency has jurisdiction . . . when it has the power to exercise authority in a particular situation. . . . [T]he phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body." *Id.* at 479 (citation omitted). *See also* United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989) (quoting this definition from *Rodgers*). The Sixth Circuit has further explained that, "'[W]hen the federal agency has power to exercise its authority, even if the federal agency does not have complete control over the matter,' the matter is within the agency's jurisdiction." United States v. Grenier, 513 F.3d 632, 638 (6th Cir. 2008) (*quoting* United States v. Shafer, 199 F.3d 826, 829 (6th Cir. 1999)). The term "[executive] [legislative] [judicial] branch" was substituted for the term "department or agency" to reflect the statutory amendment in 1996.

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. These provisions should be used only if relevant. The bracketed provision stating that the government need not prove the defendant knew the matter was within the jurisdiction of the federal government is based on United States v. Yermian, 468 U.S. 63 (1984) and United States v. Gibson, 881 F.2d 318, 323 (6th Cir. 1989) (*citing* United States v. Lewis, 587 F.2d 854 (6th Cir. 1978)). The bracketed provision stating that the false statement need not be made directly to, or even received by, the United States government is based on United States v. Lutz, 154 F.3d 581, 587 (6th Cir. 1998) (*quoting* United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989)).

Sixth Circuit cases on falsity indicate that a conviction cannot be based on an ambiguous question where the response is not false on its face and may be literally and factually correct. United States v. Gatewood, 173 F.3d 983, 986 (6th Cir. 1999); United States v. Hixon, 987 F.2d 1261, 1267 (6th Cir. 1993) (*quoting* United States v. Gahagan, 881 F.2d 1380, 1383 (6th Cir. 1989) *and citing* United States v. Vesaas, 586 F.2d 101, 103 (8th Cir. 1978)). In addition, the

false statement need not be express; an implied false statement can support a conviction. In United States v. Brown, *supra* at 484-85, the court affirmed a conviction on the basis that the use of a document makes the factual assertions necessarily implied from the statute, regulations and announced policies that created the document. The court explained, "While no case law is directly on point, we conclude that the body of law, in the aggregate, makes plain that implied falsity is a basis for a conviction." *Id*. at 485.

Oral and written statements are treated the same under § 1001. United States v. Steele, 933 F.2d 1313, 1319 n.4 (6th Cir. 1991) (en banc) (*citing* United States v. Bramblett, 384 U.S. 503 (1955)).

Intent and knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge under § 1001. *See, e.g.*, United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998) (*quoting* United States v. Arnous, 122 F.3d 321, 323 (6th Cir. 1997) (conviction affirmed based on evidence defendant deliberately ignored a high probability that food stamp application contained a material false statement)).

13.03 MAKING OR USING A FALSE WRITING IN A MATTER WITHIN THE JURISDICTION OF THE UNITED STATES GOVERNMENT (18 U.S.C. § 1001(a)(3))

(1) The defendant is charged with the offense of making or using a false writing or document in a matter within the jurisdiction of the United States government. For you to find the defendant guilty of this offense, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [made] [used] a false [writing] [document];

(B) Second, that the [writing] [document] contained a [statement] [entry] that was [false] [fictitious] [fraudulent];

(C) Third, that the [statement] [entry] was material;

(D) Fourth, that the defendant acted knowingly and willfully; and

(E) Fifth, that the [writing] [document] pertained to a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A statement is "false" or "fictitious" if it was untrue when it was made, and the defendant knew it was untrue at that time. A statement is "fraudulent" if it was untrue when it was made, the defendant knew it was untrue at that time, and the defendant intended to deceive.

(B) A "material" statement or entry is one that has the natural tendency to influence or is capable of influencing a decision of [*insert name of government entity*].

(C) An act is done "knowingly and willfully" if it is done voluntarily and intentionally, and not because of mistake or some other innocent reason.

(D) A matter is "within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government" if [*insert name of government entity*] has the power to exercise authority in that matter.

