MANUAL OF

MODEL CRIMINAL

JURY INSTRUCTIONS

for the

DISTRICT COURTS OF THE

EIGHTH CIRCUIT

Prepared by

Judicial Committee on Model
Jury Instructions
for the Eighth Circuit

2013 Edition

TO THE JUDGES AND MEMBERS OF THE BAR OF THE EIGHTH JUDICIAL CIRCUIT

The Eighth Circuit Judicial Committee on Model Jury Instructions herewith submits its 2013 edition of the Manual of Model Criminal Jury Instructions. It supersedes all prior editions.

The purpose of this Manual is stated in its introduction. We recognize that the manner of instructing a jury varies widely among judges, but these models are offered as clear, brief and simple instructions calculated to maximize jury comprehension. They are available to judges and litigants to be used in their discretion in tailoring the instructions in a particular case. These are intended to be model, not mandatory, instructions and should be modified as appropriate to more clearly and precisely present issues to the jury.

Although the Eighth Circuit cannot give prior approval to the instructions, we are grateful for the support they have provided to us in this endeavor. We are also grateful to the judges, lawyers, prosecutors and federal practice committees throughout the Circuit who assisted the Criminal Jury Instructions Subcommittee. This subcommittee drafted the vast majority of these instructions, notes and committee comments. They meet regularly and the substantial contribution they make is obvious from the instructions which are included. The names and addresses of the committee and subcommittee members are attached.

We also express special thanks to Kay Bode, Judicial Assistant to Judge Whitworth, who retyped many of the instructions and edited them for consistency. Her careful attention to detail was essential in discovering and eliminating errors which might otherwise have been included.

These instructions are available to you on the Eighth Circuit Jury Instructions Website at http://www.juryinstructions.ca8.uscourts.gov/. The Committee plans to continue in operation to make the instructions more clear to jurors and to add instructions on the substantive law for offenses that are frequently tried in the Eighth Circuit. As these instructions are used, if a judge or lawyer believes improvement can be made in the clarity of any instruction, or that a particular instruction is in error, we would appreciate hearing from you.

The Committee sincerely hopes these instructions will be of some help to judges in their communications with the jury, thereby improving the quality of justice we all endeavor to attain.

This volume is dedicated to the Honorable William A. Knox, who was a member of the Committee and served as Chairman of both the Civil and Criminal Subcommittees for 24 years. A dedication page is included herein.

Respectfully submitted,
BILL R. WILSON
Chairman

DEDICATION

The Committee is honored to dedicate these Instructions to the Honorable William A. Knox. Judge Knox was a member of the Committee and served as Chairman of both the Civil and Criminal Subcommittees for more than 24 years before his retirement in January 2010. Judge Knox continues to be an active member of both Subcommittees, even in retirement. As a former law professor at the University of Missouri, Judge Knox has superb knowledge of the law and his many contributions to this project have been invaluable and have played a huge role in its success.

It is a great privilege for the Committee to recognize Judge Knox's work on the Instruction Committee and Subcommittees and dedicate these Instructions in recognition of his outstanding contributions.

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INTRODUCTION

These instructions have been prepared to help judges communicate more effectively with juries. The Manual is meant to provide judges and lawyers with models of clear, brief and simple instructions calculated to maximize juror comprehension. They are not intended to be treated as the only method of properly instructing a jury. *See United States v. Ridinger*, 805 F.2d 818, 821 (8th Cir. 1986). "The Model Instructions . . . are not binding on the district courts of this circuit, but are merely helpful suggestions to assist the district courts." *United States v. Norton*, 846 F.2d 521, 525 (8th Cir. 1988). *See also United States v. Jones*, 23 F.3d 1407 (8th Cir. 1994).

Every effort has been made to assure conformity with current Eighth Circuit law; however, it cannot be assumed that all of these model instructions in the form given will necessarily be appropriate under the facts of a particular case. The Manual covers issues on which instructions are most frequently given, but because each case turns on unique facts, instructions should be drafted or adapted to conform to the facts in each case.

In drafting instructions, the Committee has attempted to use simple language, short sentences and the active voice and omit unnecessary words. We have tried to use plain language because giving the jury the statutory language, or language from appellate court decisions, is often confusing.

It is our position that instructions should be as brief as possible and limited to what the jury needs to know for the case. We also recommend sending a copy of the instructions as given to the jury room.

Counsel are reminded of the dictates of Criminal Rule 30(d) which provides, “[a] party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate.” *See United States v. Hecht*, 705 F.2d 976, 978 (8th Cir. 1983). Simply offering instructions without making specific objections does not satisfy Rule 30. *Id.* at 978-79. Moreover, merely offering a requested instruction to the trial judge for his or her consideration is not not sufficient to preserve an error based on a judge's failure to use the instruction. *Id.* at 978-79. A requested instruction must set out a correct declaration of law and be supported by the evidence. *United States v. Brake*, 596 F.2d 337, 339 (8th Cir. 1979).

DIRECTIONS FOR USE

The suggested instructions in this volume do not attempt to take into account all of the variations of a particular statute or all of the factual variations that may occur in a particular trial. These instructions may have to be modified to reflect the facts of the case.

In some of the Comments and Notes, the Committee has used terminology such as "should be given" or "should be defined." Unless there is case law requiring such, this does not mean that it would be error not to give or define the suggested instruction or that the suggested instruction would be appropriate in every context. Rather, the use of such terms simply means that it is the Committee's belief that to achieve clarity, completeness or consistency, such an instruction would be appropriately given.

Further, in some factual situations, it may be helpful to define certain terms or concepts which the Committee has not defined. In this regard, the Committee Comments may be helpful in finding proper definitions of these terms and concepts.

The Committee Comments are meant to be helpful, but not all inclusive. No significance is to be given to the inclusion or exclusion of any matter in the Comments.

Brackets [ ] are used to indicate words, phrases or sentences which should be used or eliminated in accordance with the actual charges in the individual case. Example:

> "*One*, the defendant made a [false] [fictitious] [fraudulent] [statement] [representation] in a matter, etc."

Where more than one manner of violating a statute is charged, the disjunctive "or" should be used in the instructions:

> "*One*, the defendant made a false, fictitious or fraudulent statement or representation in a matter, etc."

However, if the defendant was charged only with making false statements, the instruction would read:

> "*One*, the defendant made a false statement in a matter, etc."

Parentheses ( ) are used to indicate a direction to insert some specific matter at that point in the instruction. This is usually factual matter particular to a given case.

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1.00. PRELIMINARY INSTRUCTIONS BEFORE OPENING STATEMENTS

Introductory Comment

Preliminary instructions are given at the beginning of trial prior to opening statements to help orient the jurors to their function in that trial by explaining the nature and scope of the jury's duties, listing some of the basic ground rules and identifying the issues to be decided. *See generally United States v. Bynum*, 566 F.2d 914, 923-24 (5th Cir. 1978). Preliminary instructions are not a substitute for final instructions. *United States v. Ruppel*, 666 F.2d 261, 274 (5th Cir. 1982).

In addition to the preliminary instructions set out in this Manual, other examples of preliminary instructions can be found in 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 10.01-.09 (5th ed 2000); Fifth Circuit Pattern Jury Instructions (Criminal Cases) §§ 1.01, 1.02 (2001); Pattern Criminal Federal Jury Instructions for the Seventh Circuit §§ 1.01-.10 (1998); Ninth Cir. Criminal Jury Instructions § 1.1-.14 (2000); Eleventh Circuit Pattern Jury Instructions: Criminal §§ 1.1, 1.2, 2.1, 2.2 (1997); Federal Judicial Center, Pattern Criminal Jury Instructions §§ 1-4 (1988). Some of these cover matters not addressed in this manual, such as sequestration, pretrial publicity, and questions from the jury.

Preliminary Instructions Before Opening Statements

0.01. INSTRUCTIONS BEFORE VOIR DIRE

Members of the Jury Panel, if you have a cell phone, PDA, Blackberry, smart phone, I-phone and any other wireless communication device with you, please take it out now and turn it off. Do not turn it to vibration or silent; power it down. [During jury selection, you must leave it off.] (Pause for thirty seconds to allow them to comply, then tell them the following:)

If you are selected as a juror, (briefly advise jurors of your court's rules concerning cellphones, cameras and any recording devices).

I understand you may want to tell your family, close friends and other people about your participation in this trial so that you can explain when you are required to be in court, and you should warn them not to ask you about this case, tell you anything they know or think they know about it, or discuss this case in your presence. You must not post any information on a social network, or communicate with anyone, about the parties, witnesses, participants, [claims] [charges], evidence, or anything else related to this case, or tell anyone anything about the jury's deliberations in this case until after I accept your verdict or until I give you specific permission to do so. If you discuss the case with someone other than the other jurors during deliberations, you may be influenced in your verdict by their opinions. That would not be fair to the parties and it would result in a verdict that is not based on the evidence and the law.

While you are in the courthouse and until you are discharged in this case, do not provide any information to anyone by any means about this case. Thus, for example, do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, camera, recording device, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or Website such as Facebook, MySpace, YouTube, or Twitter, or any other way to communicate to anyone any information about this case until I accept your verdict or until you have been excused as a juror.

Do not do any research -- on the Internet, in libraries, in the newspapers, or in any other way -- or make any investigation about this case on your own. Do not visit or view any place discussed in this case and do not use Internet programs or other device to search for or to view any place discussed in the testimony. Also, do not research any information about this case, the

law, or the people involved, including the parties, the witnesses, the lawyers, or the judge until you have been excused as jurors.

The parties have a right to have this case decided only on evidence they know about and that has been presented here in court. If you do some research or investigation or experiment that we don't know about, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process, including the oath to tell the truth and by cross-examination. Each of the parties is entitled to a fair trial, rendered by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. If you decide a case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this country and you will have done an injustice. It is very important that you abide by these rules. Failure to follow these instructions could result in the case having to be retried.

[Are there any of you who cannot or will not abide by these rules concerning communication with others in any way, shape or form during this trial?] (And then continue with other voir dire.)

Preliminary Instructions Before Opening Statements

0.02. INSTRUCTIONS AT END OF VOIR DIRE

During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. Do not allow anyone to discuss the case with you or within your hearing. "Do not discuss" also means do not e-mail, send text messages, blog or engage in any other form of written, oral or electronic communication, as I instructed you before.

Do not read any newspaper or other written account, watch any televised account, or listen to any radio program on the subject of this trial. Do not conduct any Internet research or consult with any other sources about this case, the people involved in the case, or its general subject matter. You must keep your mind open and free of outside information. Only in this way will you be able to decide the case fairly based solely on the evidence and my instructions on the law. If you decide this case on anything else, you will have done an injustice. It is very important that you follow these instructions.

I may not repeat these things to you before every recess, but keep them in mind until you are discharged.

Preliminary Instructions Before Opening Statements

1.01. GENERAL: NATURE OF CASE; NATURE OF INDICTMENT; BURDEN OF PROOF; PRESUMPTION OF INNOCENCE; DUTY OF JURY; CAUTIONARY

Ladies and gentlemen: I will take a few moments now to give you some initial instructions about this case and about your duties as jurors. At the end of the trial I will give you further instructions. I may also give you instructions during the trial. Unless I specifically tell you otherwise, all such instructions - both those I give you now and those I give you later - are equally binding on you and must be followed.

[Describe your court's policy, such as "You must leave your cell phone, PDA, Blackberry, smart phone, I-phone and any other wireless communication devices in the jury room during the trial and may only use them during breaks. However, you are <u>not</u> allowed to have cell phones in the jury room during your deliberations. You may give the cell phone to the [bailiff] [deputy clerk] for safekeeping just before you start to deliberate. It will be returned to you when your deliberations are complete."]

This is a criminal case, brought against the defendant[s] by the United States Government. The defendant[s] [is] [are] charged with _____.[1] [That charge is] [Those charges are] set forth in what is called an indictment[,] [which reads as follows: (insert)] [which I will summarize as follows: (insert)] [which I will ask the Government attorney to summarize for you].[2] You should understand that an indictment is simply an accusation. It is not evidence of anything. The defendant[s] [has] [have] pleaded not guilty, and [is] [are] presumed to be innocent unless and until proved guilty beyond a reasonable doubt.[3]

It will be your duty to decide from the evidence whether [the] [each] defendant is guilty or not guilty of the crime[s] charged. From the evidence, you will decide what the facts are. You are entitled to consider that evidence in the light of your own observations and experiences in the affairs of life. You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence. You will then apply those facts to the law which I give you in these and in my other instructions, and in that way reach your verdict. You are the sole judges of the facts, but you must follow my instructions, whether you agree with them or not. You have taken an oath to do so.

Preliminary Instructions Before Opening Statements

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

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

Finally, please remember that only [this defendant] [these defendants], not anyone else, [is] [are] on trial here, and that [this defendant] [these defendants] [is] [are] on trial only for the crime[s] charged, not for anything else.

Notes on Use

1. The description of the offense should not track statutory language, but rather should be a simple, general statement (*e.g.*, "unlawfully importing cocaine;" "embezzling bank funds"). Statutory citations are unnecessary.

2. 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 prosecutor or not read or summarized, depending on what is necessary to assist the jury in understanding the issues before it.

3. A brief summary of the defense may be included here if requested by the defendant.

Committee Comments

See Introductory Comment, Section 1.00, *supra*.

Preliminary Instructions Before Opening Statements

1.02. ELEMENTS OF THE OFFENSE - PRELIMINARY

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

One, _____

Two, _____ ; and

Etc., _____.[1]

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

Notes on Use

1. List the elements of the offense charged in the indictment. If more than one offense is charged, each offense should be referred to separately (*e.g.*: "As to Count I, which charges _____, the elements are: _____"). Statutory citations are unnecessary. For guidance in framing the elements, *see* Instruction 3.09 and Section 6, *infra*.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 10.01 (5th ed. 2000).

This is an *optional* instruction; and some care should be exercised in using it. The Committee recommends that it not be utilized unless there has first been a discussion with counsel concerning any problems that it might present.

Preliminary Instructions Before Opening Statements

1.03. EVIDENCE; LIMITATIONS

I have mentioned the word "evidence." "Evidence" includes the testimony of witnesses, documents and other things received as exhibits, any facts that have been stipulated--that is, formally agreed to by the parties, and any facts that have been judicially noticed--that is, facts which I say you may, but are not required to, accept as true, even without evidence.

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

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

2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question, you must ignore the question and must not try to guess what the answer might have been.

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

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

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

Finally, some of you may have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 11.03, 11.08, 11.09, 12.03, 12.04 (5th ed. 2000).

See also Instruction 3.03, *infra*.

Stipulated facts and judicially noticed facts are further explained in Instructions 2.02, 2.03 and 2.04, *infra*. The Committee recommends giving the appropriate one of those instructions the first time evidence is received either by way of stipulation or judicial notice, even though a brief definition is in this instruction.

1.04. DIRECT AND CIRCUMSTANTIAL EVIDENCE

(*See* final paragraph of Instruction 1.03, *supra*.)

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 12.04 (5th ed. 2000), the substance of which was approved in *United States v. Kirk*, 534 F.2d 1262, 1279 (8th Cir. 1976).

The Committee believes that the last paragraph of Instruction 1.03 is sufficient and that in the ordinary case it is unnecessary to attempt to define or distinguish direct and circumstantial evidence.

Preliminary Instructions Before Opening Statements

1.05. CREDIBILITY OF WITNESSES

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

[In deciding what testimony of any witness to believe, consider the witness' intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness' memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with other evidence that you believe].[1]

Notes on Use

1. Whether the court wishes to include this language or other additional detail in its preliminary instructions is optional.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 15.01 (5th ed. 2000).

See also Instruction 3.04, *infra*.

For an approved instruction on the credibility of a child witness, *see United States v. Butler*, 56 F.3d 941 (8th Cir. 1995).

A district court's credibility instruction will be affirmed if it adequately calls to the jury's attention the factors which may impact a witnesses' credibility. *United States v. Stevens*, 918 F.2d 1383, 1385 (8th Cir. 1990). Special instructions dealing with factors such as immunity agreements, prior convictions and Governmental payments have been approved. *United States v. Dierling*, 131 F.3d 722, 734 (8th Cir. 1997). The Eighth Circuit has also recognized a special instruction may be appropriate in considering the testimony of addict - informants. *United States v. Parker*, 32 F.3d 395, 401 (8th Cir. 1994)

Preliminary Instructions Before Opening Statements

1.06A. NO TRANSCRIPT AVAILABLE - NOTE-TAKING

At the end of the trial you must make your decision based on what you recall of the evidence. You will not have a written transcript to consult, and it may not be practical for the court reporter to read [play][1] back lengthy testimony. You must pay close attention to the testimony as it is given.

[If you wish, however, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. And do not let note-taking distract you so that you do not hear other answers by the witness.]

[When you leave at night, your notes will be secured and not read by anyone.][2]

Notes on Use

1. Use the word "play" if electronic recording system is used and testimony will be "played" back rather than read back to the jury.

2. The court may wish to describe the method to be used for safekeeping. In a high-profile case, the court may want to give some additional cautionary instructions.

Committee Comments

Both the unbracketed and bracketed portions of this instruction are optional. The unbracketed portion may help keep jurors attentive and may discourage requests for lengthy read-backs of testimony. The practice of restricting the reading back of testimony is discretionary. *United States v. Ratcliffe*, 550 F.2d 431, 434 (9th Cir. 1976).

Whether to permit note-taking is within the discretion of the trial judge. *United States v. Bassler*, 651 F.2d 600, 602 (8th Cir. 1981). Note-taking is not a favored procedure. Some circuit judges have expressed concern about letting jurors take notes. *See United States v. Darden*, 70 F.3d 1507, 1536-37 (8th Cir. 1995).

See 1 and 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 5.11, 10.03 and 10.04 (5th ed. 2000).

This instruction is identical to *8th Cir. Civil Jury Instr.* 1.06.

Preliminary Instructions Before Opening Statements

1.06B. QUESTIONS BY JURORS [1]

When attorneys have finished their examination of a witness, you may ask questions of the witness (describe procedure to be used here)[2]. If the rules of evidence do not permit a particular question, I will so advise you. Following your questions, if any, the attorneys may ask additional questions.

Notes on Use

1. This instruction may be used if the court permits questioning of witnesses by jurors. Various procedures have been used for handling jurors' questions. Some judges require that the questions be in writing, while others permit the jurors to state their questions orally. The procedure employed for taking jurors' questions, considering objections, and posing the questions should be left to the discretion of the judge. The jury should be advised of the procedure to be used.

2. Different methods may be used. For example:

(1) When attorneys have finished their examination of a witness, you may submit a written question or questions if you have not understood something. I will review each question with the attorneys. You may not receive an answer to your question because I may decide that the question is not proper under the rules of evidence. Even if the question is proper, you may not get an immediate answer to your question. For instance, a later witness or an exhibit you will see later in the trial may answer your question.

(2) Most of the testimony will be given in response to questions by the attorneys. Sometimes I may ask questions of a witness. When the attorneys have finished their questioning of a witness and I have finished mine, I will ask you whether you have any questions for that witness. If you do, direct each of your questions to me, and if I decide that it meets the legal rules, I will ask it of the witness. After all your questions for a witness have been dealt with, the attorneys will have an opportunity to ask the witness further about the subjects raised by your questions. When you direct questions to me to be asked of the witness, you may state them either orally or in writing.

(3) The court will permit jurors to submit written questions during the course of the trial. Such questions must be submitted to the court, but, depending upon the court's ruling on the questions, the court may not submit them to the witness. The court will endeavor to permit such questions at the conclusion of a witness' testimony.

Preliminary Instructions Before Opening Statements

Committee Comments

The Eighth Circuit has held that the practice of allowing juror questions is a matter within the sound discretion of the district court and is not prejudicial *per se*. *United States v. Taylor*, 900 F.2d 145, 148 (8th Cir. 1990). However, the Eighth Circuit has strongly discouraged this practice. *United States v. Welliver*, 976 F.2d 1148 (8th Cir. 1992). While some courts have found that it is advantageous that jurors become more involved in the trial proceedings and are permitted to address their particular concerns with respect to the issues, *see* Hener and Penrod, "*Increasing Juror's Participation with Jury Notetaking and Question Asking*," 12 Law & Human Behavior 231 (1988); "Toward More Active Juries: Taking Notes and Asking Questions," American Judicature (1991), some courts have perceived dangers in the practice and have strongly criticized the practice. *See United States v. Johnson*, 892 F.2d 707 (8th Cir. 1989) (Concurrence by Lay, Chief Judge); *United States v. Land*, 877 F.2d 17, 19 (8th Cir. 1989); *United States v. Polowichak*, 783 F.2d 410, 413 (4th Cir. 1986); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1985). The Eighth Circuit has affirmed jury questioning procedures used by courts when the jury is instructed that it should not draw any factual conclusions from what it observed in the process because it was the judge's job to determine what questions were proper. *United States v. George*, 986 F.2d 1176, 1178-79 (8th Cir. 1993). The Eighth Circuit will affirm a district court's procedure that provides for debate of questions outside the hearing of the jury and the rejection of any question found objectionable under the rule of evidence. *Id.*

This instruction is identical to *8th Cir. Civil Jury Instr.* 1.07.

Preliminary Instructions Before Opening Statements

1.07. BENCH CONFERENCES AND RECESSES

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

Committee Comments

See Federal Judicial Center, Pattern Criminal Jury Instructions § 1 (1988); Fifth Circuit Pattern Jury Instructions (Criminal Cases) § 1.01 ((2001); Ninth Cir. Criminal Jury Instructions § 2.2 (2000); Eleventh Circuit Pattern Jury Instructions: Criminal (Trial) §§ 1.1, 1.2 (1997).

Preliminary Instructions Before Opening Statements

1.08. CONDUCT OF THE JURY

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

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

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom do not let anyone tell you anything about the case, or about anyone involved with it [until the trial has ended and your verdict has been accepted by me]. If someone should try to talk to you about the case [during the trial], please report it to the [bailiff] [deputy clerk]. (Describe person.)

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

Fifth, it may be necessary for you to tell your family, close friends, teachers, coworkers, or employer about your participation in this trial. You can explain when you are required to be in court and can warn them not to ask you about this case, tell you anything they know or think they know about this case, or discuss this case in your presence. You must not communicate with anyone or post information about the parties, witnesses, participants, [claims] [charges], evidence, or anything else related to this case. You must not tell anyone anything about the jury's deliberations in this case until after I accept your verdict or until I give you specific permission to do so. If you discuss the case with someone other than the other jurors during deliberations, it could create the perception that you have clearly decided the case or that you

may be influenced in your verdict by their opinions. That would not be fair to the parties and it may result in the verdict being thrown out and the case having to be retried. During the trial, while you are in the courthouse and after you leave for the day, do not provide any information to anyone by any means about this case. Thus, for example, do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or Website such as Facebook, MySpace, YouTube, or Twitter, or any other way to communicate to anyone any information about this case until I accept your verdict.

Sixth, do not do any research -- on the Internet, in libraries, in the newspapers, or in any other way -- or make any investigation about this case on your own. Do not visit or view any place discussed in this case and do not use Internet programs or other device to search for or to view any place discussed in the testimony. Also, do not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge.