(3) [It is not necessary that the government prove [that the defendant knew the matter was within the jurisdiction of the United States government] [that the statements were made directly to, or even received by, the United States government]].

(4) If you are convinced that the government has proved all of the elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of the elements, then you must find the defendant not guilty of this charge.

Use Note

The court may need to modify the language if the charge is based on aiding and abetting or causing under 18 U.S.C. § 2.

Brackets indicate options for the court.

The provisions of paragraph (3) should be used only if relevant.

Committee Commentary Instruction 13.03
(current through December 1, 2009)

This instruction covers violations of § 1001 listed in subsection (a)(3) which prohibits making or using a false writing or document within the jurisdiction of the United States government.

In Paragraph (1), the five elements of the false writing offense are based on United States v. White, 492 F.3d 380, 396 (6th Cir. 2007) (*quoting* United States v. Raithatha, 385 F.3d 1013, 1022 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1136 (2005)). Some of the language used in *White* was modified to reflect the language of the statute more completely. In paragraph (1)(E), the term "pertained to" is drawn from United States v. Steele, 933 F.2d 1313, 1319 (6th Cir. 1991) (en banc), and the phrase "a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of" the United States government is based on the language of § 1001(a).

In paragraph (2)(A), the definitions of false, fictitious and fraudulent are, in the absence of Sixth Circuit authority, based on the Seventh Circuit Pattern Instructions for § 1001. The definition of "false or fictitious" is substantially verbatim from the Seventh Circuit definition. The definition of "fraudulent" is based on the Seventh Circuit instruction; the Sixth Circuit implicitly approved the language in United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998) (*quoting* United States v. Shah, 44 F.3d 285, 289 (5th Cir. 1995)).

The definition of "material" in paragraph (2)(B) is based on United States v. White, 270 F.3d 356, 365 (6th Cir. 2001) (*citing* United States v. Lutz, 154 F.3d 581, 588 (6th Cir. 1998)). The use of brackets for the name of the government entity was drawn from Tenth Circuit Pattern Instruction Inst. 2.46.

As to the definition of "knowingly and willfully" in paragraph (2)(C), no Supreme Court or Sixth Circuit cases define either of these terms in the context of § 1001. In the absence of specific authority, the Committee relied on the definition of knowingly given in United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984) (prosecution under 18 U.S.C. § 1005 for making a false entry in a bank report). Beyond the general definition of knowingly, case law on § 1001 does establish particular elements to which the term "knowingly" applies. The government must prove that the defendant knew the statement was false. United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998); United States v. Arnous, 122 F.3d 321, 322-23 (6th Cir. 1997). The government need not prove that the defendant made the statement with knowledge of federal agency jurisdiction. United States v. Yermian, 468 U.S. 63 (1984).

For the term "willfully" in paragraph (2)(C), aside from the discussion of knowledge of federal jurisdiction in *Yermian, supra*, neither the Supreme Court nor the Sixth Circuit has defined the term in the context of § 1001. In the absence of such authority, the Committee adopted the approach taken in a plurality of the circuit courts of appeals. Other circuits have concluded that "willfully" in § 1001 does not require the defendant to have specific knowledge that his conduct is criminal. *See* United States v. Hsia, 176 F.3d 517, 522 (D.C. Cir. 1999); United States v. Daughtry, 48 F.3d 829, 831-32 (4th Cir.), *vacated on other grounds*, 516 U.S. 984 (1995); United States v. Curran, 20 F.3d 560, 567-70 (3d Cir. 1994); United States v. Rodriguez-Rios, 14 F.3d 1040, 1048 n.21 (5th Cir. 1994). *But cf.* United States v. Whab, 355 F.3d 155, 159, 162 (2d Cir. 2004) (no plain error where the instruction provided: "[I]t is not necessary for the Government to establish that the defendant knew that he was breaking any particular law or particular rule. He need only have been aware of the generally unlawful nature of his actions.").