Seventh, do not read any news stories or articles in print, or on the Internet, or in any blog, about the case, or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it. [In fact, until the trial is over, I suggest that you avoid reading any newspapers or news journals at all, and avoid listening to any television or radio newscasts at all. I do not know whether there might be any news reports of this case, but if there are, you might inadvertently find yourself reading or listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over.] I can assure you, however, that by the time you have heard the evidence in this case, you will know what you need to return a just verdict.

The parties have a right to have the case decided only on evidence they know about and that has been introduced here in court. If you do some research or investigation or experiment that we don't know about, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process, including the oath to tell the truth and by cross-examination. All of the parties are entitled to a fair trial, rendered by an

impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. If you decide a case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this country and you will have done an injustice. It is very important that you abide by these rules. Remember, you have taken an oath to abide by these rules and you must do so. [Failure to follow these instructions may result in the case having to be retried and could result in you being held in contempt.]

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

Preliminary Instructions Before Opening Statements

1.09. OUTLINE OF TRIAL

The trial will proceed in the following manner:

First, the Government attorney will make an opening statement. [Next the defendant's attorney may, but does not have to, make an opening statement.][1] An opening statement is not evidence but is simply a summary of what the attorney expects the evidence to be.

The Government will then present its evidence and counsel for the defendant may cross-examine. [Following the Government's case, the defendant may, but does not have to, present evidence, testify or call other witnesses. If the defendant calls witnesses, the Government counsel may cross-examine them.][2]

After presentation of evidence is completed, the attorneys will make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. The court will instruct you further on the law. After that you will retire to deliberate on your verdict.

Notes on Use

1. This sentence may be omitted if the defendant so requests.
2. These sentences may be omitted if the defendant so requests.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 10.01 (5th ed 2000).

2.00. INSTRUCTIONS FOR USE DURING TRIAL

Introductory Comment

The instructions included in this section are those the Committee felt were most likely to be given *during* trial, to limit or explain evidence, to advise the jury of its duties, or to cure or avoid prejudice. An instruction bearing on the jury's duties during recesses is contained in Instruction 2.01. Instructions explaining various kinds of evidence include Instructions 2.02-2.07.

Limiting instructions must be given, if requested, where evidence is admissible for one purpose, but not for another purpose, or against one defendant but not another. Fed. R. Evid. 105. Although it may be the better practice to give such an instruction *sua sponte*, this circuit has made it clear that the district court is not required to give a limiting instruction unless counsel requests one. *United States v. Perkins*, 94 F.3d 429, 435 (8th Cir. 1996). Generally, when neither party requests a limiting instruction, the trial court's failure to give a limiting instruction is reviewed for plain error. *Id.* A party who declines a district court's offer to provide a limiting instruction or who makes it clear that he does not want such a limiting instruction waives the issue on appeal and cannot complain that such a failure constituted plain error. *United States v. Haukass*, 172 F.3d 542, 545 (8th Cir. 1999); *Arkansas State Highway Comm'n v. Arkansas River Co.*, 271 F.3d 753, 760 (8th Cir. 2001) (when error invited, there can be no reversible error).

The district court has discretion in deciding whether to give limiting instructions, but when it does, it should instruct the jury as to the limited purpose for which the evidence is received. *United States v. Larry Reid & Sons Partnership*, 280 F.3d 1212, 1215 (8th Cir. 2002). Limiting instructions include Instructions 2.08-2.19.

Curative instructions are used to avoid or cure possible prejudice that may arise from a variety of situations occurring during trial. *United States v. Flores*, 73 F.3d 826, 831 (8th Cir. 1996). *See, e.g.*, *United States v. Waddington*, 233 F.3d 1067, 1077 (8th Cir. 2000) (reference to a co-defendant's conviction in the same underlying case)*; United States v. O'Dell*, 204 F.3d 829, 835 (8th Cir. 2000) (improper prosecutor's argument that the Government cannot force someone to testify); *United States v. Sopczak*, 742 F.2d 1119, 1122 (8th Cir. 1984) (witness mentioned the defendant had changed plea from guilty to not guilty); *United States v. Martin*, 706 F.2d 263, 266 (8th Cir. 1983) (court's reference to the defendants as "pimps"); *United States v. Singer*, 660 F.2d 1295, 1304-05 (8th Cir. 1981) (prosecutor's comments during closing argument); *United States v. Smith*, 578 F.2d 1227, 1236 (8th Cir. 1978) (the codefendant's disruptive conduct at trial); *United States v. Leach*, 429 F.2d 956, 963 (8th Cir. 1970) (witness characterized the defendant's remark as "vulgar"). Curative instructions include Nos. 2.20-2.22.

The court has discretion to refuse a curative instruction where the effect may be to amplify the event rather than dispel prejudice. *Long v. Cottrell*, 265 F.3d 663, 665 (8th Cir. 2001).

Instructions for Use During Trial

Other Instructions dealing with evidentiary matters are found in Section 4. Any of those evidentiary instructions may easily be adapted for use during trial where appropriate.

Instructions given during trial may be repeated at the conclusion of trial, if appropriate.

Instructions for Use During Trial

2.01. DUTIES OF JURY - RECESSES

During this recess, and every other recess, you must not discuss this case with anyone, including the other jurors, members of your family, people involved in the trial, or anyone else. Do not allow anyone to discuss the case with you or within your hearing. Only you have been chosen as jurors in this case, and only you have sworn to uphold the law – no one else has been chosen to do this. You should not even talk among yourselves about the case before you have heard all the evidence and the case has been submitted to you by me for deliberations, because it may affect your final decision. If anyone tries to talk to you about the case, please let me know about it immediately.

When I say "you must not discuss the case with anyone," I also mean do not e-mail, send text messages, blog or engage in any other form of written, oral or electronic communication, as I instructed you before.

[Do not read any newspaper or other written account, watch any televised account, or listen to any radio program about this trial. Do not conduct any Internet research or consult with any other sources about this case, the people involved in the case, or its general subject matter. You must keep your mind open and free of outside information. Only in this way will you be able to decide the case fairly, based solely on the testimony, evidence presented in this courtroom, and my instructions on the law. If you decide this case on anything else, you will have done an injustice. It would be a violation of your oath for you to base your decision on some reporter's view or opinion, or upon other information you acquire outside the courtroom. It is very important that you follow these instructions.]

I may not repeat these things to you before every recess, but keep them in mind throughout the trial.[1]

Notes on Use

1. This language should be used for overnight and weekend recesses, but may be omitted for subsequent breaks during trial.

Instructions for Use During Trial

2.02. STIPULATED TESTIMONY

The Government and the defendant[s] have stipulated - that is, they have agreed - that if (name of witness) were called as a witness [he] [she] would testify in the way counsel has just stated. You should accept that as being (name of witness)'s testimony, just as if it had been given here in court from the witness stand.

Committee Comments

There is a difference between stipulating that a witness would give certain testimony, and stipulating that certain facts are established. *United States v. Lambert*, 604 F.2d 594, 595 (8th Cir. 1979). Instruction 2.03, *infra*, covers stipulations of facts. By entering into a stipulation as to a witness' testimony, calling that person as a witness is avoided. *Osborne v. United States*, 351 F.2d 111, 120 (8th Cir. 1965).

Where there is stipulation as to testimony, the parties may contest the truth or accuracy of that testimony. *See United States v. Garcia*, 593 F.2d 77, 79 (8th Cir. 1979). In such a situation, it may be appropriate to instruct the jury on the factual areas that remain disputed. *See, e.g.*, *United States v. Renfro*, 600 F.2d 55, 59 (6th Cir. 1979), for an example of such an instruction where only authenticity was stipulated.

Instructions for Use During Trial

2.03. STIPULATED FACTS

The Government [prosecutor] and the defendant[s] have stipulated – that is, they have agreed – that certain facts are as counsel have just stated. You must therefore treat those facts as having been proved.

Committee Comments

When facts are stipulated, it is not error for the court to so instruct. *United States v. Sims*, 529 F.2d 10, 11 (8th Cir. 1976). *See, e.g., United States v. Steeves*, 525 F.2d 33, 35 (8th Cir. 1975). When the parties stipulate to an element of an offense, it is not error to instruct the jury as to that fact. "Stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them." *Osborne v. United States*, 351 F.2d 111, 120 (8th Cir. 1965).

A case may be submitted on an agreed statement of facts and the defendant may raise any defenses by stipulation. Such a practice, where the essential facts in the case are uncontested, has been approved as a practical and expeditious procedure. *United States v. Wray*, 608 F.2d 722, 724 (8th Cir. 1979). When facts which tend to establish guilt are submitted on stipulation, the court must determine whether the consequences of the admissions are understood by the defendant and whether he consented to them. *Cox v. Hutto*, 589 F.2d 394, 396 (8th Cir. 1979) (stipulation to prior convictions in habitual offender action). An extensive examination before entry of a guilty plea under Rule 11 is ordinarily not required. *United States v. Stalder*, 696 F.2d 59, 62 (8th Cir. 1982). However, when a stipulation is entered that leaves no fact to be tried, the court should determine that the stipulation was voluntarily and intelligently entered into, and that the defendant knew and understood the consequences of the stipulation. *Id.*

By agreeing to a stipulation, a defendant waives any right to argue error on appeal. *United States v. Hawkins*, 215 F.3d 858, 860 (8th Cir. 2000) (citing *Ohler v. United States*, 529 U.S. 753, 756 (2000) (party introducing evidence cannot complain on appeal that the evidence was erroneously admitted)).

Instructions for Use During Trial

2.04. JUDICIAL NOTICE (Fed. R. Evid. 201)

Even though no evidence has been introduced about it, I have decided to accept as proved the fact that (insert fact noticed). I believe this fact [is of such common knowledge] [can be so accurately and easily determined from (name accurate source)] that it cannot reasonably be disputed. You may therefore treat this fact as proved, even though no evidence was brought out on the point. As with any fact, however, the final decision whether or not to accept it is for you to make and you are not required to agree with me.

Committee Comments

The kinds of facts which may be judicially noticed are set out in Rule 201(b) of the Federal Rules of Evidence.

An instruction regarding judicial notice is appropriately given at the time notice is taken. In *United States v. Deckard*, 816 F.2d 426 (8th Cir. 1987), the jury was instructed at the time notice was taken that it would be instructed at the close of the case on what to do with facts judicially noticed. That part of the final charge read as follows:

> When the court declares it will take judicial notice of some fact or event, you may accept the court's declaration as evidence, and regard as proved the fact or event which has been judicially noticed, but you are not required to do so since you are the sole judge of the facts.

816 F.2d at 428.

Rule 201(g) of the Federal Rules of Evidence requires that the jury in a criminal case be instructed that it is not required to accept as conclusive any fact so noticed. However, failure to so instruct does not rise to the level of plain error if the defendant is not prejudiced. *United States v. Berrojo*, 628 F.2d 368, 370 (5th Cir. 1980); *United States v. Piggie*, 622 F.2d 486, 488 (10th Cir. 1980).

Courts "may take judicial notice of either legislative or adjudicative facts, [but] only notice of the latter is subject to the strictures of Rule 201. Although Rule 201 is frequently (albeit erroneously) cited in cases that involve judicial notice of legislative facts, see II [Kenneth C.] Davis & [Richard J.] Pierce, Jr., Administrative Law Treatise § 10.6 at 155 (3d ed. 1994), [courts] recognize the importance of this distinction and its clear basis in Rule 201(a) and the advisory note thereon." *United States v. Hernandez-Fundora*, 58 F.3d 802, 812 (2d Cir. 1995). While the federal rule provides, in part, that "[i]n a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed," the rule extends only to adjudicative, not legislative facts. *United States v. Gould*, 536 F.2d 216 (8th Cir. 1976); *United States v. Bowers*, 660 F.2d 527 (5th Cir. 1981) (per curiam). "No rule deals with judicial notice of 'legislative' facts.'" *United States v. Hernandez-Fundora*, 58 F.3d at 811.

Instructions for Use During Trial

Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case. If the court reaches a "conclusion through an exercise in statutory interpretation" about a particular issue, the conclusion is a legislative fact that need not be submitted to the jury. *United States v. Gould*, 536 F.2d at 220 (instruction to jury that it could disregard the judicially noticed fact that cocaine hydrochloride was a schedule II controlled substance would have been inappropriate); *United States v. Hernandez-Fundora*, 58 F.3d at 810 (resolution of territorial jurisdiction issue required the determination of legislative facts with the result that Rule 201(g) inapplicable); *United States v. Madeoy*, 912 F.2d 1486, 1494 (D.C. Cir. 1990) ("public official" for purposes of bribery statute is a question of law for the court); *United States v. Anderson*, 782 F.2d 908, 917 (11th Cir. 1986) (fact that violation of Georgia arson statute is a felony for RICO purposes is a legislative fact that can be judicially noticed but not instructed on).

Instructions for Use During Trial

2.05. WIRETAP OR OTHER RECORDED EVIDENCE

[You [are about to hear] [have heard] recordings of conversations. These conversations were legally recorded, and you may consider the recordings just like any other evidence.]

Committee Comments

The Committee recommends that this instruction be given only if a question as to the propriety of the recording has been raised in the jury's presence.

Note that when a transcript is offered and the recording is available, the recording, rather than the transcript, controls. *See* Fed. R. Evid. 1002. *United States v. Martinez*, 951 F.2d 887, 889 (8th Cir. 1991). The trial court did not err in permitting the jury to listen to a recording, which was arguably unintelligible, and follow along with the transcript, when the court instructed the jury that only the recording and not the transcript was to be considered when weighing the evidence. This is covered in Instruction 2.06A, *infra*. In situations where a transcript is utilized together with the recording, Instruction 2.06A should be given immediately after this instruction.

In *United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974), the Court set forth the foundation requirements for use of recordings as evidence. The *McMillan* foundation requirements are directed to the Government's use of recording equipment, but not to a recording found in a defendant's possession. *United States v. O'Connell*, 841 F.2d 1408 (8th Cir. 1988); *United States v. Kandiel*, 865 F.2d 967 (8th Cir. 1989). If the requirements are satisfied, a recording may be admitted even if it is poor quality as long as the quality of the recording does not call into question the trustworthiness of the recording. *United States v. Munoz*, 324 F.3d 987, 992 (8th Cir. 2003); *cf. United States v. Le*, 272 F.3d 530, 532 (8th Cir. 2001). It is within the trial court’s discretion to exclude a recording when its quality renders it untrustworthy.

Instructions for Use During Trial

2.06A. TRANSCRIPT OF RECORDED CONVERSATION

As you have [also] heard, there is a transcript of the recording [I just mentioned] [you are about to hear]. That transcript also undertakes to identify the speakers engaged in the conversation.

The transcript is for the limited purpose of helping you follow the conversation as you listen to the recording, and also to help you keep track of the speakers. Differences in meaning between what you hear in the recording and read in the transcript may be caused by such things as the inflection in a speaker's voice. It is what you hear, however, and not what you read, that is the evidence.

[Whether the transcript correctly or incorrectly reflects the conversation or the identity of the speakers is entirely for you to decide based upon what you hear on the recording and what you have heard here about the preparation of the transcript, and upon your own examination of the transcript in relation to what you hear on the recording. If you decide that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.][1]

Notes on Use

1. This paragraph should be given if the parties do not stipulate to the transcript. In *United States v. Gonzalez*, 365 F.3d 656, 660 (8th Cir. 2004), the court said: "[W]e believe that whenever the parties intend to introduce a transcript at trial, they should first try 'to produce an 'official' or 'stipulated' transcript, one which satisfies all sides,' *United States v. Cruz*, 765 F.2d 1020, 1023 (11th Cir. 1985) (quoting *United States v. Wilson*, 578 F.2d 67, 69-70 (5th Cir. 1978)). If they are unable to do so, 'then each side should produce its own version of a transcript or its own version of the disputed portions. In addition, each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side's version.' *Id.* (quoting *Wilson*, 578 F.2d at 69-70)." In the opinion of the Committee, one transcript with bracketed alternatives can also be used to aid the jury where the dispute only involves short disagreements.

Committee Comments

See generally United States v. McMillan, 508 F.2d 101 (8th Cir. 1974) (specifies the procedures for use of transcripts at trial). *United States v. Calderin-Rodriquez*, 244 F.3d 979, 987 (8th Cir. 2001), held that transcripts which provide voice identification and date headings were properly admitted.

A jury may use transcripts of recorded conversations during trial and deliberations. *United States v. Delpit*, 94 F.3d 1134, 1147-48 (8th Cir. 1996) (citing, *inter alia, United States v. Byrne*, 83 F.3d 984, 990 (8th Cir. 1996), holding that it is "well-settled that the jury may use

transcripts of wiretapped conversations during trial and deliberations"); *see also United States v. Foster*, 815 F.2d 1200, 1203 (8th Cir. 1987), holding that it was not error for the trial court to permit the transcripts to be sent to the jury during deliberations when the transcripts were admitted into evidence without objection, and the jury was instructed that the recording is controlling. If the accuracy of the transcript has been stipulated, the transcript may be admitted into evidence without limiting instructions. *See United States v. Crane*, 632 F.2d 663, 664 (6th Cir. 1980).

The trial court has broad discretion in the use of transcripts. *See, e.g., United States v. Grajales-Montoya*, 117 F.3d 356, 367 (8th Cir. 1997), holding that the trial court did not abuse its discretion by admitting transcripts of certain translations of recorded conversations in Spanish and not admitting the recordings themselves. In *United States v. Delpit*, 94 F.3d 1134, 1147 (8th Cir. 1996), the court held it was not error for the trial court to allow the jury to use the transcripts of wire-tapped conversations during trial and deliberations which included the Government's interpretation and translation, in brackets, of pig-Latin codes used in recordings.

Instructions for Use During Trial

2.06B. TRANSCRIPT OF FOREIGN LANGUAGE; RECORDED CONVERSATION [1]

The exhibits admitted during the trial included recordings of conversations in the _____ language. You were also given English transcripts of those conversations. The transcripts were prepared [by the Government] so that you can understand the recordings. Whether a transcript is an accurate translation, in whole or in part, is for you to decide. You should not rely in any way on any knowledge you may have of the language spoken on the recording; your consideration of the transcripts should be based on the evidence introduced in the trial.[2]

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

Notes on Use

1. This instruction should be given if the parties do not stipulate to the transcript. In *United States v. Gonzalez*, 365 F.3d 656, 660 (8th Cir. 2004), the court encouraged the parties to produce an official or stipulated transcript, which satisfies all sides. If they are unable to do so, "then each side should produce its own version of a transcript or its own version of the disputed portions. In addition, each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side's version." (quoting *United States v. Wilson*, 578 F.2d 67, 69-70 (5th Cir. 1978)). In the opinion of the Committee, one transcript with bracketed alternatives can also be used to aid the jury where the dispute only involves short disagreements.

2. Jurors should be instructed to rely only on the English translation, not on their own knowledge of the foreign language. *United States v. Gonzalez*, 365 F.3d 656, 661-62 (8th Cir. 2004). The court cited with approval the Seventh Circuit Federal Criminal Jury Instruction § 3.18, and encouraged district courts to "use an instruction similar to it when introducing an English transcript of dialogue that originally was spoken in another language." *Id.* at 662.

Instructions for Use During Trial

2.07. STATEMENT BY DEFENDANT

You have heard testimony that [the defendant] [defendant (name)] made a statement to (name of person or agency). It is for you to decide:

First, whether [the defendant] [defendant (name)] made the statement; and

Second, if so, how much weight you should give to it.[1]

[In making these two decisions you should consider all of the evidence, including the circumstances under which the statement may have been made.] [2]

Notes on Use

1. In a multi-defendant trial, this instruction should be followed by Instruction 2.15, *infra*, unless the statement was made during the course of a conspiracy or was otherwise adoptive.

2. Use this sentence, if appropriate.

Committee Comments

See generally 18 U.S.C. § 3501 and *United States v. Dickerson*, 530 U.S. 428 (2000).

The instruction uses the word "statement" in preference to the word "confession." Not all statements are "confessions," particularly from a lay person's point of view.

Pursuant to 18 U.S.C. § 3501(a), the trial judge must first make a determination as to the voluntariness of the statement (including compliance with applicable *Miranda* requirements), outside the presence of the jury. This may, of course, be done either pretrial or out of the jury's presence during trial. If done during trial, no reference to the statement should be made in the jury's presence unless and until the trial judge has made a determination that the statement is admissible. If such a determination is made, the trial judge should then permit the jury to hear evidence on the issue of voluntariness and give the present instruction. The jury should *not* be advised that the trial judge has made an independent determination that the statement was voluntary. *United States v. Standing Soldier*, 538 F.2d 196, 203 (8th Cir. 1976); *United States v. Bear Killer*, 534 F.2d 1253, 1258-59 (8th Cir. 1976). The Committee concludes that it is not necessary to instruct the jury with respect to the various specific factors enumerated in 18 U.S.C. § 3501(b).

The defendant may introduce evidence of the circumstances in which the statement was made. *Crane v. Kentucky*, 476 U.S. 683 (1986); *United States v. Blue Horse*, 856 F.2d 1037, 1039 n.3 (8th Cir. 1988).

If the voluntariness of the statement is not an issue, the defendant is not entitled to this instruction. *Blue Horse*, 856 F.2d at 1039.

Instructions for Use During Trial

Even though the defendant's failure to request an instruction such as this one may be a waiver of any error in the matter, *see United States v. Houle*, 620 F.2d 164, 166 (8th Cir. 1980), the Committee strongly recommends that if voluntariness is an issue, the instruction be given even absent a request.

"Informal" voluntary statements - that is, in the language of 18 U.S.C. § 3501(d), those made "without interrogation by anyone, or at any time at which the person . . . was not under arrest or other detention" - do not require any instruction. *See United States v. Houle*, 620 F.2d at 166.

Instructions for Use During Trial

2.08. DEFENDANT'S PRIOR SIMILAR ACTS - Where Introduced to Prove an Issue Other Than Identity (Fed. R. Evid. 404(b))

You [are about to hear] [have heard] evidence that the defendant (describe evidence the jury is about to hear or has heard). You may consider this evidence only if you (unanimously) find it is more likely true than not true. You decide that by considering all of the evidence and deciding what evidence is more believable. This is a lower standard than proof beyond a reasonable doubt.

If you find this evidence has been proved, then you may consider it to help you decide (describe purpose under 404(b) for which evidence has been admitted.)[1] You should give it the weight and value you believe it is entitled to receive. If you find that this evidence has not been proved, you must disregard it.[2]

Remember, even if you find that the defendant may have committed [a] similar [act] [acts] in the past, this is not evidence that [he] [she] committed such an act in this case. You may not convict a person simply because you believe [he] [she] may have committed similar acts in the past. The defendant is on trial only for the crime[s] charged, and you may consider the evidence of prior acts only on the issue[s] stated above.[3]

Notes on Use

1. Use care in framing the language to be used in specifying the purpose for which the evidence can be used. *See United States v. Mothershed*, 859 F.2d 585, 588-89 (8th Cir. 1988) (court should specify to which component of Rule 404(b) the prior similar act evidence is relevant and explain the relationship between the prior acts and proof of that proper component).

2. *See generally United States v. Frazier*, 280 F.3d 835, 846-47 (8th Cir. 2002).

3. This paragraph should be given only upon request of the defendant. This portion of the instruction explains that prior similar act evidence is not admissible to prove propensity to commit crime, and the defendant may want the jury so instructed. On the other hand, this portion of the instruction repeats reference to the prior act[s]. The trade-off between explanation and repetition should be made by the defendant in the first instance.