The definition of "within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government" in paragraph (2)(D) is based on United States v. Rodgers, 466 U.S. 475 (1984). The Court explained, "A department or agency has jurisdiction . . . when it has the power to exercise authority in a particular situation. . . . [T]he phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body." *Id.* at 479 (citation omitted). *See also* United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989) (quoting this definition from *Rodgers*). The Sixth Circuit has further explained that, "'[W]hen the federal agency has power to exercise its authority, even if the federal agency does not have complete control over the matter,' the matter is within the agency's jurisdiction." United States v. Grenier, 513 F.3d 632, 638 (6th Cir. 2008) (*quoting* United States v. Shafer, 199 F.3d 826, 829 (6th Cir. 1999)). The term "[executive] [legislative] [judicial] branch" was substituted for the term "department or agency" to reflect the statutory amendment in 1996.

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. These provisions should be used only if relevant. The bracketed provision stating that the government need not prove the defendant knew the matter was within the jurisdiction of the federal government is based on United States v. Yermian, 468 U.S. 63 (1984) and United States v. Gibson, 881 F.2d 318, 323 (6th Cir. 1989) *citing* United States v. Lewis, 587 F.2d 854 (6th Cir. 1978). The bracketed provision stating that the false statement need not be made directly to, or even received by, the United States government is based on United States v. Lutz, 154 F.3d 581, 587 (6th Cir. 1998) *quoting* United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989).

Oral and written statements are treated the same under § 1001. United States v. Steele, 933 F.2d 1313, 1319 n.4 (6th Cir. 1991) (en banc) *citing* United States v. Bramblett, 384 U.S. 503 (1955).

Sixth Circuit cases on falsity indicate that a conviction cannot be based on an ambiguous question where the response is not false on its face and may be literally and factually correct. United States v. Gatewood, 173 F.3d 983, 986 (6th Cir. 1999); United States v. Hixon, 987 F.2d

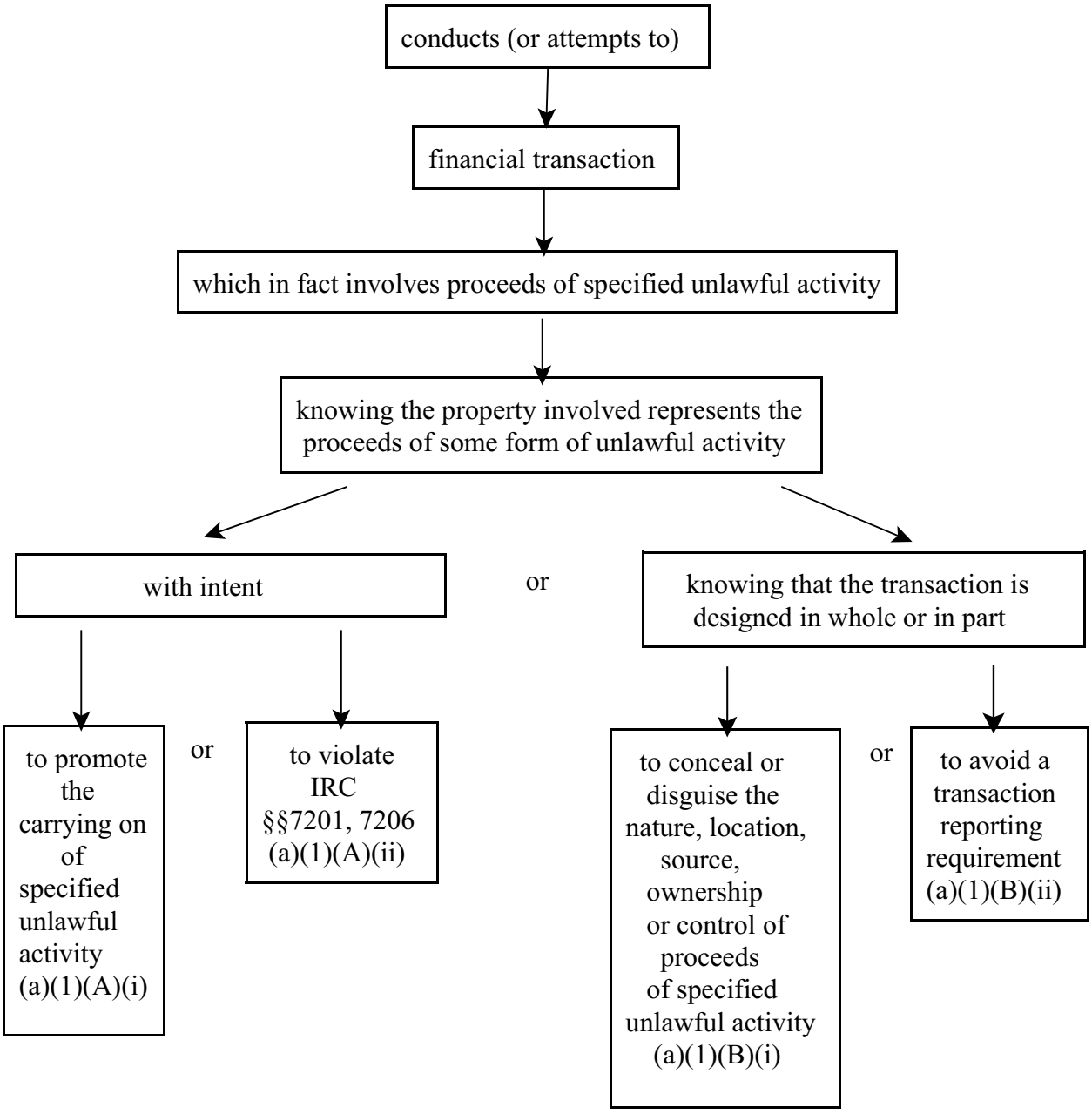
1261, 1267 (6th Cir. 1993) (*quoting* United States v. Gahagan, 881 F.2d 1380, 1383 (6th Cir. 1989) *and citing* United States v. Vesaas, 586 F.2d 101, 103 (8th Cir. 1978)). In addition, the false statement need not be express; an implied false statement can support a conviction. In United States v. Brown, 151 F.3d 476, 484-85 (6th Cir. 1998), the court affirmed a conviction on the basis that the use of a document makes the factual assertions necessarily implied from the statute, regulations and announced policies that created the document. The court explained, "While no case law is directly on point, we conclude that the body of law, in the aggregate, makes plain that implied falsity is a basis for a conviction." *Id*. at 485.