Committee Comments

See generally Fed. R. Evid. 404(b). *See also United States v. Felix*, 867 F.2d 1068, 1075 (8th Cir. 1989) (court satisfied that earlier, but nearly identical, version of this instruction was correct as given).

Instructions for Use During Trial

See also Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

The Supreme Court, in *Huddleston v. United States*, 485 U.S. 681, 691 (1988), acknowledged the unfair prejudice that can arise from the admission of similar act evidence and noted that such prejudice could be dealt with, in part, through a limiting instruction. Such an instruction should be given when requested.

Prior act evidence is admissible when it is relevant to a material issue in question other than the character of the defendant, the act is similar in kind and reasonably close in time to the crime charged, there is sufficient evidence to support a finding by the jury that the defendant committed the prior act and the potential unfair prejudice does not substantially outweigh the probative value of the evidence. *United States v. Winn*, 628 F.3d 432 (8th Cir. 2010). This circuit follows a rule of inclusion, wherein such evidence is admissible unless it tends to prove only the defendant's criminal disposition. *E.g.*, *United States v. Oaks*, 606 F.3d 530, 538 (8th Cir. 2010).

While other act evidence is generally admissible to prove intent, knowledge, motive, etc., it is only admissible where such an issue is material in the case. *United States v. Stroud*, 673 F.3d 854, 861 (8th Cir. 2012). In *United States v. Carroll*, 207 F.3d 465, 467 (8th Cir. 2000), the Court stated,

> [i]n some circumstances, a defendant's prior bad acts are part of a broader plan or scheme relevant to the charged offense. . . . Evidence of past acts may also be admitted . . . *as direct proof of a charged crime that includes a plan or scheme element*. . . . In other circumstances . . . the "pattern and characteristics of the crimes [are] so unusual and distinctive as to be like a signature[.]" . . . In these cases, the evidence goes to identity. . . . These "plan" and "identity" uses of Rule 404(b) evidence are distinct from each other. . . .

Id. (emphasis added, citations omitted); *see also United States v. LeCompte*, 99 F.3d 274 (8th Cir. 1996). Where admission of other act evidence is sought, "the proponent of the evidence [must] articulate the basis for the relevancy of the prior act evidence and . . . the court [must] 'specify which components of the rule form the basis of its ruling *and why*.' *United States v. Harvey*, 845 F.2d 760, 762 (8th Cir. 1988) (emphasis added)." *United States v. Johnson*, 879 F.2d 331, 334 n.2 (8th Cir. 1989). Other act evidence is admissible during the Government's case-in-chief where the defendant plans to present a general denial defense, because the defendant, by pleading not guilty, puts the Government to its proof on all elements of the charged crime. *United States v. Miller*, 974 F.2d 953, 960 (8th Cir. 1992); *United States v. Crouch*, 46 F.3d 871, 875 (8th Cir. 1995). For a discussion of the stringent test which the defendant must meet to remove a state-of-mind issue, *see United States v. Thomas*, 58 F.3d 1318, 1321-22 (8th Cir. 1995), and *United States v. Jenkins*, 7 F.3d 803, 806-07 (8th Cir. 1993) (Rule 404(b) evidence inadmissible to show intent during rebuttal when the defendant denied committing the criminal act).

Instructions for Use During Trial

This instruction is designed for use *only* in those situations where the prior acts are to be utilized for one or more purposes covered by Rule 404(b), "such as proof of motive, opportunity, intent, preparation, plan, knowledge, . . . or absence of mistake or accident . . ." but *not* for proof of identity or in sexual assault or child molestation cases.

This instruction should *not* be used when the theory for admitting the evidence is to show identity. When the evidence is to be used for this purpose, use Instruction 2.09, *infra*. This instruction is also not appropriate when evidence of similar crimes is introduced in sexual assault and child molestation cases. Those cases are covered by Federal Rules of Evidence 413 and 414, which allow evidence of similar crimes to show the defendant's propensity to commit such crimes as evidence that he or she did commit the crime for which the defendant is on trial. When Rules 413 and 414 are at issue, use Instruction 2.08.A, *infra*.

If the defendant's prior conviction has been admitted under Rule 609, a different limiting instruction should be given. *See* Instruction 2.16, *infra.*

Instructions for Use During Trial

2.08A. DEFENDANT'S PRIOR SIMILAR ACTS IN SEXUAL ASSAULT AND CHILD MOLESTATION CASES (Fed. R. Evid. 413 and 414)

You [are about to hear] [have heard][1] evidence that the defendant may have previously committed [another] [other] offense[s] of [sexual assault] [child molestation]. The defendant is not charged with [this] [these] other offense[s]. You may consider this evidence only if you unanimously find it is more likely true than not true. You decide that by considering all of the evidence and deciding what evidence is more believable. This is a lower standard than proof beyond a reasonable doubt.

If you find that [this offense has] [these offenses have] not been proved, you must disregard [it] [them].[2] If you find that [this offense has] [these offenses have] been proved, you may consider [it] [them] to help you decide any matter to which [it is] [they are] relevant. You should give [it] [them] the weight and value you believe [it is] [they are] entitled to receive. You may consider the evidence of such other act[s] of [sexual assault] [child molestation] for its tendency, if any, to show the defendant's propensity[3] to engage in [sexual assault] [child molestation] [.] [, as well as its tendency, if any, to [determine whether the defendant committed the acts charged in the Indictment] [determine the defendant's intent] [determine the identity of the person who committed the act[s] charged in the Indictment] [determine the defendant's (motive) (plan) (design) (opportunity) to commit the act[s] charged in the Indictment] [determine the defendant's knowledge] [rebut the contention of the defendant that [his] [her] participation in the offense[s] charged in the Indictment was the result of (accident) (mistake) (entrapment)] [rebut the issue of ___ raised by the defense].]

Remember, the defendant is on trial only for the crime[s] charged. You may not convict a person simply because you believe [he] [she] may have committed similar acts in the past.

Notes on Use

1. This instruction should be given both during the trial -- ideally prior to the time a witness testifies about another sexual assault or child molestation -- as well as in the final instructions. *See United States v. Summage*, 575 F.3d 864, 878 (8th Cir. 2009) (finding no abuse of discretion in allowing a witness's testimony about a prior child molestation under Rule 414, noting the court gave a limiting instruction during the trial which "diminishes the danger of

unfair prejudice," and setting forth the limiting instruction given in the final instructions); *United States v. Bentley*, 561 F.3d 803, 816 (8th Cir. 2009) (finding no abuse of discretion in admitting testimony under Rule 414 and noting that the court "took precautions to limit the prejudicial nature of the Rule 414 testimony" by instructing the jury both before the witnesses testified and in its final charge); *United States v. Hollow Horn*, 523 F.3d 882, 889 & n.9 (8th Cir. 2008) (finding no abuse of discretion in admitting testimony under Rule 413 where the court gave a limiting instruction after the witness's direct examination but before her cross-examination).

2. *See* Notes on Use 2 to Instruction 2.08.

3. Although "[e]vidence of prior bad acts is generally not admissible to prove a defendant's character or propensity to commit a crime[,] Congress altered [the general rule] in sex offense cases when it adopted Rules 413 and 414 of the Federal Rules of Evidence." *United States v. Holy Bull*, 613 F.3d 871, 873 (8th Cir. 2010) (citing Rule 404(b) as the general rule). Evidence admitted pursuant to Rules 413 and 414 is subject to Rule 403's balancing test. *See United States v. Rodriguez*, 581 F.3d 775, 795-96 (8th Cir. 2009) (Rule 413); *Summage*, 575 F.3d at 877-78 (Rule 414); *Bentley*, 561 F.3d at 815 (Rule 414); *Hollow Horn*, 523 F.3d at 887-88 (Rule 413). It is not subject to analysis under Rule 404(b). *United States v. Tail*, 459 F.3d 854, 858 (8th Cir. 2006) (stating the policy articulated in Rule 413 "renders the general prohibition on propensity evidence in Rule 404(b) inapposite").

Instructions for Use During Trial

2.09. DEFENDANT'S PRIOR SIMILAR ACTS - Where Introduced to Prove Identity (Fed. R. Evid. 404(b))

You [are about to hear] [have heard] evidence that the defendant previously committed [an act] [acts] similar to [the one] [those] charged in this case. You may use this evidence to help you decide [manner in which the evidence will be used to prove identity - *e.g.*, whether the similarity between the acts previously committed and the one[s] charged in this case suggests that the same person committed all of them].[1] [If you find that the evidence of other acts is not more likely true than not true, you must disregard it. You will decide whether the other acts have been proved after considering all of the evidence and deciding what evidence is more believable. This is a lower standard than proof beyond a reasonable doubt.][2]

The defendant is on trial for the crime[s] charged and for [that] [those] crime[s] alone. You may not convict a person simply because you believe [he] [she] may have committed some act[s], even bad act[s], in the past.[3]

Notes on Use

1. The language here should specify whether the evidence is to be considered to show a common pattern, scheme or plan or for another permissible purpose relating to proof of the acts charged.

2. *See* Notes on Use 2 and 3 to Instruction 2.08.

3. *See* Notes on Use 2 and 3 to Instruction 2.08.

Committee Comments

See generally Fed. R. Evid. 404(b).

See also Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

Evidence of prior crimes or acts may be admissible in some cases to prove the crime charged. *See, e.g.*, *United States v. Calvert*, 523 F.2d 895, 905-07 (8th Cir. 1975); *United States v. Robbins*, 613 F.2d 688, 692-95 (8th Cir. 1979). For example, such evidence is admissible to prove identity when the theory for admitting the evidence is to show a common scheme, pattern or plan between the prior acts and the present offense. *United States v. McMillian*, 535 F.2d 1035, 1038 (8th Cir. 1976); *United States v. Davis*, 551 F.2d 233, 234 (8th Cir. 1977); *United States v. Weaver*, 565 F.2d 129, 133-35 (8th Cir. 1977); *United States v. Mays*, 822 F.2d 793, 797 (8th Cir. 1987). Such evidence is admissible where there is a "peculiar similarity" between the prior acts and the crime charged. *United States v. Garbett*, 867 F.2d 1132, 1135 (8th Cir. 1989). This instruction is not appropriate when evidence of similar crimes is introduced in

sexual assault and child molestation cases covered by Federal Rules of Evidence 413 and 414. *See* Instruction 2.08A, *supra*.

Because similar act evidence tends not only to prove the commission of the act but also has a tendency to show the defendant's bad or criminal character, undue prejudice must be avoided. This instruction, which in effect tells the jury to consider the evidence only on the issue of identity and not on the issue of character, should be given on request. *See United States v. Danzey*, 594 F.2d 905, 914-15 (2d Cir. 1979); *see also McMillian*, 535 F.2d at 1038-39.

Where similar act evidence may be admissible both on the issue of identity and for another proper purpose, Instructions 2.08 and 2.08A, *supra*, and this Instruction 2.09 may need to be adapted to meet the particular situation.

Instructions for Use During Trial

2.10. CROSS-EXAMINATION OF DEFENDANT'S CHARACTER WITNESS

You will recall that after witness (name) testified about the defendant's [reputation for] [character for] [reputation and character for] (insert character trait covered by testimony), the prosecutor asked the witness some questions about whether [he] [she] knew that (describe in brief terms the subject of the cross-examination on the character trait, *e.g.*, the defendant was convicted of fraud on an earlier occasion). Those questions were asked only to help you decide if the witness really knew about the defendant's [reputation for] [character for] [reputation and character for] (insert character trait covered by the testimony). The information developed by the prosecutor on that subject may not be used by you for any other purpose.

That the defendant [committed] [may have committed] (describe character trait, *e.g.*, committed fraud on an earlier occasion) is not evidence that [he] [she] committed the crime charged in this case.

Committee Comments

See Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

For a good treatment of this topic, *see Michelson v. United States*, 335 U.S. 469 (1948); *United States v. Monteleone*, 77 F.3d 1086, 1089-90 (8th Cir. 1996).

Although character testimony is usually limited to the reputation of the defendant, the Government may challenge a defendant's character witness by cross-examining the witness about the witness' knowledge of "relevant specific instances" of a defendant's conduct. *United States v. Monteleone*, 77 F.3d at 1089-90. This type of cross-examination is discouraged, however, because it is fraught with danger and could form the basis for a miscarriage of justice. *United States v. Knapp*, 815 F.2d 1183, 1186 (8th Cir. 1989). The Government may only use this type of cross-examination if two requirements are met: (1) a good faith factual basis for the incidents, which must be of a type likely to be a matter of general knowledge in the community; and (2) the incidents must be relevant to the character trait at issue. *United States v. Monteleone*, 77 F.3d at 1089-90. With respect to community reputation for a character trait, only reputation reasonably contemporaneous with the acts charged is relevant. *Mullins v. United States*, 487 F.2d 581, 590 (8th Cir. 1973). Cross-examination must be limited to the particular character trait placed in issue. *Michelson v. United States*, 335 U.S. at 475-76. *Cf. United States v. Smith*, 32 F.3d 1291, 1295 (8th Cir. 1994), in which the court held it was harmless error to permit cross-examination of the defendant's character witness on the defendant's prior marijuana conviction when the jury was instructed that the Government's questions and the witness' responses were only to be used to challenge the character witness' knowledge of the defendant's reputation.

Instructions for Use During Trial

2.11. DISMISSAL, DURING TRIAL, OF SOME CHARGES AGAINST SINGLE DEFENDANT

At the beginning of the trial I told you that the defendant was accused of (insert number) different crimes: (Briefly describe the offenses mentioned at the commencement of trial.)[1] Since the trial started, however, [one] [two, etc.] of these charges [has] [have] been disposed of, the one(s) having to do with (describe offenses disposed of).[2] [That charge is] [Those charges are] no longer before you, and the only crime[s] that the defendant is charged with now [is] [are] (describe remaining offenses). You should not guess about or concern yourselves with the reason for this disposition. You are not to consider this fact when deciding if the [Government] [prosecutor] has proved, beyond a reasonable doubt, the count[s] which remain, which are (list remaining count[s]).

[I am striking the evidence that (describe the stricken evidence). It is no longer before you and you may not consider it.][3]

Notes on Use

1. If one or more counts of the same offense have been disposed of and other counts of the same offense remain, the language of this instruction should be modified.

2. In some cases, circumstances may require a more specific treatment of the reasons for dismissal.

3. If the evidence remains admissible, the jury may be so instructed. *See United States v. Kelley*, 152 F.3d 886, 888 (8th Cir. 1998) (citing with approval 8th Cir. Model Crim. Jury Instruction 2.11).

Committee Comments

See Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

Such an instruction is appropriate only on rare occasions and should *not* be given unless requested by the defendant.

Instructions for Use During Trial

2.12. DISPOSITION, DURING TRIAL, OF ALL CHARGES AGAINST ONE OR MORE CODEFENDANT[S]

At the beginning of the trial I told you that (insert name[s]) [was] [were] [a] defendant[s] in this case. The charge[s] against defendant[s] (insert name[s]) [has] [have] been disposed of, and [he] [she] [they] [is] [are] no longer [a] [defendant[s] in this case. You should not guess about or concern yourselves with the reason for this disposition. You are not to consider this fact when deciding if the [Government] [prosecutor] has proved, beyond a reasonable doubt, [its] [his] [her] case against defendant[s] (name remaining defendant[s]).

[I am striking the evidence that (describe stricken evidence). It is no longer before you, and you may not be consider it.][1]

Notes on Use

1. If the evidence remains admissible, the jury may be so instructed. *See United States v. Kelley*, 152 F.3d 886, 888 (8th Cir. 1998).

Committee Comments

See Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

The Eighth Circuit has held that the trial court properly instructed a jury that the absence of the codefendants, who pled guilty after opening statements during trial, should have no bearing upon the case of the remaining defendant. Therefore, a mistrial was not warranted due to the pleas of the codefendants. *United States v. Daniele*, 886 F.2d 1046, 1055 (8th Cir. 1989).

If a guilty plea of a codefendant is brought into trial, either directly or indirectly, a trial court must ensure that it is not being offered as substantive evidence of a defendant's guilt. One factor in determining whether admission of such evidence is an abuse of a trial court's discretion is whether a limiting instruction is given. *United States v. Jones*, 145 F.3d 959, 963 (8th Cir. 1998). However, if the introduction of the evidence is invited by counsel or if defense counsel requests no limiting instruction, failure to give a limiting instruction may not constitute plain error. *Id.; United States v. Francisco*, 410 F.2d 1283, 1288-89 (8th Cir. 1969).

Instructions for Use During Trial

2.13. DISPOSITION, DURING TRIAL, OF ONE OR MORE BUT LESS THAN ALL CHARGES AGAINST THE CODEFENDANT[S]

At the beginning of the trial I told you that [both] [all] defendants were charged, among other things, with the crimes of (describe crimes).[1] The charges of (describe disposed of charges), as against the defendant[s], [has] [have] been disposed of, and [he] [she] [they] [is] [are] no longer [a] defendant[s] as to [that] [those] charge[s]. You should not guess about or concern yourselves with the reason for this disposition. You are not to consider this fact when deciding if the [Government] [prosecutor] has proved beyond a reasonable doubt that defendant[s] (name remaining defendant[s]) committed any of the crimes with which [he] [she] [they] [is] [are] charged, or when deciding if the [Government] [prosecutor] has proved beyond a reasonable doubt that defendant[s] (name remaining defendants) committed the remaining crime[s] with which [he] [she] [they] [is] [are] charged.

[I am striking the evidence that (describe stricken evidence). It is no longer before you, and you may not be consider it.][2]

[So far as this case is concerned, you will continue to be concerned with the following charges: (describe charges).][3]

Notes on Use

1. If one or more counts of the same offense has been disposed of and other counts of the same offense remain, the language of this instruction should be modified.

2. If the evidence remains admissible, the jury may be so instructed. *See United States v. Kelley*, 152 F.3d 886, 888 (8th Cir. 1998).

3. Optional for use when there are a number of charges, and the court feels it would be helpful to "re-cap" those remaining for the jury.

Committee Comments

See Introductory Comment, Section 2.00, *supra*, and Committee Comments, Instruction 2.12, *supra*.

Instructions for Use During Trial

2.14. EVIDENCE ADMITTED AGAINST ONLY ONE DEFENDANT

As you know, there are (insert number) defendants on trial here: (name each defendant). Each defendant is entitled to have [his] [her] case decided solely on the evidence which applies to [him] [her]. You may consider some of the evidence in this case only against defendant (name); you may not consider that evidence against the other defendant[s].

You may consider the [evidence] [testimony] [exhibit] you [are about to hear] [just heard about], (describe testimony or exhibit), only against defendant (name). You must not consider that evidence when you are deciding if the [Government] [prosecutor] has proved, beyond a reasonable doubt, [its] [his] [her] case against defendant[s] (name[s]).

Committee Comments

See Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

Limiting instructions informing the jury of proper use of the evidence are sufficient, unless the defendant shows that his defense is irreconcilable with the other defendants' defenses or the jury cannot compartmentalize the evidence. *United States v. Bordeaux*, 84 F.3d 1544, 1547 (8th Cir. 1996). A district court, in admitting Rule 404(b)-type evidence, need not issue a limiting instruction *sua sponte*. *United States v. Perkins*, 94 F.3d 429, 435-36 (8th Cir. 1996). In the absence of a specific defense request, no limiting instruction is required where the evidence is relevant to an issue in the case. *United States v. Conley*, 523 F.2d 650, 654 n.7 (8th Cir. 1975). Where evidence was admissible against one defendant but not admissible to three other defendants, a trial court did not err in failing to give a limiting instruction where none was requested by defense counsel and before retiring, the jury was instructed that "[e]ach defendant is entitled to have his case decided solely on the evidence which applies to him." *United States v. Ortiz*, 125 F.3d 630, 633 (8th Cir. 1997). *See also United States v. Bell*, 99 F.3d 870, 881 (8th Cir. 1996).

Instructions for Use During Trial

2.15. STATEMENT OF ONE DEFENDANT IN MULTI-DEFENDANT TRIAL

You may consider the statement of defendant (name) only in the case against [him] [her], and not against the other defendant[s]. You may not consider or discuss defendant (name)'s statement in any way when you are deciding if the [Government] [prosecutor] proved, beyond a reasonable doubt, [its] [his] [her] case against the other defendant[s].

Committee Comments

See Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

Bruton v. United States, 391 U.S. 123 (1968), held that nontestifying codefendant confessions used in a joint trial which implicate another defendant on their face are so "devastating" that their effect cannot be limited by jury instructions to consider that confession only against the codefendant. Unless directly admissible, *Bruton* holds such confessions to be barred by the Confrontation Clause. The *Bruton* rule has been extended to apply to a nontestifying codefendant's confession in cases in which the confession of the defendant has been admitted, even where the confessions are "interlocking," *Cruz v. New York*, 481 U.S. 186, 191-93 (1987). However, the fact that the confessions "interlock" may be considered in assessing whether the statements are supported by sufficient indicia of reliability to be directly admissible against the defendant. *Id.* at 193-94.

In some cases, a nontestifying codefendant's confession may be admitted with a proper limiting instruction where the confession is redacted to eliminate the defendant's name and any reference to his or her existence or where the statement provides only "evidentiary linkage" to the defendant on trial. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

This instruction should *not* be used in connection with coconspirator declarations admitted under Rule 801(d)(2)(E) of the Federal Rules of Evidence. *See, e.g., United States v. Roth*, 736 F.2d 1222, 1229 (8th Cir. 1984), or in any situation in which the codefendant's statement may be directly admissible against the defendant. *See Cruz v. New York*, 481 U.S. at 193-94 (citing *Lee v. Illinois*, 476 U.S. 530 (1986)). However, a limiting instruction is appropriate when an out-of-court statement of a coconspirator is admitted not for the truth of the matter stated, but rather to explain the actions of an agent. *Garrett v. United States*, 78 F.3d 1296, 1303 (8th Cir. 1995). ("We have previously noted that 'if a conspirator statement is both permissible background and highly prejudicial, otherwise inadmissible hearsay, fairness demands that the government find a way to get the background into evidence without hearsay.' The trial court 'should instruct the jury as to the limited purpose of any hearsay statements that cannot be avoided.' . . . Without such procedures, there is a strong risk that while the statement 'may be offered as background for the agents' actions, they will inevitably be used as direct evidence' of the defendant's guilt." (Citations omitted.)

Instructions for Use During Trial

2.16. DEFENDANT'S TESTIMONY - IMPEACHMENT BY PRIOR CONVICTION

You [are about to hear] [have heard] evidence that defendant (name) was previously convicted of [a] crime[s]. You may use that evidence only to help you decide whether to believe [his] [her] testimony and how much weight to give it. The fact that [he] [she] was previously convicted of a crime does not mean that [he] [she] committed the crime charged here, and you must not use that evidence as any proof of the crime charged in this case.

[That evidence may not be used in any way at all in connection with the other defendant[s].][1]

Notes on Use

1. For use in a multiple defendant case.

Committee Comments

See Introductory Comment, Section, 2.00, *supra*, concerning limiting instructions.

If past crimes of the defendant are to be used to establish intent, motive or other mental element, and not for the purpose of impeachment, Instruction 2.08 should be used rather than this Instruction. If the past crimes are to be used to show a common pattern, scheme or plan as between the prior acts and present offense, or to show the defendant's identity, Instruction 2.09, *supra*, should be used. For impeachment by prior conviction of a witness other than the defendant, *see* Instruction 2.18, *infra*.

Instructions for Use During Trial

2.17. DEFENDANT'S TESTIMONY - IMPEACHMENT BY OTHERWISE INADMISSIBLE STATEMENT (*Harris v. New York*)

There has been evidence that defendant (name) was questioned prior to this trial, and made certain statements. You may use that evidence only to help you decide whether [he] [she] made a statement before trial and whether what [he] [she] said here in court was true.

Committee Comments

See Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

A statement obtained in violation of *Miranda* may constitutionally be used for impeachment purposes if it was voluntary and trustworthy. *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971); *Clark v. Wood*, 823 F.2d 1241, 1246 (8th Cir. 1987). The trial judge should stress that the Government cannot use the prior statement to prove the defendant's guilt; it can only use it to impeach. The statement can only be used if the defendant takes the stand and testifies contrary to the prior statement. Where the statement is used for impeachment, the standard for admissibility is voluntariness. *Oregon v. Elstad*, 470 U.S. 298, 307-08 (1985). If the defendant raises a voluntariness issue with respect to the prior statement, it will also be necessary, upon the defendant's request, to instruct the jury appropriately on that issue (*see* Committee Comments, Instruction 2.07, *supra*). However, absent a request and a clear invocation of 18 U.S.C. § 3501(a) at trial, such an instruction is not required. *United States v. Diop*, 546 F.2d 484, 485-86 (2d Cir. 1976). Presumably in those circumstances, it would also be necessary, pursuant to 18 U.S.C. § 3501, for the trial judge to conduct a hearing out of the presence of the jury, and make a finding on the issue, before allowing the prior statement to be used even for impeachment purposes.

Use of a defendant’s voluntary statement to an agent may be used for impeachment purposes if a proper limiting instruction is given. *United States v. Tucker*, 137 F.3d 1016, 1035 (8th Cir. 1998).

Instructions for Use During Trial

2.18. IMPEACHMENT OF WITNESS - PRIOR CONVICTION

You have heard that the witness (name) was once convicted of [a] crime[s]. You may use that evidence only to help you decide whether to believe the witness and how much weight to give [his] [her] testimony.

Committee Comments

See Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

Where the witness is the defendant, Instruction 2.16, *supra*, should be used.

Instructions for Use During Trial

2.19. WITNESS WHO HAS PLEADED GUILTY

You have heard that the witness (name) [pled] [pleaded] guilty to a crime which arose out of the same events for which the defendant is on trial here. You must not consider that guilty plea as any evidence of this defendant's guilt. You may consider that witness' guilty plea only for the purpose of determining how much, if at all, to rely upon [his] [her] testimony.[1]

Notes on Use

1. Such evidence may also be used to show the witness' acknowledgment of participation in the offense. *United States v. Roth*, 736 F.2d 1222, 1226 (8th Cir. 1984). If admitted for that purpose, the instruction should be so modified .

Committee Comments

See Introductory Comment, Section 2.00, *supra*, and Committee Comments, Instruction 2.12, *supra*, concerning a codefendant's guilty plea.

Evidence that a codefendant has pleaded guilty may not be used as substantive proof of a defendant's guilt. However, such evidence is admissible to impeach, to show the witness' acknowledgment of participation in the offense, or to reflect on his credibility. In such circumstances, the jury should be instructed that the evidence is received for one or more of these purposes alone, and that the jurors are not to infer the guilt of the defendant. *United States v. Lundstrom*, 898 F.2d 635, 640 n.10 (8th Cir. 1990) (noting with approval 8th Cir. Model Crim. Jury Instruction 2.19); *United States v. Roth*, 736 F.2d 1222, 1226 (8th Cir. 1984). *See also Gerberding v. United States*, 471 F.2d 55, 60 (8th Cir. 1973); *United States v. Wiesle*, 542 F.2d 61, 62-63 (8th Cir. 1976); *Wallace v. Lockhart*, 701 F.2d 719, 725-26 (8th Cir. 1983).

However, the admission of such evidence without a limiting instruction is not reversible error if defense counsel did not request an instruction and if the evidence was introduced and used for a proper purpose. *Gerberding v. United States*, 471 F.2d at 60; *United States v. Wiesle*, 542 F.2d at 63; *United States v. Roth*, 736 F.2d at 1226-27. In *Roth* it was held that a proper purpose of disclosing the plea agreement and cooperation is to diffuse any attempt to show bias on cross-examination.

For a discussion of impeachment of a witness by a prior inconsistent statement which also incriminates the defendant and appropriate limiting instructions, *see United States v. Rogers*, 549 F.2d 490, 494-98 (8th Cir. 1976).

Instructions for Use During Trial

2.20. DEFENDANT'S PREVIOUS TRIAL

You have heard that there was a previous trial of the defendant[s] for the crime[s] charged here. Keep in mind, however, that you must decide this case solely on the evidence presented to you in this trial. The fact that there was a previous trial must not affect on your consideration of this case.

Committee Comments

See United States v. Hykel, 461 F.2d 721, 726 (3d Cir. 1972); *Carsey v. United States*, 392 F.2d 810, 812 (D.C. Cir. 1967). *See also* Introductory Comment, Section 2.00, *supra*, concerning curative instructions.

This instruction should not be given unless the jury has been informed of the previous trial and the instruction has been specifically requested by the defense.

Instructions for Use During Trial

2.21. DEFENDANT'S PHOTOGRAPHS - "MUG SHOTS"

The witness (name) testified that [he] [she] viewed a photograph of defendant (name) which was shown to [him] [her] by the police. The police collect pictures of many people from many different sources and for many different purposes. The fact that the police had the defendant's picture does not mean that [he] [she] committed this or any other crime, and it must not affect on your consideration of this case.

Committee Comments

See generally United States v. Runge, 593 F.2d 66, 69 (8th Cir. 1979). *See also* Introductory Comment, Section 2.00, *supra*, concerning curative instructions.

This instruction should not be given unless specifically requested by the defense.

Instructions for Use During Trial

2.22. DISCHARGE OF DEFENSE COUNSEL DURING TRIAL

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

Committee Comments

See Introductory Comment, Section 2.00, *supra*, concerning curative instructions.

3.00. FINAL INSTRUCTIONS FOR USE IN EVERY TRIAL (BOILERPLATE)

Introductory Comment

The instructions included in this section are "boilerplate" instructions which would generally be part of the final charge in any trial regardless of the particular offense or issues.

Final Instructions for Use in Every Trial (Boilerplate)

3.01. INTRODUCTION

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

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. [This is true even though some of those I gave you [at the beginning of] [during] trial are not repeated here.]

[1][The instructions I am about to give you now [as well as those I gave you earlier] are in writing and will be available to you in the jury room.] [I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, *all* instructions, whenever given and whether in writing or not, must be followed.]

Notes on Use

1. Optional for use when the final instructions are to be sent to the jury room with the jury. The Committee recommends that practice.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 12.01 (5th ed. 2000).

Final Instructions for Use in Every Trial (Boilerplate)

3.02. DUTY OF JURY

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 12.01 (5th ed. 2000).

Final Instructions for Use in Every Trial (Boilerplate)

3.03. EVIDENCE; LIMITATIONS

I have mentioned the word "evidence." The "evidence" in this case consists of the testimony of witnesses [the documents and other things received as exhibits] [the facts that have been stipulated -- this is, formally agreed to by the parties,] [the facts that have been judicially noticed -- this is, facts which I say you may, but are not required to, accept as true, even without evidence].[1]

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.[2]

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

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

2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.

3. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.

4. Anything you saw or heard about this case outside the courtroom is not evidence.[3]

Finally, if you were instructed that some evidence was received for a limited purpose only, you must follow that instruction.[4]

Notes on Use

1. The bracketed material should be given only if there has been documentary or exhibit evidence, stipulated evidence or judicially noticed evidence. Rule 201(g) of the Federal Rules of Evidence requires that the court instruct the jury that "it may, but is not required to, accept as conclusive any fact judicially noticed." *See* Instruction 2.04, *supra*.

2. *See* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 12.05 (5th ed. 2000).

In certain situations it may be appropriate to instruct the jury with respect to a specific inference it may make. *See* Instructions 4.13 and 4.15, *infra*, for instructions and comments on specific inferences.

3. This paragraph should not be given, of course, if there has been an inspection or testimony taken outside the courtroom.

4. *See* Instructions 2.08-.20, *supra*.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 12.03, 12.08 (5th ed. 2000).

See also Instructions 1.03, 2.02, 2.03, 2.04, *supra*.

Final Instructions for Use in Every Trial (Boilerplate)

3.04. CREDIBILITY OF WITNESSES

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

In deciding what testimony to believe, consider the witness' intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness' memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time,[1] the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

[In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.]

[You should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness.][2]

Notes on Use

1. With respect to the use of prior inconsistent statements (second paragraph of this instruction), Rule 105 of the Federal Rules of Evidence gives a party the right to require a limiting instruction explaining that the use of this evidence is limited to credibility. Note, however, that such a limiting instruction should not be given if the prior inconsistent statement was given under oath in a prior trial, hearing or deposition, because such prior sworn testimony of a witness is not hearsay and may be used to prove the truth of the matters asserted. Fed. R. Evid. 801(d)(1)(A).

2. To be given only if the defendant has testified. *See Taylor v. United States*, 390 F.2d 278, 282 (8th Cir. 1968).

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 15.01, 15.02 (5th ed. 2000).

See also Instruction 1.05, *supra*.

The form of a credibility instruction is within the discretion of the trial court. *Clark v. United States*, 391 F.2d 57, 60 (8th Cir. 1968); *United States v. Merrival*, 600 F.2d 717, 719 (8th Cir. 1979). In *Clark*, the court held that the following instruction given by the trial court correctly set out the factors to be considered by the jury in determining the credibility of the witnesses:

> You are instructed that you are the sole judges of the credibility of the witnesses and of the weight and value to be given to their testimony. In determining such credibility and weight you will take into consideration the character of the witness, his or her demeanor on the stand, his or her interest, if any, in the result of the trial, his or her relation to or feeling toward the parties to the trial, the probability or improbability of his or her statements as well as all the other facts and circumstances given in evidence.

391 F.2d at 60. In *Merrival*, the court held that the following general credibility instruction provided protection for the accused:

> You, as jurors, are the sole judges of the truthfulness of the witnesses and the weight their testimony deserves.
>
> You should carefully study all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' ability to observe the matters as to which he or she has testified and whether each witness is either supported or contradicted by other evidence in the case.

600 F.2d at 720 n.2.

The general credibility instruction given in *United States v. Phillips*, 522 F.2d 388, 391 (8th Cir. 1975), covers other details:

> The jurors are the sole judges of the weight and credibility of the testimony and of the value to be given to each and any witness who has testified in the case. In reaching a conclusion as to what weight and value you ought to give to the testimony of any witness who has testified in the case, you are warranted in taking into consideration the interest of the witness in the result of the trial; take into consideration his or her relation to any party in interest; his or her demeanor upon the witness stand; his or her manner of testifying; his or her tendency to speak truthfully or falsely, as you may believe, the probability or improbability of the testimony given; his or her situation to see and observe; and his or her apparent capacity and willingness to truthfully and accurately tell you what he or she saw and observed; and if you believe any witness testified falsely as to any material issue in this case, then you must reject that which you believe to be false, and you may reject the whole or any part of the testimony of such witness. (Emphasis omitted.)

The instruction in the text is basically a paraphrase of former 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 17.01 (now 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 15.01 (5th ed.

2000)), as approved in *United States v. Hastings*, 577 F.2d at 42. However any factors set out in the *Phillips*, *Clark*, or *Merrival* instructions, may be inserted when relevant to the case.

A general instruction on the credibility of witnesses is in most cases sufficient. Whether a more specific credibility instruction is required with respect to any particular witness or class of witnesses is generally within the discretion of the trial court. Some of the most common situations are covered in Instructions 4.04 (Testimony under Grant of Immunity or Plea Bargain), 4.05A (Testimony of Accomplice), 4.06 (Testimony of Informer), and 4.08 (Eye Witness Testimony), *infra*.

As to the credibility of a "perjurer," *see United States v. Koonce*, 485 F.2d 374, 378 n.8 (8th Cir. 1973); *United States v. Spector*, 793 F.2d 932, 939 (8th Cir. 1986); *United States v. Reda*, 765 F.2d 715, 718-19 (8th Cir. 1985); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 15.10 (5th ed. 2000) Both *Koonce* and *Reda* supported the trial court's rejection of a "*falsus in uno, falsus in omnibus*" instruction.

Some instructions specifically address the credibility of a defendant in terms of his interest in the case. *See, e.g.*, 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 15.12 (5th ed. 2000). This circuit has repeatedly criticized the use of such an instruction because it has the effect of singling out the defendant in the jury charge. *United States v. Bear Killer*, 534 F.2d 1253, 1260 (8th Cir. 1976). *See also Taylor v. United States*, 390 F.2d 278, 282 (8th Cir. 1968); *United States v. Brown*, 453 F.2d 101, 107 (8th Cir. 1971); *United States v. Standing Soldier*, 538 F.2d 196, 204 (8th Cir. 1976).

The credibility of a child witness is covered in 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 15.13 (5th ed. 2000). Seventh Circuit Federal Jury Instructions: Criminal § 3.23 (1999) and Ninth Cir. Crim. Jury Instr. 4.14 (1997) recommend that no "child witness" instruction be given. This Committee joins in those comments.

The testimony of police officers is addressed in *Golliher v. United States*, 362 F.2d 594, 604 (8th Cir. 1966).

Instructions on the credibility of rape victims are usually rejected. *United States v. Merrival*, 600 F.2d 717, 719 (8th Cir. 1979); *United States v. Vik*, 655 F.2d 878 (8th Cir. 1981); *United States v. Bear Ribs*, 722 F.2d 420 (8th Cir. 1983).

Factors to be taken into account in determining whether a special instruction is warranted with respect to a drug user are discussed in *United States v. Johnson*, 848 F.2d 904, 905-06 (8th Cir. 1988). Addict-Informers are covered in Committee Comments Instruction 4.06, *infra*.

Impeachment evidence is also related to credibility. Instructions 2.16-.19, *supra*, cover this concept in the form of limiting instructions. Impeachment by prior inconsistent statement is covered in this instruction. *See United States v. Rogers*, 549 F.2d 490 (8th Cir. 1976). *See also* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 15.07, 15.09 (5th ed. 2000).

Whether a party is entitled to a more specific instruction on witness bias is also generally left to the discretion of the trial court. *See* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 15.01 (5th ed. 2000); *United States v. Ashford*, 530 F.2d 792, 799 (8th Cir. 1976).

Final Instructions for Use in Every Trial (Boilerplate)

3.05. DESCRIPTION OF CHARGE; INDICTMENT NOT EVIDENCE; PRESUMPTION OF INNOCENCE; BURDEN OF PROOF (Single Defendant, Single Count)

The Indictment in this case charges the defendant with (insert offense).[1] The defendant has pleaded not guilty to that charge.

The Indictment is simply the document that formally charges the defendant with the crime for which [he] [she] is on trial. The Indictment is not evidence. You must presume the defendant to be innocent at this stage in the proceedings. Thus, the trial of the defendant begins with a clean slate with no evidence against [him] [her].

The presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the Government proves, beyond a reasonable doubt, each element of the crime charged.

There is no burden upon a defendant to prove that [he] [she] is innocent. [Instead, the burden of proof remains on the Government throughout the trial.][2] [Accordingly, the fact that the defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdict.][3]

Notes on Use

1. The description of the offense should be the same as that utilized with Instruction 1.01.

2. In those cases involving certain affirmative defenses that shift the burden of proof to the defense, such as coercion (Instruction 9.02), insanity (Instruction 9.03), and withdrawal from conspiracy (Instruction 5.06H), this sentence should be revised or eliminated.

3. This sentence should be given only if the defendant so requests on the record.

Committee Comments

An instruction on the "presumption of innocence" is one means of protecting the accused's constitutional right to be judged solely on the basis of the proof adduced at trial. *Taylor v. Kentucky*, 436 U.S. 478, 486 (1978). Failure to give such an instruction may be evaluated as a due process violation. *Kentucky v. Whorton*, 441 U.S. 786, 790 (per curiam) (1979).

The Committee has recently updated, and slightly expanded upon, its previous jury instructions regarding the presumption of innocence and the burden of proof in criminal cases. In *United States v. Lewis*, 593 F.3d 765, 771 (8th Cir. 2010), the Court upheld a district court's

jury instruction regarding the presumption of innocence which included the “clean slate” concept, although previously such language was not included in the model instructions and is not constitutionally mandated.

Final Instructions for Use in Every Trial (Boilerplate)

3.06. DESCRIPTION OF CHARGES; INDICTMENT NOT EVIDENCE; PRESUMPTION OF INNOCENCE; BURDEN OF PROOF (Single Defendant, Multiple Counts)

The Indictment in this case charges the defendant with (insert number) different crimes. Count[s] ___, charge[s] that the defendant committed the crime of (describe offense).[1] The defendant has pleaded not guilty to each of those charges.

The Indictment is simply the document that formally charges the defendant with the crime for which [he] [she] is on trial. The Indictment is not evidence. The defendant began the trial with a clean slate, with no evidence against [him] [her].

You must presume the defendant to be innocent at the beginning of the trial. The presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the Government proved, beyond a reasonable doubt, each element of a crime charged.

Keep in mind that each count charges a separate crime. You must consider each count separately, and return a separate verdict for each count.

[There is no burden upon a defendant to prove that he or she is innocent. Instead, the burden of proof remains on the Government throughout the trial.][2] [The fact that the defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdicts.][3]

Notes on Use

1. The description of the offense should be the same as that utilized with Instruction 1.01.

2. In those cases involving certain affirmative defenses that shift the burden of proof to the defense, such as coercion (Instruction 9.02), insanity (Instruction 9.03), and withdrawal from conspiracy (Instruction 5.06H), this sentence should be revised or eliminated. *See United States v. Norton*, 846 F.2d 521, 525 (8th Cir. 1988).

3. This sentence should be given only if the defendant so requests on the record.

Committee Comments

An instruction on the "presumption of innocence" is one means of protecting the accused's constitutional right to be judged solely on the basis of the proof adduced at trial. *Taylor v. Kentucky*, 436 U.S. 478, 486 (1978). Failure to give such an instruction may be

evaluated as a due process violation. *Kentucky v. Whorton*, 441 U.S. 786, 790 (1979) (per curiam).

The Committee has recently updated, and slightly expanded upon, its previous jury instructions regarding the presumption of innocence and the burden of proof in criminal cases. In *United States v. Lewis*, 593 F.3d 765, 772 (8th Cir. 2010), the court upheld a district court's jury instruction regarding the presumption of innocence which included the "clean slate" concept, although previously such language was not included in the model instructions and is not constitutionally mandated.

Final Instructions for Use in Every Trial (Boilerplate)

3.07. DESCRIPTION OF CHARGES; INDICTMENT NOT EVIDENCE; PRESUMPTION OF INNOCENCE; BURDEN OF PROOF (Multiple Defendants, Single Count)

The Indictment in this case charges the defendants with (insert offense).[1] The defendants have pleaded not guilty to that charge.

The Indictment is simply the document that formally charges the defendants with the crime for which they are on trial. The Indictment is not evidence. The defendants began the trial with a clean slate, with no evidence against them.

You must presume each defendant to be innocent at the beginning of the trial. The presumption of innocence alone is sufficient to find a defendant not guilty and can be overcome only if the Government proved, beyond a reasonable doubt, each element of the crime charged.

Keep in mind that you must give separate consideration to the evidence about each individual defendant. Each defendant is entitled to be treated separately, and you must return a separate verdict for each defendant.

[There is no burden upon a defendant to prove that he or she is innocent.] Instead, the burden of proof remains on the Government throughout the trial.][2] [The fact that a defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdicts.][3]

Notes on Use

1. The description of the offense should be the same as that utilized with Instruction 1.01.

2. In those cases involving certain affirmative defenses that shift the burden of proof to the defense, such as coercion (Instruction 9.02), insanity (Instruction 9.03), and withdrawal from conspiracy (Instruction 5.06H), this sentence should be revised or eliminated. *See United States v. Norton*, 846 F.2d 521, 525 (8th Cir. 1988).

3. This sentence should be given only if the defendant so requests on the record.

Committee Comments

An instruction on the "presumption of innocence" is one means of protecting the accused's constitutional right to be judged solely on the basis of the proof adduced at trial. *Taylor v. Kentucky*, 436 U.S. 478, 486 (1978). Failure to give such an instruction may be

evaluated as a due process violation. *Kentucky v. Whorton*, 441 U.S. 786, 790 (1979) (per curiam).

The Committee has recently updated, and slightly expanded upon, its previous jury instructions regarding the presumption of innocence and the burden of proof in criminal cases. In *United States v. Lewis*, 593 F.3d 765, 772 (8th Cir. 2010), the court upheld a district court's jury instruction regarding the presumption of innocence which included the "clean slate" concept, although previously such language was not included in the model instructions and is not constitutionally mandated.

Final Instructions for Use in Every Trial (Boilerplate)

3.08. DESCRIPTION OF CHARGES; INDICTMENT NOT EVIDENCE; PRESUMPTION OF INNOCENCE; BURDEN OF PROOF (Multiple Defendants, Multiple Counts)

The Indictment in this case charges the defendants with (insert number) different crimes.

Count[s] ___, charge[s] that defendant[s] (insert name[s]) committed the crime of (describe offense).[1]

Count[s] __ charge[s] that defendant[s] (insert name[s]) committed the crime of (describe offense). (Continue as necessary.)

Each defendant has pleaded not guilty to each of those charges.

The Indictment is simply the document that formally charges the defendants with the crimes for which they are on trial. The Indictment is not evidence. You must presume each defendant to be innocent at this stage in the proceedings. Thus, the trial of the defendants begins with a clean slate, with no evidence against them.

The presumption of innocence alone is sufficient to find each defendant not guilty of each count. This presumption can be overcome as to each charge only if the Government proves, beyond a reasonable doubt, each element of that charge.

Keep in mind that you must give separate consideration to the evidence about each individual defendant. Each defendant is entitled to be treated separately, and you must return a separate verdict for each defendant. Also keep in mind that you must consider, separately, each crime charged against each individual defendant, and you must return a separate verdict for each of those crimes charged.

[There is no burden upon a defendant to prove that he or she is innocent. Instead, the burden of proof remains on the Government throughout the trial.[2]] [The fact that a defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdict.][3]

Notes on Use

1. The description of the offense should be the same as that utilized with Instruction 1.01.

Final Instructions for Use in Every Trial (Boilerplate)

2. In those cases involving certain affirmative defenses that shift the burden of proof to the defense, such as coercion (Instruction 9.02), insanity (Instruction 9.03), and withdrawal from conspiracy (Instruction 5.06H), this sentence should be revised or eliminated. *See United States v. Norton*, 846 F.2d 521, 525 (8th Cir. 1988).