Intent and knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge under § 1001. *See, e.g.*, United States v. Brown, *supra* at 484 (*quoting* United States v. Arnous, 122 F.3d 321, 323 (6th Cir. 1997) (conviction affirmed based on evidence defendant deliberately ignored a high probability that food stamp application contained a material false statement)).

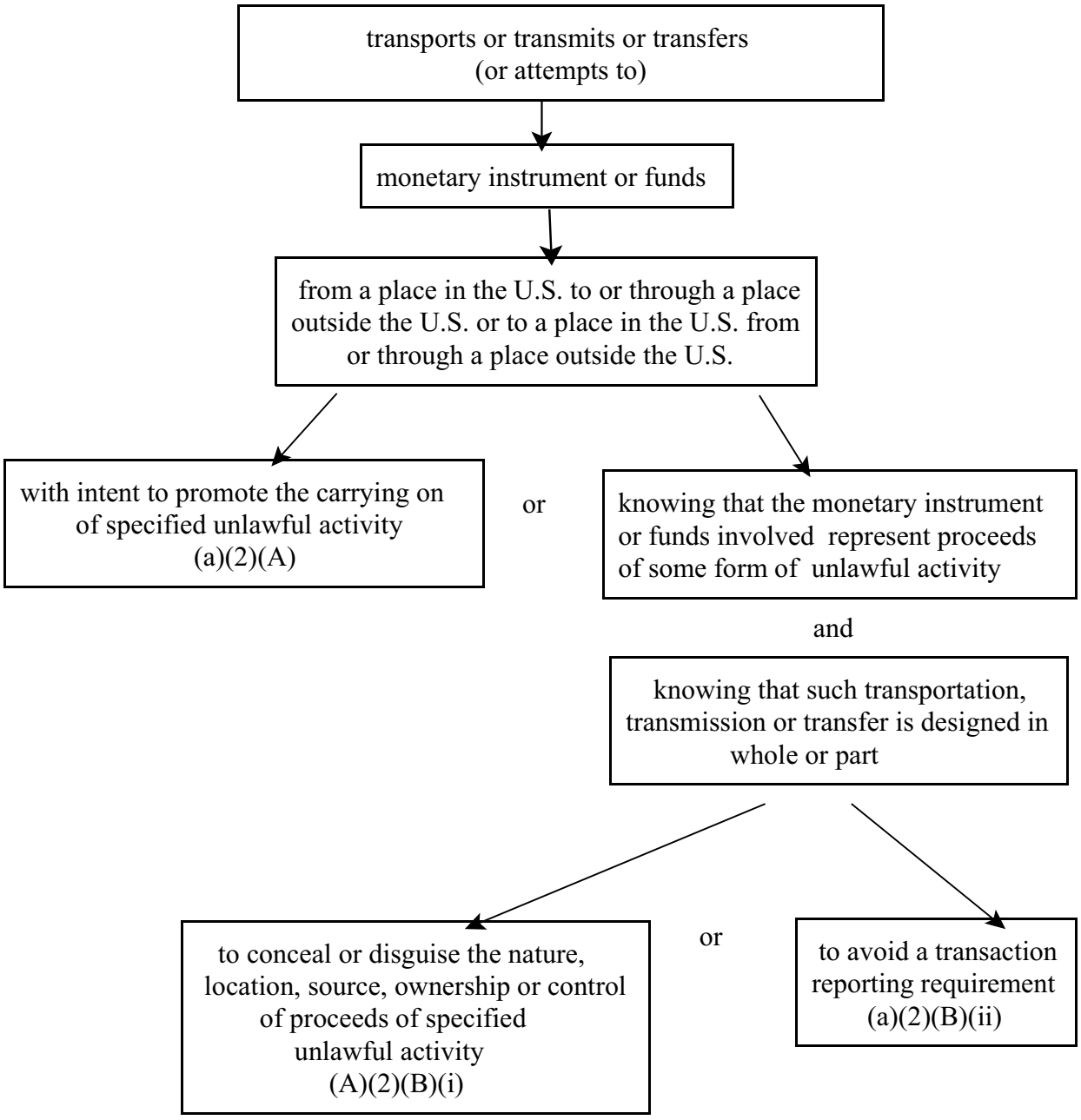
Appendix

I. Charts of 18 U.S.C. § 1956 Laundering of Monetary Instruments

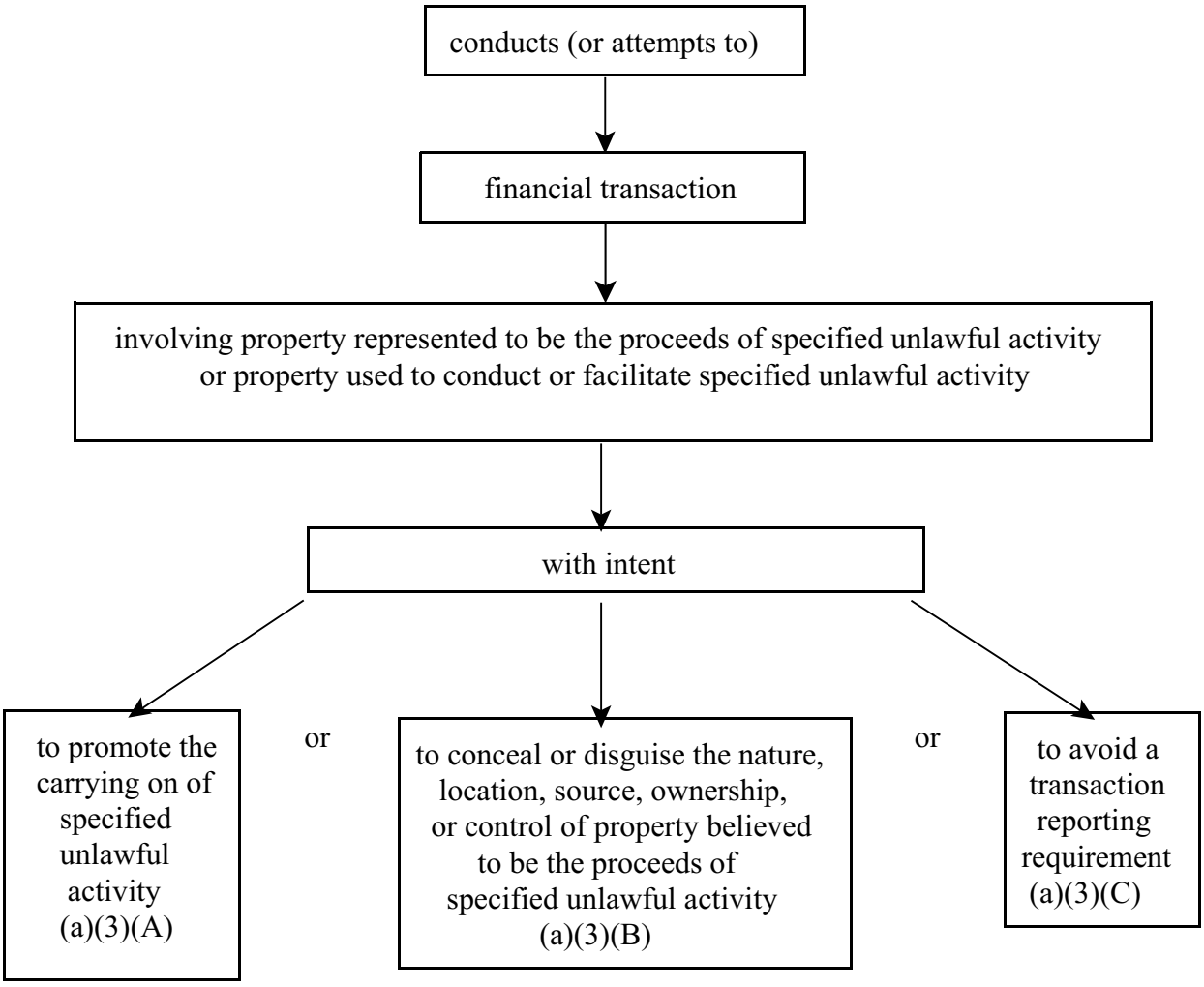
§ 1956(a)(1)


conducts (or attempts to)
financial transaction
which in fact involves proceeds of specified unlawful activity
knowing the property involved represents the proceeds of some form of unlawful activity
with intent
or
knowing that the transaction is designed in whole or in part
to promote the carrying on of specified unlawful activity (a)(1)(A)(i)
or
to violate IRC §§7201, 7206 (a)(1)(A)(ii)
to conceal or disguise the nature, location, source, ownership or control of proceeds of specified unlawful activity (a)(1)(B)(i)
or
to avoid a transaction reporting requirement (a)(1)(B)(ii)

§ 1956(a)(2)


transports or transmits or transfers
(or attempts to)
monetary instrument or funds
from a place in the U.S. to or through a place outside the U.S. or to a place in the U.S. from or through a place outside the U.S.
with intent to promote the carrying on of specified unlawful activity
(a)(2)(A)
or
knowing that the monetary instrument or funds involved represent proceeds of some form of unlawful activity
and
knowing that such transportation, transmission or transfer is designed in whole or part
to conceal or disguise the nature, location, source, ownership or control of proceeds of specified unlawful activity
(A)(2)(B)(i)
or
to avoid a transaction reporting requirement
(a)(2)(B)(ii)

§ 1956(a)(3)


conducts (or attempts to)
financial transaction
involving property represented to be the proceeds of specified unlawful activity or property used to conduct or facilitate specified unlawful activity
with intent
to promote the carrying on of specified unlawful activity (a)(3)(A)
or
to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity (a)(3)(B)
or
to avoid a transaction reporting requirement (a)(3)(C)