3. This sentence should be given only if the defendant so requests on the record.

Committee Comments

An instruction on the "presumption of innocence" is one means of protecting the accused's constitutional right to be judged solely on the basis of the proof adduced at trial. *Taylor v. Kentucky*, 436 U.S. 478, 486 (1978). Failure to give such an instruction may be evaluated as a due process violation. *Kentucky v. Whorton*, 441 U.S. 786, 790 (1979) (per curiam).

The Committee has recently updated, and slightly expanded upon, its previous jury instructions regarding the presumption of innocence and the burden of proof in criminal cases. In *United States v. Lewis*, 593 F.3d 765, 772 (8th Cir. 2010), the court upheld a district court's jury instruction regarding the presumption of innocence which included the "clean slate" concept, although previously such language was not included in the model instructions and is not constitutionally mandated.

Final Instructions for Use in Every Trial (Boilerplate)

3.09. ELEMENTS OF OFFENSE - BURDEN OF PROOF

The crime of _____[1], as charged in [Count ___ of] the Indictment, has ____ elements, which are:

One, _____;

Two, _____; and

Etc., _____.

If all of [these] [the][2] elements have been proved beyond a reasonable doubt as to [the defendant] [defendant (name)] [and if it has further been proved beyond a reasonable doubt that [the defendant) [defendant (name)] was not [entrapped] [acting in self defense], [acting in defense of _____] [as defined in Instruction No. ____]];[3] then you must find [the defendant] [defendant (name)] guilty of the crime charged [under Count _____]; otherwise you must find [the defendant] [defendant (name)] not guilty of this crime [under Count ____].[4]

Notes on Use

1. The description of the offense should be the same as that utilized with Instructions 1.01 and 3.05, 3.06, 3.07 or 3.08. There may be occasions, however, when the trial judge prefers not to repeat the description of the charge. In that event, the opening clause of this instruction should be modified to read as follows:

The crime charged in [Count ___ of] the Indictment has ____ elements, which are:

2. Use "the" when the instruction does not immediately follow the enumeration of the elements, such as in a multiple-offense case.

3. If the evidence in the case is sufficient to support submission of one of the so-called "affirmative defenses" other than insanity, coercion or withdrawal from conspiracy, this or similar language should be used in this instruction, *United States v. Norton*, 846 F.2d 521, 524-25 (8th Cir. 1988), and the appropriate affirmative defense instruction from Section 9 should be given separately. Other defenses which the government has the burden of disproving can be handled in a similar fashion as those set out in Section 9.

The *Norton* case addressed the 1986 edition of these instructions in which the affirmative defense was placed in the elements section of this instruction. The Committee believes it is consistent with *Norton* to place the affirmative defense in the verdict-directing paragraph of this instruction as has been done here because an affirmative defense is not technically a negative element. However, *Norton* does allow the affirmative defense to be placed in the instruction as a negative element.

If the defense of insanity is in issue, the last paragraph of this Instruction 3.09 should be changed to read as follows:

> If all of these elements have been proved beyond a reasonable doubt, you must find the defendant *guilty, unless* you also find that the defendant was insane at the time of the crime, [as defined in Instruction No. ___] in which case [he] [she] must be found *not guilty by reason of insanity*. The defendant has the burden of proving, by clear and convincing evidence, that [he] [she] was insane at the time of the crime. The Government does not have the burden of proving that the defendant was sane.

Instruction 9.03, defining insanity, should immediately follow.

If the defense of coercion is in issue, the last paragraph of this Instruction 3.09 should be changed to read as follows:

> If all of these elements have been proved beyond a reasonable doubt, you must find the defendant *guilty, unless* you also find that the defendant was coerced at the time of the crime, [as defined in Instruction No. ___] in which case [he] [she] must be found *not guilty by reason of coercion*. The defendant has the burden of proving it is more likely true than not true that [he] [she] was coerced at the time of the crime. You decide that by considering all the evidence and deciding what evidence is more believable. This is a lower standard than proof beyond a reasonable doubt. The Government does not have the burden of proving that the defendant was not coerced.

Instruction 9.02, defining coercion, should immediately follow.

4. In many of the elements instructions set out in Section 6 of this Manual, it is recommended that certain evidentiary matter be inserted to make the instruction more specific to the case. For example, instead of the word "property," it is suggested that the property be specifically described. This procedure works best in cases in which not more than one violation of any statute is charged. However, in multi-count cases charging more than one violation of the same statute, a separate elements instruction for each count would be required to accomplish such specificity. Where the court wishes to avoid giving a series of almost identical elements instructions pertaining to the same statutory violation, various alternatives can be used.

One suggestion would be to generalize the elements instruction, i.e., use "property" instead of a specific description of the property, and make the one instruction applicable to all counts charging violations of the same statute. *See* Appendix A. In cases in which there are more factual variables between counts, the element which changes may be restated for each count and the elements which do not change given only once. *See* Appendix B.

In districts or courts in which the practice requires a separate elements instruction for each count, if the written instructions are to be sent to the jury room, and if the written elements instruction (this Instruction 3.09) for each count is written out in full, the Committee believes it is safe if the trial judge, in reading the instructions to the jury, reads only the first such instruction in full and thereafter, as to the same kind of offense in subsequent counts, explains

that the elements are the same as those previously read, except with respect to the element which is different, then reading in full only that element.

In multi-count or multi-defendant cases, the jury should be instructed to consider each count or each defendant separately.

Committee Comments

The Committee has prepared an elements instruction for many of the most commonly encountered offenses. For other offenses not covered by this effort, the Committee suggests a review of the statute and controlling case law to determine the elements of an offense, followed by a careful effort to state those elements in language which is as simple and direct as possible.

This Instruction 3.09 is designed for use in any case, regardless of the number of defendants or counts in the indictment. The bracketed phrases set forth the language alternatives necessary where the case involves multiple defendants, or multiple counts, or both. Without any of the bracketed phrases, the instruction serves for a single-defendant, single-count case. The same is true of the elements instructions in Section 6. If the indictment involves two or more different statutory violations, a separate elements instruction will be necessary for each violation. If two or more counts charge violations of the same statute, the elements instruction can be handled in various ways. *See* Note 4, *supra*.

Final Instructions for Use in Every Trial (Boilerplate)

Appendix A

The crime of interstate transportation of stolen securities, as charged in Counts II-IX of the Indictment, has four elements, which are:

One, the security, which in each of Counts II-IX is alleged to be a separate John Doe Company bond, was stolen;

Two, the security then had a value of $5,000.00 or more;

Three, after the security was stolen, the defendant caused it to be moved across a state line; and

Four, at the time he caused the security to be moved across a state line, the defendant knew that it had been stolen.

If all of [these] [the] elements have been proved beyond a reasonable doubt as to [the defendant] [defendant (name)] [and if it has further been proved beyond a reasonable doubt that [the defendant] [defendant (name)] was not [entrapped] [acting in self defense], [acting in defense of _____] [as defined in Instruction No. ____]]; then you must find [the defendant] [defendant (name)] guilty of the crime charged [under Count _____]; otherwise you must find [the defendant] [defendant (name)] not guilty of this crime [under Count ____].

(Insert an instruction advising the jury to consider each count separately. *See* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 12.12 (5th ed. 2000).)

Final Instructions for Use in Every Trial (Boilerplate)

Appendix B

The crime of distribution of cocaine, as charged in Counts II, III, and IV of the Indictment, has three elements, which are:

One, that as to Count II, on or about March 2, 1983, in the District of Nebraska, R. Roe knowingly or intentionally did unlawfully distribute cocaine;

that as to Count III, on or about March 22, 1983, in the District of Nebraska, R. Roe knowingly or intentionally did unlawfully distribute cocaine;

that as to Count IV, on or about April 11, 1983, in the District of Nebraska, R. Roe knowingly or intentionally did unlawfully distribute cocaine;

Two, that such distribution was being carried out in furtherance of the conspiracy alleged in Count I; and

Three, that such distribution was at a time when the defendant was a member of the conspiracy alleged in Count I.

If all of [these] [the] elements have been proved beyond a reasonable doubt as to [the defendant] [defendant (name)] [and if it has further been proved beyond a reasonable doubt that [the defendant] [defendant (name)] was not [entrapped] [acting in self defense], [acting in defense of _____] [as defined in Instruction No. ____]]; then you must find [the defendant] [defendant (name)] guilty of the crime charged [under Count _____]; otherwise you must find [the defendant] [defendant (name)] not guilty of this crime [under Count ____].

(Insert an instruction advising the jury to consider each count and each defendant separately. *See* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 12.13 (5th ed. 2000).)

Final Instructions for Use in Every Trial (Boilerplate)

3.10. LESSER-INCLUDED OFFENSE

If your verdict under Instruction No. ___ [as to any particular defendant charged] [under Count ___] is not guilty, or if, after all reasonable efforts, you are unable to reach a verdict [as to that defendant] on Instruction No. ___, you should record that decision on the verdict form[s] and go on to consider whether [that] defendant is guilty of the crime of (describe lesser-included offense) under this instruction. The crime of (describe lesser-included offense), [a lesser-included offense of the crime charged in [Count ___ of] the Indictment,][1] has _____ elements, which are:

One, _____;

Two, _____; and

Etc., _____.

For you to find [a] defendant guilty of this crime [, a lesser-included offense,] [under Count ___], the Government must prove all of these elements beyond a reasonable doubt [as to that defendant]; otherwise you must find [the] [that particular] defendant not guilty of this crime [,a lesser-included offense,] [under Count ___].[2]

Notes on Use

1. The bracketed language describing the offense as a lesser-included offense is optional.

2. If a lesser-included offense is submitted to the jury using this instruction, which allows a guilty verdict on the lesser-included offense, and if the jury finds the defendant not guilty of the greater offense or is unable to reach a verdict on the greater offense, the verdict form should be modified to reflect that option.

Committee Comments

See generally Fed. R. Crim. P. 31(c).

In *United States v. Hanson*, 618 F.2d 1261, 1265 (8th Cir. 1980), the Eighth Circuit adopted the Second Circuit's holding in *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978), that

> [n]either an instruction which requires a unanimous verdict of not guilty of greater offense before allowing the jury to move to the lesser, nor an instruction that it is sufficient to move to the lesser if the jury cannot reach agreement on a conviction for the greater offense, is wrong as a matter of law, and the court may give the one that it prefers

> if the defendant expresses no choice; if he does, court should give the form of instruction which defendant seasonably elects.

See also United States v. Bordeaux, 121 F.3d 1187, 1190 n.5 (8th Cir. 1997); *United States v. Roy*, 843 F.2d 305, 309 (8th Cir.1988).

The Committee recommends the use of an instruction such as this one, which presents both alternatives.

The Eighth Circuit holds that a lesser-included offense instruction should be given if either the defense or the government requests it and where various factors are present, including where: (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) there is some evidence which would justify conviction of the lesser offense; (4) proof on element or elements differentiating the two crimes is sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater offense and guilty of the lesser included offense; and (5) there is mutuality, i.e., the charge may be demanded by either the prosecution or defense. *See, e.g., United States v. Pumpkin Seed*, 572 F.3d 552, 562 (8th Cir. 2009). This five-part test for determining whether a lesser-included offense instruction should be given has been enunciated frequently. *See, e.g., United States v. Gentry*, 555 F.3d 659, 667 (8th Cir. 2009); *United States v. Herron*, 539 F.3d 881, 885-86 (8th Cir. 2008); *United States v. Neiss*, 684 F.2d 570, 571 (8th Cir. 1982). In *United States v. Roy*, 843 F.2d at 310, the court set out a four-part test which does not include the "mutuality" factor of the five-part test, that is, the factor stating that the lesser-included instruction may be demanded by either the prosecution or the defense.

The Supreme Court has settled a conflict among the circuits and adopted an "elements" test to determine when one offense is necessarily included in another.

> 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).

Schmuck v. United States, 489 U.S. 705, 715 (1989); *see United States v. Santisteban*, 501 F.3d 873, 881 (8th Cir. 2007).

In a simple case with only one defendant, the lesser-included offense instruction could start with the phrase, "[i]f you do not find the defendant guilty of ___ under Instruction No. ___, then you must consider whether he is guilty of ____ under this instruction." The instruction should then continue with an elements instruction and burden of proof instruction for the lesser-included offense.

Final Instructions for Use in Every Trial (Boilerplate)

3.11. REASONABLE DOUBT

Reasonable doubt is doubt based upon reason and common sense, and not doubt based on speculation. A reasonable doubt may arise from careful and impartial consideration of all the evidence, or from a lack of evidence. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person, after careful consideration, would not hesitate to rely and act upon that proof in life's most important decisions. Proof beyond a reasonable doubt i s proof that leaves you firmly convinced of the defendant's guilt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

Committee Comments

It is the court's duty to instruct on the meaning of reasonable doubt. *Friedman v. United States*, 381 F.2d 155 (8th Cir. 1967). A constitutionally inadequate reasonable doubt instruction is *not harmless error*. *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

The Committee has recently updated, and slightly expanded upon, its previous jury instructions regarding the presumption of innocence and the definition of reasonable doubt in criminal cases. Included in the revision is the addition of the phrase "in life's most important decisions," a phrase similar to that used in the model instructions of other circuits. *See, e.g.*, Fifth Circuit Model Jury Instruction, § 1.05; Sixth Circuit Model Jury Instructions, § 1.03; Eleventh Circuit Model Jury Instruction § 3 (Reasonable Doubt).

This instruction does not use the phrases, "moral evidence" or "moral certainty," which raised some serious questions in *Sandoval v. California*, 511 U.S. 1101 (1994), or other troubling language, such as requiring a "grave uncertainty," which was found objectionable in *Cage v. Louisiana*, 498 U.S. 39, 40 (1990). The Supreme Court reiterated in *Sandoval* that the Constitution does not mandate any particular form of words.

Final Instructions for Use in Every Trial (Boilerplate)

3.12. ELECTION OF FOREPERSON; DUTY TO DELIBERATE; PUNISHMENT NOT A FACTOR; COMMUNICATIONS WITH COURT; CAUTIONARY; VERDICT FORM

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I will list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict - whether guilty or not guilty - must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.

Third, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the Government has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.

Fifth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict whether guilty or not guilty must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be - that is entirely for you to decide.[1]

Finally, the verdict form is simply the written notice of the decision that you reach in this case. [The form reads: (read form)]. You will take this form to the jury room, and when each of

you has agreed on the verdict[s], your foreperson will fill in the form, sign and date it, and advise the marshal or bailiff that you are ready to return to the courtroom.

[If more than one form was furnished, you will bring the unused forms in with you.]

Notes on Use

1. The trial judge may give a fair summary of the evidence as long as the comments do not relieve the jury of its duty to find that each element of the charged offense is satisfied. Judges may, in appropriate cases, focus the jury on the primary disputed issues, but caution should be exercised in doing so. *See United States v. Neumann*, 887 F.2d 880 (8th Cir. *en banc* 1989).

Committee Comments

As to the subject covered by the "First" point, *see* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 20.01 (5th ed. 2000).

As to the subject covered by the "Second" point, *see* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 20.01 (5th ed. 2000).

The Eighth Circuit has indicated that if a hammer instruction is to be given, it is preferable that it be included in the final instructions given before the jurors begin their deliberations. *Potter v. United States*, 691 F.2d 1275, 1277 (8th Cir. 1982); *United States v. Arpan*, 887 F.2d 873 (8th Cir. *en banc* 1989). Accordingly, the Committee recommends that the matter covered by this "Second" point always be included as a part of the original final instructions.

In this circuit, a defendant does not have a right to an instruction that the jury has the right to reach no decision. *United States v. Arpan*, *reaffirming United States v. Skillman*, 442 F.2d 542 (8th Cir. 1971).

As to when and in what circumstances a supplemental instruction may be appropriate, *see* Instruction 10.02 *infra*.

As to the subject covered by the "Third" point, *see* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 20.01 (5th ed. 2000).

As to the subject covered by the "Fourth" point, *see* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 20.01 (5th ed. 2000).

As to the subject covered by the "Fifth" point, *see* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 20.01 (5th ed. 2000).

As to the subject covered by the "Final" point, *see* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 20.01 (5th ed. 2000).

Final Instructions for Use in Every Trial (Boilerplate)

3.13. VENUE

The Government must prove it is more likely true than not true that the offense charged[1] was begun, continued or completed[2] in the (insert district) District of (insert State).[3] You decide these facts by considering all of the evidence and deciding what evidence is more believable. This is a lower standard than proof beyond a reasonable doubt. The requirement of proof beyond a reasonable doubt applies to all other issues in the case [except (list any other issues subject to a lower standard, *e.g.*, insanity, coercion, 404(b) evidence)].

Notes on Use

1. The actual offense as charged in the elements instruction may be named in lieu of using the phrase "offense charged." If the elements instructions do not submit all alternative means of committing the crime charged, this instruction should be revised to make it consistent with the elements instructions. *See, e.g.*, *United States v. Shyres*, 898 F.2d 647, 657-58 (8th Cir. 1990). The instruction should be tailored to fit the individual case. In describing the event that establishes venue, the court should be careful not to assume as true something that must be proven beyond a reasonable doubt, such as the use of the mail.

2. *See* 18 U.S.C. § 3237(a).

3. Where appropriate, the geographic area encompassed by the district may be set out in an instruction.

Committee Comments

Venue is a question of fact for the jury and it must be instructed upon if in issue. However, failure to give such an instruction is not reversible error where the evidence establishing venue is very clear or uncontradicted. *United States v. Redfearn*, 906 F.2d 352 (8th Cir. 1990); *United States v. Netz*, 758 F.2d 1308, 1312 (8th Cir. 1985); *United States v. Moeckly*, 769 F.2d 453, 461 (8th Cir. 1985); *United States v. Shyres*, 898 F.2d 647, 657-58 (8th Cir. 1990).

Venue need only be proved by a preponderance of the evidence. *Netz*, 758 F.2d at 1312.

4.00. FINAL INSTRUCTIONS: CONSIDERATION OF PARTICULAR KINDS OF EVIDENCE

Introductory Comment

This section covers jury instructions which address particular kinds of evidence. These instructions, like those in Section 2 of this Manual, are in a variety of forms. Some are limiting instructions which must be given if requested under Rule 105 of the Federal Rules of Evidence, others are purely discretionary with the court and often need not be given if the same concept is covered in a more general instruction. Others serve to explain to the jury how to evaluate certain kinds of evidence that may be outside its daily experience.

The instructions set out in Section 2 are not repeated here; however, any of those instructions which were given during trial should in most cases be repeated in the final charge. Moreover any Section 2 instruction which was not given during trial but is applicable and properly requested could be appropriately given during the final charge.

Certain credibility instructions are covered in this section. The Committee Comments to Instruction 3.04, *supra*, cover credibility in general and situations in which a specific instruction may or may not be appropriate.

The instructions in this section cover the most commonly encountered situations. Other instructions may be appropriate in particular cases.

Final Instructions: Consideration of Particular Kinds of Evidence

4.01. DEFENDANT'S FAILURE TO TESTIFY

(See last paragraph of Instructions 3.05 - 3.08, *supra*.)

Committee Comments

Although it is not reversible error to give an instruction such as this without specific request, or even over the defendant's objection, *Lakeside v. Oregon*, 435 U.S. 333 (1978), the Committee recommends that the instruction not be given unless a defendant specifically requests it. If the instruction is requested, it *must* be given, *Bruno v. United States*, 308 U.S. 287, 292-94 (1939), even in a multi-defendant trial where another defendant objects. *Id.*; *United States v. Schroeder*, 433 F.2d 846, 851 (8th Cir. 1970).

The Committee recommends the practice of inquiring, on the record but *outside* the jury's presence, whether the defendant elects to testify and, if not, whether this instruction is desired.

Final Instructions: Consideration of Particular Kinds of Evidence

4.02. CHARACTER AND REPUTATION, FOR TRUTHFULNESS, WITNESSES (Including the Defendant) [1]

You have heard testimony about the character and reputation of [(name of witness)] [the defendant] [defendant (name)] for truthfulness. You may consider this evidence only in deciding whether to believe the testimony of [(name of witness)] [the defendant] [defendant (name)] and how much weight to give to it.

Notes on Use

1. This instruction should *not* be used where a defendant's character for truthfulness in fact represents a "pertinent character trait" within the scope of Rule 404(a)(1). *United States v. Krapp*, 815 F.2d 1183, 1187 (8th Cir. 1987). In a perjury case, for example, the defendant's character for truthfulness would presumably be a "pertinent character trait," and it would be erroneous to instruct that the evidence could be used only in deciding whether to believe the defendant's testimony (assuming that he testified). The same problem may also exist with respect to certain types of fraud charges and other offenses. In any such situation, if an instruction is to be given at all (*see* Committee Comments, Instruction 4.03, *infra*, and *United States v. Krapp*, 815 F.2d at 1187-88), it should advise the jury that it "may consider this evidence in deciding whether or not the defendant committed the crime of _____." A similar sort of instruction, if one is desired, may be used to cover evidence of other pertinent character traits within Rule 404(a)(1) (e.g., peaceableness in a murder case, etc.), and to cover pertinent character traits of a *victim* within the scope of Rule 404(a)(2) (e.g., victim's aggressive character where self defense is a defense).

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 15.09 (5th ed. 2000). *See generally* Fed. R. Evid. 404(a)(3), 608.

Once a criminal defendant has testified, his or her character for truth and veracity may be attacked, as with any other witness, in the ways provided for in Rule 608 (and 609) of the Federal Rules of Evidence. It is not necessary, for that purpose, that he or she first have attempted to introduce evidence of his or her good character for truth and veracity, *United States v. Walker*, 313 F.2d 236, 238 (6th Cir. 1963). A defendant who testifies has no right to offer evidence of his or her character for truthfulness (as a witness) unless that character has first been attacked, either in a way provided for in Rule 608 or in some other actual way. *See* 3 *Weinstein's Evidence* ¶ 608[08] (1985). There are, however, constitutional limitations on excluding character evidence offered by a defendant. *See, e.g., United States v. Watson*, 669 F.2d 1374, 1381-84 (11th Cir. 1982); *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981).

If the defendant offers evidence of a pertinent character trait of the victim, evidence of the defendant's own character as to that trait becomes admissible. Fed. R. Evid. 404(a)(1).

4.03. DEFENDANT'S CHARACTER "STANDING ALONE"

(No instruction recommended.)

Committee Comments

See United States v. Krapp, 815 F.2d 1183, 1187 (8th Cir. 1987).

Rule 405 of the Federal Rules of Evidence allows testimony as to the reputation of the defendant or an opinion as to the defendant's character in cases where evidence of character or a character trait is admissible. The Eighth Circuit, along with some other circuits, has disapproved the giving of a "standing alone" instruction (that proof of the defendant's good character, standing alone, may be sufficient to create a reasonable doubt with respect to such evidence) with regard to such evidence. *United States v. Krapp*; *Black v. United States*, 309 F.2d 331, 343-44 (8th Cir. 1962). *See also United States v. Winter*, 663 F.2d 1120, 1148 (1st Cir. 1981); holding that such an instruction is an unwarranted invasion of the jury's special function in deciding what weight to give any particular item of evidence; *United States v. Logan*, 717 F.2d 84 (3d Cir. 1983); *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979); *United States v. Ruppel*, 666 F.2d 261 (5th Cir. 1982). *But see* Justice White's dissent to the denial of certiorari in *Spangler v. United States*, 487 U.S. 1224 (1988).

A "standing alone" instruction on good character does appear in many jury instruction manuals. *See* Federal Judicial Center, Pattern Criminal Jury Instructions § 51 (1988); Seventh Circuit Federal Jury Instructions § 3.06 (1999); Eleventh Circuit Pattern Jury Instructions: Criminal (Special) § 11 (1997).

Volume 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 15.15 (5th ed. 2000) proposes an instruction which does not use the "standing alone" language but simply directs the jury to consider that evidence along with the other evidence in the case.

Final Instructions: Consideration of Particular Kinds of Evidence

4.04. TESTIMONY UNDER GRANT OF IMMUNITY OR PLEA BARGAIN

You have heard evidence that (name of witness) [has made a plea agreement with the Government] [has received a promise from the Government that [he] [she] will not be prosecuted] [has received a promise from the Government that [his] [her] testimony will not be used against [him] [her] in a criminal case]. [His] [Her] testimony was received in evidence and may be considered by you. You may give [his] [her] testimony such weight as you think it deserves. Whether or not [his] [her] testimony may have been influenced by the [plea agreement] [Government's promise] is for you to determine.

[The witness' guilty plea cannot be considered by you as any evidence of this defendant's guilt. The witness' guilty plea can be considered by you only for the purpose of determining how much, if at all, to rely upon the witness' testimony.][1]

Notes on Use

1. Use only where the government's promises have been coupled with a guilty plea by the witness. Where there has simply been a guilty plea by the witness to the crime on trial, without any evidence of a plea bargain or other governmental promise, use Instruction 2.19, *supra*.

Committee Comments

See United States v. Ridinger, 805 F.2d 818, 821 n.5 (8th Cir. 1986); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 15.03 (5th ed. 2000); *United States v. Hastings*, 577 F.2d 38, 42 (8th Cir. 1978).

This instruction is designed to be used in normal situations involving a plea agreement or a grant of immunity under 18 U.S.C. § 6002. If in a particular case a witness receives a different or additional promise from the government, there should be an appropriate modification of this instruction.

An instruction regarding the credibility of immunized witnesses, accomplices, informants, etc. is permissible and the Committee recommends one be given if requested. Failure to give such an instruction is not reversible error, however, where the testimony is corroborated. *United States v. McGinnis*, 783 F.2d 755, 758 (8th Cir. 1986); *United States v. Mothershed*, 859 F.2d 585, 592 (8th Cir. 1988).

Where the testimony is uncorroborated, it is the better practice to caution the jury. The jury is sufficiently cautioned when it is directed to the specific factors the jury should take into account in assessing the credibility of these categories of witnesses. *United States v. Bowman*, 798 F.2d 333, 334-35 (8th Cir. 1986); *United States v. Ridinger*, 805 F.2d 818, 821-22 (8th Cir.

1986). This instruction and Instructions 4.05A and 4.06 were drafted to direct the jury's attention to the specific factors.

It should be noted that, although other circuits have treated the failure to caution the jury on uncorroborated testimony as reversible error, *United States v. McGinnis*, 783 F.2d at 758, this circuit has long held that there is no such "absolute and mandatory duty . . . imposed upon the court to advise the jury by instruction that they should consider the testimony of an uncorroborated accomplice with caution." *Esters v. United States*, 260 F.2d 393, 397 (8th Cir. 1958), *construing Caminetti v. United States*, 242 U.S. 470, 496 (1917). This circuit continues to construe *Caminetti* in accord with *Esters*. *United States v. Rockelman*, 49 F.3d 418, 423 (8th Cir. 1995); *United States v. Schoenfeld*, 867 F.2d 1059, 1061-62 (8th Cir. 1989); *United States v. Shriver*, 838 F.2d 980, 983 (8th Cir. 1988).

While *Caminetti* acknowledges that the better practice is to "caution" the jury, it did not require that the jury be so instructed or specify the form of any such "caution." Often this has been accomplished by what this circuit has labeled a "cautionary tail," language to the effect that testimony from such a witness must be examined with greater caution and care than ordinary witnesses. *See, e.g.*, 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 15.02-.05 (5th ed. 2000). However this Circuit has criticized the use of a "cautionary tail" as an unwarranted intrusion into the jury's functions.

Accordingly, if an instruction along with the lines of the text is given, which identifies specific factors the jury should take into account in assessing credibility, the Committee recommends against the use of a "cautionary tail" in these kinds of instructions (4.04, 4.05A, and 4.06).

Final Instructions: Consideration of Particular Kinds of Evidence

4.05A. TESTIMONY OF ACCOMPLICE

You have heard testimony from (name of witness) who stated that [he] [she] participated in the crime charged against the defendant. [His] [Her] testimony was received in evidence and may be considered by you. You may give [his] [her] testimony such weight as you think it deserves. Whether or not [his] [her] testimony may have been influenced by [his] [her] desire to please the Government or to strike a good bargain with the Government about [his] [her] own situation is for you to determine.

Committee Comments

See United States v. Ridinger, 805 F.2d 818, 821 n.5 (8th Cir. 1986); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 15.04 (5th ed. 2000); *United States v. Valdez*, 529 F.2d 996, 997 (8th Cir. 1976).

See also Committee Comments, Instruction 4.04, *supra*.

An accomplice instruction may be given if requested but is not required. *United States v. Rockelman*, 49 F.3d 418, 423 (8th Cir. 1995); *United States v. Schoenfeld*, 867 F.2d 1059, 1061-62 (8th Cir. 1989); *United States v. Roberts*, 848 F.2d 906, 908 (8th Cir. 1988); *United States v. Shriver*, 838 F.2d 980, 983 (8th Cir. 1988).

This instruction is to be used when the accomplice is called by the government and his testimony does not exculpate the defendant. Do not use this instruction if the witness received immunity; in that case, use Instruction 4.04, *supra*.

An accomplice instruction is generally thought to be helpful to a defendant's case, and the giving of such an instruction, even over defense counsel's objection, may not be prejudicial error. *United States v. Smith*, 596 F.2d 319, 322 (8th Cir. 1979) (defense counsel objected because he did not wish to call attention to accomplice testimony).

4.05B. CREDIBILITY - COOPERATING WITNESS

You [have heard] [are about to hear] evidence that [name of witness] hopes to receive a reduced sentence on criminal charges pending against [him] [her] in return for [his] [her] cooperation with the Government in this case. [Name of witness] entered into an agreement with [name of agency] which provides (specify general agreement, for example, that in return for his assistance, the Government will dismiss certain charges, recommend a less severe sentence [which could be less than the mandatory minimum sentence for the crime[s] with which he/she is charged]). [[Name of witness] is subject to a mandatory minimum sentence, that is, a sentence that the law provides must be of a certain minimum length. If the prosecutor handling this witness' case believes [he] [she] provided substantial assistance, that prosecutor can file in the court in which the charges are pending against this witness a motion to reduce [his] [her] sentence below the statutory minimum. The judge has no power to reduce a sentence for substantial assistance unless the Government, acting through the United States Attorney, files a such a motion. If such a motion for reduction of sentence for substantial assistance is filed by the Government, then it is up to the judge to decide whether to reduce the sentence at all, and if so, how much to reduce it.]

You may give the testimony of this witness such weight as you think it deserves. Whether or not testimony of a witness may have been influenced by [his] [her] hope of receiving a reduced sentence is for you to decide.

Final Instructions: Consideration of Particular Kinds of Evidence

4.06. TESTIMONY OF INFORMER

You have heard evidence that (name of witness) has an arrangement with the Government under which [he] [she] [gets paid] [receives (describe benefit)] for providing information to the Government. [His] [Her] testimony was received in evidence and may be considered by you. You may give [his] [her] testimony such weight as you think it deserves. Whether or not [his] [her] information or testimony may have been influenced by [such payments] [receiving (describe benefit)] is for you to determine.

Committee Comments

See United States v. Ridinger, 805 F.2d 818, 821 (8th Cir. 1986).

See also Committee Comments, Instruction 4.04, *supra*.

The giving of a special instruction on the credibility of an informer is within the discretion of the trial court. *United States v. Robertson*, 706 F.2d 253, 255 (8th Cir. 1983). The presence of substantial independent evidence in support of the defendant's guilt is a factor entitled to considerable weight in determining whether the trial court abused that discretion in refusing to give an informer instruction. *Id.*

Case law clearly identifies an informer as a witness who is a narcotics user or addict and who is testifying either to gain some advantage or to avoid some disadvantage, or who is paid on a contingency fee basis by the government. *See Government of Virgin Islands v. Hendricks*, 476 F.2d 776, 779-80 (3d Cir. 1973). Informants include witnesses who are paid in cash or receive other benefits for their testimony in a specific case or on a continuing basis by the government. *United States v. Lee*, 506 F.2d 111, 122-23 (D.C. Cir. 1974).

A witness who did not receive any pay or promises was held not to be an informer in *United States v. Klein*, 701 F.2d 66, 68 (8th Cir. 1983) and in *Jones v. United States*, 396 F.2d 66, 68 (8th Cir. 1969). A reluctant witness who was told he would not be prosecuted if he told the truth was not considered an informer in *United States v. Phillips*, 522 F.2d 388, 391-92 (8th Cir. 1975). In all of these cases it was held that a cautionary instruction was not required.

The Eighth Circuit has declined to adopt a per se rule requiring that an addict-informant instruction be given on request. Instead, the circumstances of each case determine the need for an addict-informant instruction. *United States v. Hoppe*, 645 F.2d 630, 633 (8th Cir. 1981) (lists several factors obviating need for addict-informant instruction); *United States v. Shigemura*, 682 F.2d 699, 702-03 (8th Cir. 1982); *United States v. Broyles*, 764 F.2d 525, 527 (8th Cir. 1985).

4.07. COMMON SCHEME - ACTS OR DECLARATIONS OF PARTICIPANT

(*See* Instruction 5.06I, *infra*.)[1]

Notes on Use

1. The "Coconspirator Statements" instruction at No. 5.06I, *infra*, can be easily modified to apply to acts or declarations of a participant in a common scheme.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 18.02 (5th ed. 2000)

See Committee Comments, Instruction 5.06I, *infra*.

Where there is evidence of a common scheme or plan, acts and declarations of the participants may be introduced in the same manner as acts or declarations of co-conspirators. Rule 801(d)(2)(E) of the Federal Rules of Evidence, defining such declarations to be non-hearsay, applies whether or not a conspiracy was charged. *United States v. Kiefer*, 694 F.2d 1109, 1112 n.2 (8th Cir. 1982); *United States v. Miller*, 644 F.2d 1241, 1244 (8th Cir. 1981).

Final Instructions: Consideration of Particular Kinds of Evidence

4.08. EYEWITNESS TESTIMONY

The value of identification testimony depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In evaluating such testimony you should consider all of the factors mentioned in these instructions concerning your assessment of the credibility of any witness, and you should also consider, in particular, whether the witness had an adequate opportunity to observe the person in question at the time of the offense. You may consider, in that regard, such matters as the length of time the witness had to observe the person in question, the prevailing conditions at that time in terms of visibility or distance and the like, and whether the witness had known or observed the person at earlier times.

[In general, a witness uses his or her senses to make an identification. Usually the witness identifies an offender by the sense of sight -- but this is not necessarily so, and other senses may be used.]

You should also consider whether the identification made by the witness after the offense was the product of [his] [her] own recollection. You may consider, in that regard, the strength of the identification, and the circumstances under which the identification was made, and the length of time that elapsed between the occurrence of the crime and the next opportunity the witness had to see the defendant.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to [him] [her] for identification, you should scrutinize the identification with great care.

[You may take into account any occasions in which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with [his] [her] identification at trial.]

Final Instructions: Consideration of Particular Kinds of Evidence

The Government has the burden of proving identity beyond a reasonable doubt. It is not essential that the witness be free from doubt as to the correctness of the identification. However you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may find [him] [her] guilty. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Committee Comments

See United States v. Telfaire, 469 F.2d 552, 558-59 (D.C. Cir. 1972); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 14.10, 14.11 (5th ed. 2000).

Although the court in *Telfaire* found the case before it was not one requiring a special eyewitness instruction, as part of its appellate function it drafted an eyewitness instruction for future use in appropriate cases. The instruction in this manual is basically the same instruction. However, changes have been made in vocabulary and sequence and repetitive material has been eliminated.

The purpose of the *Telfaire* instruction was to adopt the approach of *United States v. Barber*, 442 F.2d 517, 528 (3d Cir. 1971) to (1)"obviate skeletal pattern instructions" and (2) "assure the essential particularity demanded by the facts surrounding each identification." 469 F.2d at 557. *Telfaire* stressed that the instruction was to be used as a model, with the language to be revised and adapted to suit the proof and contentions of each case. *Id.*

This Circuit has strongly recommended the giving of a *Telfaire* instruction, if requested, in a case in which the reliability of eyewitness identification of a defendant presents a serious question, although the exact language need not be given, and further, where the government's case rests solely or substantially on questionable eyewitness identification, it is reversible error to refuse to give a *Telfaire*-type instruction. *United States v. Mays*, 822 F.2d 793, 798 (8th Cir. 1987); *Williams v. Lockhart*, 736 F.2d 1264, 1267 (8th Cir. 1984); *United States v. Cain*, 616 F.2d 1056, 1058 (8th Cir. 1980); *United States v. Greene*, 591 F.2d 471, 474-77 (8th Cir. 1979); *Durns v. United States*, 562 F.2d 542, 549-50 (8th Cir. 1977); *United States v. Dodge*, 538 F.2d 770, 783-84 (8th Cir. 1976); *United States v. Roundtree*, 527 F.2d 16, 19 (8th Cir. 1975).

In *Dodge*, the court indicated it would view with concern the failure to give specific and detailed instructions on identification in future cases where the identification of the defendant is based solely or substantially on eyewitness testimony. 538 F.2d at 784. Failure to give such an instruction in that case was not grounds for reversal since the identification was not considered "questionable." *See also United States v. Johnson*, 848 F.2d 904, 906 (8th Cir. 1988) holding that a specific eyewitness instruction was not necessary where nothing suggested that the eyewitness' testimony was unreliable. A general credibility instruction was held sufficient. In *Durns* failure to include the first and last paragraphs of *Telfaire* was found not to be error where

there was substantial circumstantial evidence in addition to the eyewitness identification. 562 F.2d at 549-50.

In *Greene* the court found failure to give the instruction reversible error, analyzing the basic question as whether eyewitness testimony is essential to support a conviction. 591 F.2d at 475. Three factors not present in *Dodge* were found present in *Greene*: l) the eyewitness identification was the sole basis for conviction; 2) there was the possibility of misidentification and 3) the trial court gave no instruction alerting the jury to the crucial role that eyewitness identification played in that case. 591 F.2d at 476. It should be further noted that the *Telfaire* instruction was requested. 591 F.2d at 474-75 n.4.

In *Cain* and *Mays* there was no prejudicial error to refuse to give a requested *Telfaire* instruction where the identification testimony was strongly corroborated. 616 F.2d at 1058-59; 822 F.2d at 798. In *Roundtree* the court found no error where the instruction had not been requested. 527 F.2d at 13.

In *United States v. Grey Bear*, 883 F.2d 1382 (8th Cir. 1989), the court upheld a trial court's refusal to give a very detailed identification instruction where the instruction given adequately pointed out the relevant considerations to be weighed in gauging eyewitness testimony including accurate recollection and the ability to observe.

Final Instructions: Consideration of Particular Kinds of Evidence

4.09. INFLUENCING WITNESS, ETC.

Attempts by a defendant to [conceal] [destroy] [make up evidence] [influence a witness] [influence witnesses] in connection with the crime charged in this case may be considered by you in light of all the other evidence in the case. You may consider whether this evidence shows a consciousness of guilt and determine the significance to be attached to any such conduct.

[Furthermore, you should also understand that such testimony does not relate to the other defendant[s] in any way at all, and must not be used against [him] [her] [them] for any purpose whatsoever.][1]

Notes on Use

1. This limiting paragraph must be given when requested in multi-defendant cases, *unless* the concealment, threats, etc. were part of a conspiracy.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 14.07 (5th ed. 2000).

If the probative value of the evidence outweighs the prejudicial impact under Rule 403 of the Federal Rules of Evidence, evidence of threats by a defendant against a potential witness can be used to show guilty knowledge. *United States v. White*, 794 F.2d 367, 371 (8th Cir. 1986). *Cf. United States v. Weir*, 575 F.2d 668, 670 (8th Cir. 1978) (prejudicial impact not outweighed). Evidence of attempts to influence witnesses is admissible and it is for the jury to say what weight should be given to it. *United States v. Hall*, 565 F.2d 1052, 1055 (8th Cir. 1977).

An instruction allowing the jury to consider whether such evidence points to a consciousness of guilt was held appropriate under the evidence in *United States v. Rucker*, 586 F.2d 899, 904 (2d Cir. 1978).

Final Instructions: Consideration of Particular Kinds of Evidence

4.10. OPINION EVIDENCE - EXPERT WITNESS

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 14.01 (5th ed. 2000). *See also Chatman v. United States*, 557 F.2d 147, 148-49 (8th Cir. 1977).

4.11. DEMONSTRATIVE SUMMARIES NOT RECEIVED IN EVIDENCE

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, or other underlying evidence in the case. Those charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the books, records or other underlying evidence.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 14.02 (5th ed. 2000); *United States v. Lewis*, 759 F.2d 1316, 1329 n.6 (8th Cir. 1985); *United States v. Diez*, 515 F.2d 892, 905-06 (5th Cir. 1975). *See generally* 5 *Weinstein's Evidence* ¶ 1006 (1978).

This instruction should be given only where the chart or summary is used solely as demonstrative evidence. Where such exhibits are admitted into evidence, pursuant to Rule 1006 of the Federal Rules of Evidence, do *not* give this instruction. For summaries admitted as evidence pursuant to Rule 1006, *see* Instruction 4.12, *infra*.

Sending purely demonstrative charts to the jury room is disfavored. If they are submitted limiting instructions are strongly suggested. *United States v. Possick*, 849 F.2d 332, 339 (8th Cir. 1988). The court may advise the jury that demonstrative evidence will not be sent back to the jury room.

Final Instructions: Consideration of Particular Kinds of Evidence

4.12. RULE 1006 SUMMARIES

You will remember that certain [schedules] [summaries] [charts] were admitted in evidence. You may use those [schedules] [summaries] [charts] as evidence, even though the underlying documents and records are not here.[1] [However, the [accuracy] [authenticity] of those [schedules] [summaries] [charts] has been challenged. It is for you to decide how much weight, if any, you will give to them. In making that decision, you should consider all of the testimony you heard about the way in which they were prepared.][2]

Notes on Use

1. This instruction is not necessary if a stipulation instruction has been given on the subject.

2. The bracketed portion of this instruction should be given if the accuracy or authenticity has been challenged.

Committee Comments

See generally Fed. R. Evid. 1006, 1008(c); 5 *Weinstein's Evidence* ¶¶ 1006, 1008 (1978).

This instruction is based on Rule 1006 of the Federal Rules of Evidence, which permits summaries to be admitted as evidence without admission of the underlying documents as long as the opposing party has had an opportunity to examine and copy the documents at a reasonable time and place and if those underlying documents would be admissible. *Ford Motor Co. v. Auto Supply Co., Inc.*, 661 F.2d 1171, 1175-76 (8th Cir. 1981). The Rules contemplate that the summaries will not be admitted until the court has made a preliminary ruling as to their accuracy. *See* Fed. R. Evid. 104; *United States v. Robinson*, 774 F.2d 261, 276 (8th Cir. 1985).

As *Weinstein* notes, and as Rule 1008(c) makes clear, the trial judge makes only a preliminary determination regarding a Rule 1006 summary, the accuracy of which is challenged. The admission is within the sound discretion of the trial judge. *United States v. King*, 616 F.2d 1034, 1041 (8th Cir. 1980). If the determination is to admit the summary, the jury remains the final arbiter with respect to how much weight it will be given and should be instructed accordingly.

The "voluminous" requirement of Rule 1006 does not require that it literally be impossible to examine all the underlying records, but only that in-court examination would be an inconvenience. *United States v. Possick*, 849 F.2d 332, 339 (8th Cir. 1988).

Charts and diagrams admitted under Rule 1006 may be sent to the jury at the district court's discretion. *Possick*, 849 F.2d at 339; *United States v. Orlowski*, 808 F.2d 1283, 1289 (8th Cir. 1986); *United States v. Robinson*, 774 F.2d at 275.

When this type of exhibit is sent to the jury, a limiting instruction is appropriate, but failure to give an instruction on the use of charts is not reversible error. *Possick*, 849 F.2d at 340.

There may be cases in which a variety of summaries are before the jury, some being simply demonstrative evidence, some being unchallenged Rule 1006 summaries, and some being challenged Rule 1006 summaries. In that situation, or any variant thereof, it will be necessary for the trial court to distinguish between the various items, probably by exhibit number, and to frame an instruction which makes the appropriate distinctions.

Final Instructions: Consideration of Particular Kinds of Evidence

4.13. SPECIFIC INFERENCES [1]

[[(Insert fact deduced) is an element of the offense of (describe offense), which must be proved beyond a reasonable doubt.][2] If you find proof beyond a reasonable doubt that (insert fact established), that is evidence from which you may, but are not required to, find or infer that (insert fact deduced).][3]

Notes on Use

1. This is a very generalized format. Requests for inference instructions may be made by the government or the defense. If an inference instruction is to be given, effort should be made to more specifically tailor it to the given situation.

2. This admonition may be necessary if this instruction is not given in proximity to the elements instruction.

3. Definitions or further cautionary instructions may be helpful or required. *See, e.g.*, *Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973). *United States v. Johnson*, 563 F.2d 936, 940 n.2 (8th Cir. 1977) and 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 59.16 (5th ed. 2000) on the inferences arising from possession of recently stolen property; *United States v. Hayes*, 631 F.2d 593, 594 (8th Cir. 1980) and 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 52.05 (5th ed. 2000) on the inferences arising from the possession of recently stolen mail; *United States v. Beardslee*, 609 F.2d 914, 919 (8th Cir. 1979), on the inferences arising from the possession of property recently purchased in another state.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 12.05 (5th ed. 2000).

An instruction advising the jury that it may make reasonable inferences is included in the general charges on evidence at Instructions 1.01 and 3.03, *supra*.

An instruction directing the jury's attention to a specific inference should be given only when a) there is a specific inference at issue supported by the evidence; b) it is one which is specifically recognized by common law, judicial precedent or statute and c) it has been requested.

Many of the inferences recognized by common law were and are still called "presumptions." However, if used in an instruction, these "presumptions" *must* be phrased in terms of a permissive inference. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

Examples of inferences recognized at common law include the inferences which may be drawn from the possession of recently stolen property, *Barnes v. United States*, 412 U.S. 837 (1973) (knowledge); *United States v. Johnson*, 563 F.2d 936, 940-41 (8th Cir. 1977) (knowledge

and participation), including recently stolen mail, *United States v. Hayes*, 631 F.2d 593, 594 (8th Cir. 1980) and *United States v. Bloom*, 482 F.2d 1162, 1163-66 (8th Cir. 1973) (knowledge it was stolen from the mail); and possession in a state other than the state in which the property had been recently purchased, *United States v. Beardslee*, 609 F.2d 914, 919 (8th Cir. 1979) (transportation), or stolen, *United States v. Mitchell*, 558 F.2d 1332, 1335-36 (8th Cir. 1977) (transportation).

These also include inferences which may be drawn from false exculpatory statements (Instruction 4.15, *infra*) and failure to produce certain witnesses under certain conditions (Instruction 4.16, *infra*). Other common law inferences on which instructions may be proper include "presumptions of regularity." *See* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 12.06 (5th ed. 2000); *United States v. Rucker*, 435 F.2d 950, 952-53 (8th Cir. 1971).

Instructions on inferences are most helpful when they involve inferences which the law allows which may not be readily apparent to the lay person, such as advising the jury that the law allows mailing to be established by proof of business custom in a mail fraud case. *See* Instruction 6.18.1341, *infra*. However, instructions on inferences based solely on common sense and experience have been discouraged. The inference of consciousness of guilt which may be drawn from flight is one example. The giving of an instruction on that inference has always been limited to very narrow circumstances, *United States v. White*, 488 F.2d 660, 661-62 (8th Cir. 1973), and has recently been altogether discouraged. *See United States v. McQuarry*, 726 F.2d 401, 403 (8th Cir. 1984) (McMillian, J. concurring). However, an instruction limiting such evidence to the determination of consciousness of guilt along the lines of Instruction 4.09, *supra*, may in some cases be appropriate.

Statutory inferences are subject to the test whether it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *Leary v. United States*, 395 U.S. 6, 36 (1969); *United States v. Franklin*, 568 F.2d 1156, 1157 (8th Cir. 1978).

An example of a statutory inference is found in 18 U.S.C. § 659 (bills of lading constitute prima facie evidence of the origin and destination of a shipment). *United States v. Franklin*, 568 F.2d at 1157. *See also* Notes 4, Instructions 6.18.659A and 6.18.659B, *infra*. Another example is found in 26 U.S.C. § 6064 (an individual's signature on an income tax return is prima facie evidence that the return was signed by him). *United States v. Cashio*, 420 F.2d 1132, 1135 (5th Cir. 1969). *See also* Instructions 6.26.7201 and 6.26.7206, *infra*; 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 67.22 (5th ed. 2000). A further example is found in 18 U.S.C. § 892b, listing the four factors which constitute prima facie evidence that a loan is extortionate. *United States v. DeVincent*, 546 F.2d 452, 454-55 (1st Cir. 1976).

Other examples of statutory inferences are found in 21 U.S.C. § 174 (knowledge of importation can be inferred from possession of heroin and opium (but not cocaine), *Turner v. United States*, 396 U.S. 398 (1970)), and in 26 U.S.C. § 5601(b)(2) ("possession" and "carrying

on" can be inferred from the defendant's unexplained presence at a still. *United States v. Gainey*, 380 U.S. 63 (1965). *But cf. United States v. Romano*, 382 U.S. 136 (1965)).

There is some debate on the propriety of instructing the jury on inferences. For the views of an American Bar Association committee, *see* 120 F.R.D. 299, 315-20 (1988).

4.14. SILENCE IN THE FACE OF ACCUSATION

[Evidence has been introduced that a statement accusing the defendant of the crime charged in the Indictment was made, and that the defendant did not [deny the accusation] [[object to] [contradict] the statement]]. If you find that the defendant was present and actually heard and understood the statement, and that it was made under such circumstances that the defendant would be expected to [deny] [contradict] [object to] it if it was not true, then you may consider whether the defendant's silence was an admission of the truth of the statement.][1]

Notes on Use

1. In the previous edition, this Committee joined in the comments to Ninth Cir. Crim. Jury Instr. 4.2 (1997) and Federal Judicial Center, Pattern Criminal Jury Instructions § 45 (1988) recommending that no instruction on this topic be given. However, without such an instruction, the jury is given no guidance on the important findings it must make before it can consider silence to be an admission. Accordingly, if requested by the defendant, the jury may be instructed on the elements it must find before it can find evidence of the defendant's silence to be an admission.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 14.05 (5th ed. 2000); *United States v. Carter*, 760 F.2d 1568, 1580 n.5 (11th Cir. 1985).

The general rule is that

> when a statement tending to incriminate one accused of committing a crime is made in his presence and hearing and such statement is not denied, contradicted, or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution as evidence of his acquiescence in its truth * * * [if made] under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth.

Arpan v. United States, 260 F.2d 649, 655 (8th Cir. 1958) and cases cited therein. *See also United States v. Mitchell*, 558 F.2d 1332, 1334-35 (8th Cir. 1977). Since the adoption of the Federal Rules of Evidence, such evidence has come in as an adoptive admission under Rule 801(d)(2)(B) of the Federal Rules of Evidence. *See United States v. Carter*, 760 F.2d at 1579.

Whether all the elements necessary to give such silence capacity to be admitted as an implied or adoptive statement are preliminary questions for the court. *Arpan*, 260 F.2d at 654; *Carter*, 760 F.2d at 1579-80. If the court allows the evidence, whether those elements have been proved becomes a jury question. *Arpan*, 260 F.2d at 655; *Carter*, 760 F.2d at 1580 n.5.

Final Instructions: Consideration of Particular Kinds of Evidence

Post-arrest silence by a defendant after *Miranda* warnings have been given is inadmissible against the defendant. *Doyle v. Ohio*, 426 U.S. 610 (1976). If a defendant gives a statement, however, his silence as to other matters may be admitted. *Anderson v. Charles*, 447 U.S. 404 (1980); *see United States v. Mitchell*, 558 F.2d 1332, 1334-35 (8th Cir. 1977). A defendant's pre-arrest silence may be admitted, *Jenkins v. Anderson*, 447 U.S. 231 (1980) as well as silence after arrest but prior to warnings. *Fletcher v. Weir*, 455 U.S. 603 (1982).

4.15. FALSE EXCULPATORY STATEMENTS

(No instruction recommended.)

Committee Comments

Although the Committee does not normally recommend an instruction on this issue, the following instruction may, in appropriate circumstances, be given:

> When a defendant voluntarily and intentionally offers an explanation, or makes some statement before trial tending to show his innocence, and this explanation or statement is later shown to be false, you may consider whether this evidence points to a consciousness of guilt. The significance to be attached to any such evidence is a matter for you to determine.

The instruction is aimed at pretrial fabrications, and is not generally appropriate for casting doubt on a defendant's trial testimony. *United States v. Clark*, 45 F.3d 1247, 1251 (8th Cir. 1995).

If the defendant denies making the statement, or denies that it is exculpatory, this language should be changed to allow the jury to decide whether or not the statement was made or whether or not it was exculpatory. *United States v. Holbert*, 578 F.2d 128, 130 (5th Cir. 1978).

If the falsity of the exculpatory statement is controverted, this language should be changed to allow the jury to find whether or not the statement was false. *See United States v. Pringle*, 576 F.2d 1114, 1120 n.6 (5th Cir. 1978).

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 14.06 (5th ed. 2000); *United States v. Wells*, 702 F.2d 141, 144 n.2 (8th Cir. 1983); *United States v. Turner*, 551 F.2d 780, 783 (8th Cir. 1977).

See also Committee Comments, Instruction 4.13, *supra*, on specific inferences.

False exculpatory statements are properly admissible as substantive evidence tending to show consciousness of guilt. *United States v. Hudson*, 717 F.2d 1211, 1215 (8th Cir. 1983) and cases cited therein. This Circuit has repeatedly held that an instruction of this nature "is properly given when a defendant . . . offers an exculpatory explanation which is later proven to be false." *Wells*, 702 F.2d at 144; *United States v. Hudson*, 717 F.2d 1211 (8th Cir. 1983); *see also Rizzo v. United States*, 304 F.2d 810, 830 (8th Cir. 1962), and cases cited therein. *See further*, *Wilson v. United States*, 162 U.S. 613, 620-21 (1896) indicating that such conduct formerly gave rise to a "presumption" of guilt.

Wells also held that such an instruction does not unfairly penalize the criminal defendant who, upon confrontation, denies the crime rather than remain silent. 702 F.2d at 144. *Hudson* further held such an instruction proper because it permits the jury to attach as much or as little significance to the statement as it chooses. 717 F.2d at 1215.

While general denials of guilt later contradicted are not considered exculpatory statements, any other exculpatory statement which is contradicted by evidence at trial justifies the giving of this kind of jury instruction. *United States v. McDougald*, 650 F.2d 532, 533 (4th Cir. 1981) (citing *United States v. Bear Killer*, 534 F.2d 1253, 1260 (8th Cir. 1976)).

The comments to Federal Judicial Center, Pattern Criminal Jury Instructions § 44 (1988), Seventh Circuit Federal Jury Instructions: Criminal § 3.22 (1999) and Ninth Cir. Crim. Jury Instr. 4.3 (1997) recommend that no instruction on this subject be given and that the subject be left to argument of counsel. However, the courts in many circuits have approved the giving of an instruction of this nature. *See*, in addition to the Eighth Circuit cases cited above, *United States v. Zang*, 703 F.2d 1186, 1191 (10th Cir. 1982); *United States v. McDougald*, 650 F.2d at 533 (noting that such instructions "have long been approved by the courts" (citing *Wilson*)); *United States v. Boekelman*, 594 F.2d 1238, 1240-41 (9th Cir. 1979); *United States v. Pringle*, 576 F.2d 1114, 1120 (5th Cir. 1978).

4.16. MISSING WITNESS

(No model instruction provided)[1]

Notes on Use

1. Because of the limited circumstances in which a missing witness instruction would be appropriate, no model instruction is provided here. With respect to argument of a party's failure to call a particular witness, the Committee recommends that the court review the subject with counsel before argument, on the record but outside the jury's presence, to determine whether such an argument will be permitted and if so what limits to place on it. *But note*, neither argument nor an instruction on this subject should be permitted as *against* a defendant who has offered no evidence.

Committee Comments

Examples of missing witness instructions may be found in 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 14.15 (5th ed. 2000).

The rule which forms the basis of the "absent witness" instruction provides that "if a party has it particularly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *United States v. Anders*, 602 F.2d 823, 825 (8th Cir. 1979) (quoting from *Graves v. United States*, 150 U.S. 118, 121 (1893)). However it is well settled that the propriety of giving this instruction is within the discretion of the trial court. *United States v. Williams*, 604 F.2d 1102, 1117 (8th Cir. 1979); *Anders*; *United States v. Johnson*, 562 F.2d 515, 517 (8th Cir. 1977); *United States v. Kirk*, 534 F.2d 1262, 1280 (8th Cir. 1976); *United States v. Williams*, 481 F.2d 735, 738 (8th Cir. 1973).

It has also long been held that, upon a request for a jury instruction, the inference is one to be applied with caution and

> that it is not one which is abstractly entitled to be given application; but that it is to be accorded opportunity for significance and effect only when there has been shown a factual area in which it can logically operate.

Wilson v. United States, 352 F.2d 889, 892 (8th Cir. 1965), *quoted with approval in United States v. Higginbotham*, 451 F.2d 1283, 1286 (8th Cir. 1971).

This is because the applicable rule in this Circuit is that:

> Absent unusual circumstances such as knowingly concealing evidence favorable to a defendant, the government has a wide discretion with respect to the witnesses to be called to prove its case. The government is not ordinarily compelled to call all witnesses competent to testify including special agents or informers.

Williams, 481 F.2d at 737; *United States v. Mosby*, 422 F.2d 72, 74 (8th Cir. 1970).

The instruction has been held properly refused where the ability to produce the witness was not solely or otherwise in the power of the government such as where a witness could not testify due to illness, *Williams*, 604 F.2d at 1117; where the witness was not subpoenaed by either party, *Williams*, 604 F.2d at 1120; *Higginbotham*, 451 F.2d at 1286; where the witness was argued to be "unavailable" because he worked for the government, *Anders*, 602 F.2d at 825; where the witness/informant's whereabouts were no longer known to the government, *Johnson*, 562 F.2d at 517; where there was no showing that the government possessed the sole power to produce the witnesses, *Kirk*, 534 F.2d at 1280; where the defendant made no motion to produce or attempt to subpoena the witness, *Williams*, 481 F.2d at 737.

Moreover, the instruction is not appropriate where the testimony of the witness would not "elucidate the transaction" such as where the testimony would be cumulative, *United States v. Johnson*, 467 F.2d 804, 808 (1st Cir. 1972), or where it would be irrelevant. *United States v. Emalfarb*, 484 F.2d 787 (7th Cir. 1973).

4.17. DIRECT AND CIRCUMSTANTIAL EVIDENCE

(*See* last paragraph of Instruction 1.03, *supra*.)

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 12.04 (5th ed. 2000); *United States v. Kirk*, 534 F.2d 1262, 1279 (8th Cir. 1976).

5.00. FINAL INSTRUCTIONS: CRIMINAL RESPONSIBILITY

Introductory Comment

This section addresses situations in which a person may be found guilty of a crime even if that person did not personally carry out all of the acts constituting the substantive offense.

Final Instructions: Criminal Responsibility

5.01. AIDING AND ABETTING (18 U.S.C. § 2(a)) [1]

A person may [also][2] be found guilty of (insert principal offense) even if [he] [she] personally did not do every act constituting the offense charged,[3] if [he] [she] aided and abetted the commission of (describe principal offense).

In order to have aided and abetted the commission of a crime a person must [, before or at the time the crime was committed,]:[4]

(1) have known (describe principal offense) was being committed or going to be committed; [and]

(2) have knowingly acted in some way for the purpose of [causing] [encouraging] [aiding] the commission of (describe principal offense)[.] [; and]

[(3) have [intended] [known] (insert mental state required by principal offense).][5]

For you to find the defendant guilty of (insert principal offense) by reason of aiding and abetting, the Government must prove beyond a reasonable doubt that all of the elements of (describe principal offense) were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

[You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.]

Notes on Use

1. Unless the principal offense is also submitted to the jury, this instruction should be read together with the principal offense instruction as one instruction. The Burden of Proof language of Instruction 3.09 should be deleted and the Burden of Proof language from Instruction 5.01 used. If there is a self defense or entrapment defense, the appropriate language from Instruction 3.09 must be included. The instruction should look something like the following:

The crime of _____ as charged in the Indictment, has ____ elements, which are:

One, _____;

Two, _____; and

Etc., _____.

A person may be found guilty of (insert principal offense) even if [he] [she] personally did not do every act constituting the offense charged, if [he] [she] aided and abetted the commission of (describe principal offense).

In order to have aided and abetted the commission of a crime a person must [, before or at the time the crime was committed,]:

(1) have known (describe principal offense) was being committed or going to be committed; [and]

(2) have knowingly acted in some way for the purpose of [causing] [encouraging] [aiding] the commission of (describe principal offense)[.] [; and]

[(3) have [intended] [known] (insert mental state required by principal offense).]

For you to find the defendant guilty of (insert principal offense) by reason of aiding and abetting, the Government must prove beyond a reasonable doubt all of the elements of (describe principal offense) were committed by some person or persons and that the defendant aided and abetted that crime [and must further prove beyond a reasonable doubt that the defendant was not [entrapped] [acting in self defense], [acting in defense of _____] [as defined in Instruction No. _____]]; otherwise you must find the [that particular] defendant not guilty of this crime [under Count ____].

2. Use if the defendant's guilt on the principal offense is also being submitted to the jury.

3. This instruction should be given only when the evidence in the case shows that more than one person has performed acts necessary for the commission of an offense. In other words, a person cannot aid and abet himself in the commission of a crime.

4. Use only if there is a disputed issue with respect to whether the defendant acted before the crime was completed. This language has been repeatedly approved. *See United States v. Jarboe*, 513 F.2d 33, 36 (8th Cir. 1975).

5. If the principal offense requires a particular mental state, the aider and abettor must share in that mental state. *United States v. Lard*, 734 F.2d 1290, 1298 (8th Cir. 1984); *Jarboe*. The instruction must include that mental state. *See United States v. Burkhalter*, 583 F.2d 389, 391 (8th Cir. 1978) (knowledge that the item transferred was a firearm required, but knowledge that the principal was unlicensed was not required). *United States v. Powell*, 929 F.2d 724 (D.C. Cir. 1991).

Committee Comments

Subsection 2(a) of Title 18, United States Code, applies to the entire Criminal Code. *United States v. Sopczak*, 742 F.2d 1119, 1121 (8th Cir. 1984).

Final Instructions: Criminal Responsibility

> To be guilty of aiding and abetting is to be guilty as if one were a principal of the underlying offense. Aiding and abetting is not a separate crime but rather is linked to the underlying offense and shares the requisite intent of the offense.

United States v. Roan Eagle, 867 F.2d 436, 445 (8th Cir. 1989).

The elements of aiding and abetting are generally "(1) that the defendant associated himself with the unlawful venture; (2) that he participated in it as something he wished to bring about; and (3) that he sought by his actions to make it succeed." *United States v. Santana*, 524 F.3d 851, 853 (8th Cir. 2008) (quoting *United States v. McCracken*, 110 F.3d 535, 540 (8th Cir. 1997)).

Association with the offense has been interpreted as meaning sharing in the state of mind of the principal. *United States v. Roan Eagle*, 867 F.2d at 445 n.15. Accordingly, the instruction has provided for inserting the intent or knowledge required for the principal offense, if any particular state of mind is required. *See* Note 4, *supra*.

A defendant may be convicted on the theory of aiding and abetting even where the indictment does not charge him on that theory. *United States v. Beardslee*, 609 F.2d 914 (8th Cir. 1979). This instruction covers either situation.

A person may be convicted of an offense on the theory of aiding and abetting even if the alleged principal has earlier been acquitted. *Standefer v. United States*, 447 U.S. 10 (1980).

> In order to sustain the conviction of a defendant who has been charged as an aider and abettor, it is necessary that there be evidence showing an offense to have been committed by a principal and that the principal was aided or abetted by the accused, although it is not necessary that the principal be convicted or even that the identity of the principal be established.

Ray v. United States, 588 F.2d 601, 603-04 (8th Cir. 1978); *Pigman v. United States*, 407 F.2d 237, 239 (8th Cir. 1969). *See also United States v. Hudson*, 717 F.2d 1211, 1214 (8th Cir. 1983).

There must be knowing participation in the activity. *United States v. Roan Eagle*, 867 F.2d at 445. *See also United States v. Powell*, 929 F.2d 724 (D.C. Cir. 1991), for discussion of what must be known to aid and abet a violation of 18 U.S.C. § 924(c).

Final Instructions: Criminal Responsibility

5.02. CAUSING AN OFFENSE TO BE COMMITTED (18 U.S.C. § 2(b))

(No definition of "causing" is provided. The Elements instruction should be modified to indicate that the defendant voluntarily and intentionally caused any acts he did not personally do.)[1]

Notes on Use

1. Thus, for example, the elements of Mail Theft, Instruction 6.18.1708A, *infra*, would be modified as follows:

One, the letter was in the United States mail;

Two, the defendant *voluntarily and intentionally caused* John Doe to take the letter from the mail;

Three, in so doing the defendant intended to deprive the addressee temporarily or permanently of the letter.

Note that the defendant must have the state of mind required by the principal offense. *See United States v. Rucker*, 586 F.2d 899, 905 (2d Cir. 1978).

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 18.01 (5th ed. 2000).

Section 2(a) and 2(b) offenses may overlap.

> Section 2(b) merely "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." The statute makes it "unnecessary that the intermediary who commits the forbidden act have a criminal intent." *United States v. Rapoport*, 545 F.2d 802, 806 (2d Cir. 1976).

United States v. Rucker, 586 F.2d 899, 905 (2d Cir. 1978). *See also United States v. Cook*, 745 F.2d 1311, 1315 (10th Cir. 1984).

A person who is legally incapable of committing an offense as a principal because he does not have the required status (*e.g.* a bank employee under 18 U.S.C. § 656) can commit that offense by causing an intermediary who has such status to do the acts. *United States v. Tobon-Builes*, 706 F.2d 1092, 1099-1100 (11th Cir. 1983); *United States v. Ruffin*, 613 F.2d 408, 413-14 (2d Cir. 1979).

5.03. CORPORATE RESPONSIBILITY

Defendant[s] (insert name[s]) [is] [are] [a] corporation[s]. A corporation may be found guilty of a criminal offense.

A corporation can act only through its agents -- that is, its directors, officers, employees, and other persons authorized to act for it.

To find a corporate defendant guilty you must find beyond a reasonable doubt that:

One, each element of the crime charged against the corporation was committed by one or more of its agents; and

Two, in committing those acts the agent[s] intended, at least in part, to benefit the corporation; and

Three, each act was within the scope of employment of the agent who committed it.

For an act to be within the scope of an agent's employment it must relate directly to the performance of the agent's general duties for the corporation. It is not necessary that the act itself have been authorized by the corporation.

If an agent was acting within the scope of his employment, the fact that the agent's act was illegal, contrary to his employer's instructions or against the corporation's policies will not relieve the corporation of responsibility for it.

[You may, however, consider the existence of corporate policies and instructions and the diligence of efforts to enforce them in determining whether the agent was acting with intent to benefit the corporation or within the scope of his employment.][1]

[If you find that an act of an agent was not committed within the scope of the agent's employment or with intent to benefit the corporation, then you must consider whether the corporation later approved the act. An act is approved if, after it is performed, another agent of the corporation, having full knowledge of the act and acting within the scope of his employment and with the intent to benefit the corporation, approves the act by his words or conduct. A corporation is responsible for any act or omission approved by its agents.][2]

Final Instructions: Criminal Responsibility

Notes on Use

1. This bracketed paragraph should only be given if there is evidence of such instructions or policies and enforcement efforts. As noted in the comments below, the Committee does not believe that current case law supports an instruction stating that any act of a corporate agent in violation of corporate rules or policies is outside the scope of employment.

2. This bracketed paragraph should be given only if there is evidence of ratification. "Ratification is an express or implied adoption or confirmation, with knowledge of all material matters by one person of an act performed in his behalf by another who at that time assumed to act as his agent but lacked authority to do so." *Federal Enterprises v. Greyhound Leasing & Fin.*, 849 F.2d 1059, 1062 n.5 (8th Cir. 1988), quoting Missouri cases.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 18.05 (5th ed. 2000). *See also* "Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions," 92 Harv. L. Rev. 1227, 1247 (1979).

"Generally a corporation is responsible for the criminal acts of its officers, agents and employees committed within the scope of their employment and for the benefit of the corporation." *United States v. Richmond*, 700 F.2d 1183, 1195 n.7 (8th Cir. 1983) (citing *United States v. Cincotta*, 689 F.2d 238 (1st Cir. 1982), and *United States v. Demauro*, 581 F.2d 50, 53 (2d Cir. 1978)). *See also New York Central & H. R.R. v. United States*, 212 U.S. 481, 493-95 (1909); *Egan v. United States*, 137 F.2d 369, 379 (8th Cir. 1943); *United States v. Beusch*, 596 F.2d 871, 877-78 (9th Cir. 1979), and *United States v. Hilton Hotels Corporation*, 467 F.2d 1000, 1004-07 (9th Cir. 1972).

"Scope of employment" is not confined to its strict agency definition, but applies to acts directly related to the performance of duties which the officer or agent has the broad authority to perform. *Continental Baking Company v. United States*, 281 F.2d 137, 149-50 (6th Cir. 1960); *United States v. Carter*, 311 F.2d 934, 941-42 (6th Cir. 1963); *United States v. Koppers Co., Inc.*, 652 F.2d 290, 298 (2d Cir. 1981). It includes acts on the corporation's behalf in performance of the agent's general line of work. *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 407 (4th Cir. 1985); *United States v. Armour & Co.*, 168 F.2d 342, 344 (3d Cir. 1948); *Hilton Hotels*, 467 F.2d at 1004. "Thus, scope of employment in practice means little more than that the act occurred while the offending employee was carrying out a job-related activity." 92 Harv. L. Rev., *supra*, at 1250. *See Egan*, 137 F.2d at 379-80, for an application of this definition.

Some courts in criminal cases have attempted to define "scope of employment" in terms of "actual" and "apparent" authority. *See, e.g., Continental Baking*, 281 F.2d at 150-51; *United States v. American Radiator and Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970); *United States v. Basic Const. Co.*, 711 F.2d 570, 572-73 (4th Cir. 1983); *United States v. Bi-Co Pavers, Inc.*, 741 F.2d 730, 737-38 (5th Cir. 1984). "Actual" authority is broken down into "express" and "implied" authority. However, as *Continental Baking* points out, these concepts

and their definitions are most helpful and relevant in deciding certain contract and tort questions in civil cases and do not properly address the true basis for criminal liability. 281 F.2d at 149-50. *See also United States v. Carter*, 311 F.2d at 941-42. In criminal cases, analyzing "scope of employment" in terms of "authority" collides with the rule that the corporation can be liable "without proof that the conduct was within the agent's actual authority, and even though it may have been contrary to express instructions." *United States v. Hilton Hotels Corporation*, 467 F.2d at 1004.

Intent to benefit the corporation is treated as a separate element in this instruction. It is sometimes treated as part of the definition of "scope of employment." *See United States v. Automated Medical Laboratories, Inc.*, 770 F.2d at 407.

If the act is done within the course of employment and with intent to benefit the corporation, the corporation is criminally liable even if the act was unlawful, *Egan*, 137 F.2d at 379; *United States v. American Radiator and Standard Sanitary Corp.*, 433 F.2d at 204-05; *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d at 407, or was done contrary to instructions or policies. *Egan, id.*; *American Radiator, id.*; *Automated Medical Laboratories, Inc., id.*; *Hilton Hotels*, 467 F.2d at 1044; *United States v. Beusch*, 596 F.2d at 877; *United States v. Harvey L. Young & Sons, Inc.*, 464 F.2d 1295, 1297 (10th Cir. 1972). *Cf.* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 18.05 (5th ed. 2000), which includes a statement that a corporate agent is not acting within the scope of his employment when he performs an act which the corporation has forbidden. The Committee does not believe this portion of No. 18.05 is supported by current case law.

The jury may, however, consider the existence of such policies or instructions in determining whether the agent was acting for the benefit of the corporation. *United States v. Beusch*, 596 F.2d at 878; *United States v. Basic Const. Co.*, 711 F.2d at 573. The fact that an employee did not follow instructions "may be a factor militating against corporate criminal responsibility but rises no higher." *United States v. Harvey L. Young & Sons, Inc.*, 464 F.2d at 1297. Merely stating or publishing such instructions and policies without diligently enforcing them is not enough to place the acts of an agent who violates them outside the scope of his employment. *Beusch*, 596 F.2d at 878.

The agent need only intend in part to benefit the corporation. He may also intend to benefit himself. *United States v. Gold*, 743 F.2d 800, 823 (11th Cir. 1984); *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d at 407. It is not necessary that the actions have actually benefitted the corporation. *Id.*; *United States v. Carter*, 311 F.2d at 942. However, there is no corporate liability where the agent acts solely for his personal gain, directly contrary to the interests of the corporation. *Standard Oil Company of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962).

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5.04. PERSONAL RESPONSIBILITY OF CORPORATE AGENT

A person is responsible for acts which [he] [she] performs, or causes to be performed, on behalf of a corporation, just as [he] [she] is responsible for acts performed on [his] [her] own behalf. This is so even if [he] [she] acted on instructions of a superior. [But a person is not responsible for the acts performed by other people on behalf of a corporation, even if those persons are officers, employees or other agents of the corporation.][1]

Notes on Use

1. Do *not* use the last sentence if a conspiracy involving other corporate employees or agents is charged.

5.05. ACCESSORY AFTER THE FACT (18 U.S.C. § 3)

As I told you, the crime charged in [Count __] [this case] is being an accessory after the fact to (describe principal offense, e.g., the kidnaping of Jane Doe.) A defendant may be found guilty of being an accessory after the fact even though [he] [she] did not personally commit the crime of (describe principal offense).

The crime of being an accessory after the fact, as charged in [Count __ of] the Indictment, has three elements, which are:

One, (name[s] of principal[s]) had committed the offense of (describe principal offense).[1]

Two, the defendant knew that (name[s] of principal[s]) had committed the offense of (describe principal offense); and

Three, after the crime of (describe principal offense) had been committed by (name[s] of principal[s]), the defendant helped[2] [him] [her] [them], in order to prevent [his] [her] [their] arrest, trial or punishment.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

To assist you in determining whether the crime of (describe offense) was committed by some other person or persons, as required by Element One above, you are advised that the elements of (describe offense) are as follows:[3]

One, _____;

Two, _____; and

Etc., _____.

Notes on Use

1. This must be a federal offense.

2. The language of the statute is "receives, relieves, comforts or assists."

3. List the elements of the offense to which the defendant is alleged to have been an accessory after the fact. *See* Instruction 3.09, *supra*, and Section 6, *infra*.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 22.03 (5th ed. 2000); *United States v. Bissonette*, 586 F.2d 73, 76 (8th Cir. 1978).

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An accessory after the fact is one who, knowing that a substantive offense has been committed by another, receives, relieves, comforts or assists the principal in order to hinder or delay the principal's apprehension, trial or punishment. *Skelly v. United States*, 76 F.2d 483, 487 (10th Cir. 1935).

Knowledge is an element for being an accessory after the fact under 18 U.S.C. § 3 (1976). Knowledge requires knowing that an offense has been committed, but it does not require knowledge that a warrant has been issued. *United States v. Bissonette*, 586 F.2d at 76. (Knowledge of the issuance of a warrant is required where the charge is harboring a fugitive under 18 U.S.C. § 1071. *Id.* at 77; *United States v. Udey*, 748 F.2d 1231 (8th Cir. 1984).) Knowledge may be inferred from circumstantial evidence. *Bissonette*, 586 F.2d at 76.

Assistance given to the offender must be after the fact because if it was given before or during the commission of the offense, the person assisting would be an aider and abettor. *United States v. Balano*, 618 F.2d 624, 631 (10th Cir. 1979); *United States v. Barlow*, 470 F.2d 1245, 1253 (D.C. Cir. 1972).

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5.06A. CONSPIRACY: ELEMENTS (18 U.S.C. § 371)

The crime of conspiracy[1] as charged in [Count __ of] the Indictment, has four[2] elements, which are:

One, on or before (insert date), two [or more] persons reached an agreement or came to an understanding [to (insert offense, e.g., transport stolen property across state lines)] [to defraud the United States by (describe means, e.g., impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes)];

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect;

Three, at the time the defendant joined in the agreement or understanding, [he] [she] knew the purpose of the agreement or understanding; and

Four, while the agreement or understanding was in effect, a person or persons who had joined in the agreement knowingly did one or more of the following acts: (list overt acts for which there is sufficient evidence[3]) for the purpose of carrying out or carrying forward the agreement or understanding.

(Insert paragraph describing Government's burden of proof, *see* Instruction 3.09, *supra*.)

Notes on Use

1. The general conspiracy statute is 18 U.S.C. § 371. At least 24 other conspiracy statutes are found in Titles 15, 18 and 21.

2. Conspiracies charged under 18 U.S.C. § 371 require an overt act which is covered in Element Four. An overt act is not required in conspiracies charged under 15 U.S.C. § 1; 18 U.S.C. §§ 241, 286, 384 and 1951; and 21 U.S.C. § 846. When one of these conspiracies is charged, Element Four should be omitted. *See* Instruction 6.21.846A; *United States v. Shabani*, 513 U.S. 10 (1994) (21 U.S.C. § 846 does not require proof of an overt act).

3. The government may prove uncharged overt acts to satisfy this element. *United States v. Sellers*, 603 F.2d 53 (8th Cir. 1979), *vacated*, 447 U.S. 932 (1980), *aff'd in relevant part*, 628 F.2d 1085 (8th Cir. 1980).

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Committee Comments

See 1A and 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 18.02, 31.01-.11 (5th ed. 2000). *See also United States v. Sopczak*, 742 F.2d 1119, 1121 (8th Cir. 1984); *United States v. Brown*, 584 F.2d 252, 260 (8th Cir. 1978).

"The offense of conspiracy consists of an agreement between [two or more persons] to commit an offense, attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States v. Hoelscher*, 764 F.2d 491, 494 (8th Cir. 1985); *United States v. Brown*, 604 F.2d 557, 560 (8th Cir. 1979) (citing *United States v. Skillman*, 442 F.2d 542, 547 (8th Cir. 1971), and *United States v. Jackson*, 549 F.2d 517, 530 (8th Cir. 1977)).

A single defendant can be indicted and convicted of conspiracy, provided that an unlawful agreement with others is proved, *Kitchell v. United States*, 354 F.2d 715, 720 n.8 (1st Cir. 1966), although if the other conspirator(s) have actually been acquitted of that conspiracy there can be no conviction of the sole remaining alleged conspirator. *United States v. Peterson*, 488 F.2d 645 (5th Cir. 1974). In an instance where all other *named* conspirators have been acquitted, but there is evidence that the conspiracy involved other, *unnamed* conspirators, conviction of the sole remaining named conspirator is permissible. *United States v. Allen*, 613 F.2d 1248 (3d Cir. 1980); *United States v. Artuso*, 618 F.2d 192 (2d Cir. 1980).

One who joins an existing conspiracy is guilty of conspiracy and adopts the prior acts of the other conspirators. *United States v. Green*, 600 F.2d 154 (8th Cir. 1979); *United States v. Lemm*, 680 F.2d 1193, 1204 (8th Cir. 1982). A new conspiracy is not created each time a new member joins, or an old member quits, an existing conspiracy. *United States v. Burchinal*, 657 F.2d 985, 990 (8th Cir. 1981); *United States v. Heater*, 689 F.2d 783, 788 (8th Cir. 1982). A defendant must know of the existence of the conspiracy. Without such knowledge he cannot be guilty even if his acts furthered the conspiracy. *United States v. Falcone*, 311 U.S. 205, 210 (1940).

Proof of association or acquaintanceship alone is not enough to establish a conspiracy; however, it has a sufficient bearing on the issue to make it admissible. *United States v. Apker*, 705 F.2d 293, 298 (8th Cir. 1983); *United States v. Brown*, 584 F.2d at 259-60.

The government need show that only one of the conspirators engaged in one overt act in furtherance of the conspiracy. *United States v. Hermes*, 847 F.2d 493, 495 (8th Cir. 1988).

5.06B. CONSPIRACY: "AGREEMENT" EXPLAINED

The Government must prove that the defendant reached an agreement or understanding with at least one other person. [It makes no difference whether that person is a defendant or named in the Indictment. You do not have to find that all of the persons charged were members of the conspiracy.][1]

The "agreement or understanding" need not be an express or formal agreement or be in writing or cover all the details of how it is to be carried out. Nor is it necessary that the members have directly stated between themselves the details or purpose of the scheme.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has joined in an agreement or understanding. A person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of one, does not thereby become a member.

But a person may join in an agreement or understanding, as required by this element, without knowing all the details of the agreement or understanding, and without knowing who all the other members are. Further it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

You must decide, after considering all of the evidence, whether the conspiracy alleged in [the Indictment] [Count ___ of the Indictment] existed. If you find that the alleged conspiracy did exist, you must also decide whether the [defendant] [defendant whose case you are considering] voluntarily and intentionally joined the conspiracy, either at the time it was first formed or at some later time while it was still in effect. In making that decision, you must consider only evidence of [the defendant's] [that defendant's] own actions and statements. You may not consider actions and pretrial statements of others [, except to the extent that pretrial statements of others describe something that had been said or done by [the] [that] defendant].[2]

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Notes on Use

1. Use such part or parts of this paragraph as are pertinent to the case. Where the other conspirators are not named, the jury may be instructed that there is no requirement that the other conspirators be named as long as the jury finds beyond a reasonable doubt that there are other coconspirators. *United States v. Collins*, 552 F.2d 243 (8th Cir. 1977).

2. This paragraph is consistent with the court's ruling in *Bourjaily v. United States*, 483 U.S. 171 (1987), and *United States v. Shigemura*, 682 F.2d 699, 705 (8th Cir. 1982). *See also United States v. Stephenson*, 53 F.3d 836 (7th Cir. 1995); *United States v. Hagmann*, 950 F.2d 175, 180 (5th Cir. 1991); *United States v. de Ortiz*, 907 F.2d 629, 635 (7th Cir. 1990) (*en banc*).

Committee Comments

See 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 31.04, 31.05, 31.07 (5th ed. 2000).

Agreement among the coconspirators to pool their resources is the essence of the crime. *Iannelli v. United States*, 420 U.S. 770, 777 (1975). To prove the existence of an agreement, proof of a formal agreement is not necessary - proof of a common plan or tacit understanding is sufficient. *United States v. Powell*, 853 F.2d 601, 604 (8th Cir. 1988); *United States v. Campbell*, 848 F.2d 846, 851 (8th Cir. 1988); *United States v. Massa*, 740 F.2d 629, 636 (8th Cir. 1984); *Nilva v. United States*, 212 F.2d 115, 121 (8th Cir. 1954).

Mere knowledge of an illegal act or association with an individual engaged in illegal conduct is not enough to prove a person has joined a conspiracy. *United States v. Raymond*, 793 F.2d 928, 932 (8th Cir. 1986). However, the defendants need not have knowledge of every detail or part of a conspiracy as long as the evidence overall shows that the defendants agreed to the essential nature of the conspiracy. *Blumenthal v. United States*, 332 U.S. 539, 557 (1947).

The Eighth Circuit has held that once the government has established existence of a conspiracy, even slight evidence connecting a particular defendant to the conspiracy may be sufficient proof of the defendant's involvement in the conspiracy. *United States v. Reeves*, 83 F.3d 203 (8th Cir. 1996).

However, "slight evidence" is a standard for appellate review and this term should not be included in jury instructions. *United States v. Cooper*, 567 F.2d 252, 253 (3d Cir. 1977).

The conspirators need not know or even have contact with each other. *United States v. Michaels*, 726 F.2d 1307, 1311 (8th Cir. 1984); *Blumenthal v. United States*, 332 U.S. at 557-58. It is sufficient that a conspirator knows that the purpose and complexity of the scheme would require the aid and assistance of the additional persons. *United States v. Rosado-Fernandez*, 614 F.2d 50, 53 (5th Cir. 1980); *United States v. Wilson*, 506 F.2d 1252, 1257 (7th Cir. 1974).

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5.06C. CONSPIRACY: SUBSTANTIVE OFFENSE; ELEMENTS [1]

[To assist you in determining whether there was an agreement or understanding to (name substantive offense, e.g., transport stolen property across state lines), you are advised that the elements of (name offense) are:

One, _____;

Two, _____; and

Etc., _____.[2]

Keep in mind that the Indictment charges a conspiracy to commit (name offense) and not that (name offense) was committed.][3]

[Count __ of the Indictment charges defendant[s] (name[s]) [and others who are not presently defendants in this case] with the charge of conspiracy to commit (name substantive offense, e.g., mail fraud). Earlier in these instructions I defined the elements of (name of offense, e.g., mail fraud) in relation to the charges that the defendant (describe conduct, e.g., willfully participated in a scheme to defraud). You may use those definitions in considering whether the defendants conspired to commit (name offense, e.g., mail fraud), keeping in mind that the charges in Count __ charge a conspiracy to commit (name offense, e.g., mail fraud) and not that (name offense, e.g., mail fraud) was committed.][4]

Notes on Use

1. Use this instruction if a conspiracy to commit a substantive offense has been charged.

2. List elements of offense which was the object of the conspiracy. *See* Instruction 3.09, *supra*, and Section 6, *infra*.

3. Use this paragraph if a conspiracy to violate a federal statute is charged and the substantive offense is not charged elsewhere in the indictment.

4. Use this paragraph if a conspiracy to violate a federal statute is charged and the substantive offense is also charged in the indictment and submitted to the jury.

5.06D. CONSPIRACY: "OVERT ACT" EXPLAINED [1]

It is not necessary that the act done in furtherance of the conspiracy be in itself unlawful. It may be perfectly innocent in itself.

It is not necessary that the defendant have personally committed the act, known about it, or witnessed it. It makes no difference which of the conspirators did the act. This is because a conspiracy is a kind of "partnership" so that under the law each member is an agent or partner of every other member and each member is bound by or responsible for the acts of every other member done to further their scheme.

[It is not necessary that the Government prove, beyond a reasonable doubt, that more than one act was done in furtherance of the conspiracy. It is sufficient if the Government proves beyond a reasonable doubt, *one* such act; but in that event, in order to return a verdict of guilty, you must unanimously agree upon which act was done.]

Notes on Use

1. Use if evidence has been admitted on more than one overt act.

Committee Comments

See 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 31.03, 31.07 (5th ed. 2000).

The overt act itself need not be criminal in nature. *United States v. Hermes*, 847 F.2d 493, 496 (8th Cir. 1988). An overt act may be perfectly innocent in itself. *United States v. Donahue*, 539 F.2d 1131, 1136 (8th Cir. 1976). The overt act need not involve more than one of the conspirators. *United States v. Bass*, 472 F.2d 207, 213 (8th Cir. 1973).

The overt act found by the jury must have taken place within the statute of limitations. If this is an issue, the jury should be appropriately instructed. *United States v. Alfonso-Perez*, 535 F.2d 1362 (2d Cir. 1976).

The government is not limited in its proof to establishing overt acts specified in the indictment, nor must the government prove every overt act alleged. *United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir. 1985).

5.06E. CONSPIRACY: SUCCESS IMMATERIAL

It is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

Committee Comments

See 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 31.08 (5th ed. 2000).

There is likewise no requirement that the defendant benefitted from the unlawful plan. *United States v. Kibby*, 848 F.2d 920, 922 (8th Cir. 1988).

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5.06F. SINGLE CONSPIRACY: MULTIPLE CRIMES [1]

The Indictment charges a conspiracy to commit [two] [three, etc.] separate crimes. It is not necessary for the Government to prove a conspiracy to commit [*both*] [*all*] of those crimes. It would be sufficient if the Government proves, beyond a reasonable doubt, a conspiracy to commit *one* of those crimes. In that event, to return a verdict of guilty, you must unanimously agree *which* of the [two] [three, etc.] crimes was the subject of the conspiracy. If you are unable to unanimously agree, you cannot find the defendant guilty of conspiracy. [In this case, you must decide which of the controlled substances, if any, [each] defendant conspired to [manufacture] [distribute] [possess with intent to distribute] and record your unanimous verdict on the form provided.][2]

Notes on Use

1. For use only where the indictment has charged a single conspiracy to commit multiple crimes.

2. Where evidence at trial shows two alternative drugs were involved in a multi-drug conspiracy, a special verdict form is required; otherwise, the sentencing court must use the relevant drug conversion which yields the most favorable sentencing result for the defendants. *United States v. Baker*, 16 F.3d 854, 858 (8th Cir. 1994) (citing the principle as also applying to 21 U.S.C. § 856); *United States v. Page-Bey*, 960 F.2d 724, 727-28 (8th Cir. 1992) (no plain error given the evidence at trial and the fact that it would have made no difference in the sentence if the jury had found that the defendant was involved with only one of the charged substances); *United States v. Watts*, 950 F.2d 508, 515 (8th Cir. 1991).

5.06G. CONSPIRACY: SINGLE/MULTIPLE CONSPIRACIES

(1) The Indictment charges that the defendants were members of one single conspiracy to commit the crime of _____.[1]

(2) One of the issues you must decide is whether there were really two (or more) separate conspiracies -- one [between] [among] _____ and _____ to commit the crime of _____, and another one [between] [among] _____ and _____ to commit the crime of _____.[2]

(3) The Government must convince you beyond a reasonable doubt that each defendant was a member of the conspiracy charged in the Indictment. If the Government fails to prove this as to a defendant, then you must find that the defendant not guilty of the conspiracy charge, even if you find that [he] [she] 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] [she] was a member of the conspiracy charged in the Indictment.[3]

[A single conspiracy may exist even if all the members did not know each other, or never met 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. Similarly, just because there were different subgroups 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. These are factors you may consider in determining whether more than one conspiracy existed.]

Notes on Use

1. If a multiple conspiracy instruction is given, 5.06B, which explains agreement, may need some revision. The bracketed paragraph, which relates in part to the question of agreement, may be tailored to the facts of the particular case.

2. If the court concludes that a multiple conspiracy instruction is required by the evidence but that the specificity called for by the model instruction is not appropriate, the following shorter version may be given:

Final Instructions: Criminal Responsibility

> If the United States has failed to prove beyond a reasonable doubt the existence of the conspiracy which is charged, then you must find the defendant not guilty, even though some other conspiracy did exist or might have existed. Likewise, if the United States has failed to prove beyond a reasonable doubt that the defendant was a member of the conspiracy which is charged, then you must find the defendant not guilty even though [he] [she] may have been a member of some other conspiracy. 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] [she] was a member of the conspiracy charged in the Indictment.

This alternative is based upon an instruction approved in *United States v. Adipietro*, 983 F.2d 1468, 1475 n.7 (8th Cir. 1993); *United States v. Sawyers*, 963 F.2d 157, 161 (8th Cir. 1992); and *United States v. Figueroa*, 900 F.2d 1211, 1216 (8th Cir. 1990).

3. 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. Further, in separate but jointly tried conspiracies, limiting instructions are required to prevent guilt of those participating in one conspiracy from being transferred to those participating in a separate conspiracy. *United States v. Varelli*, 407 F.2d 735, 747 (7th Cir. 1969); *United States v. Jackson*, 696 F.2d at 585-86; *United States v. Snider*, 720 F.2d 985, 990 (8th Cir. 1983).

Committee Comments

See 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 31.09 (5th ed. 2000).

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. *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); *United States v. Lucht*, 18 F.3d 541, 552 (8th Cir. 1994). In these circumstances, an instruction is necessary to ensure a unanimous verdict on one conspiracy. *United States v. Gordon*, 844 F.2d 1397, 1400-02 (9th Cir. 1988).

If there is evidence that supports multiple conspiracies, then whether a conspiracy is one scheme or several is primarily a jury question. *United States v. England*, 966 F.2d 403, 406 (8th Cir. 1992); *United States v. Wilson*, 497 F.2d 602 (8th Cir. 1974).

With respect to single versus multiple conspiracies, the Eighth Circuit has set forth the following guidelines:

> The general test is whether there was "one overall agreement" to perform various functions to achieve the objectives of the conspiracy. A conspirator need not know all of

> the other conspirators or be aware of all the details of the conspiracy, so long as the evidence is sufficient to show knowing contribution to the furtherance of the conspiracy.

United States v. Massa, 740 F.2d 629, 636 (8th Cir. 1984); *United States v. Adipietro*, 983 F.2d 1468, 1475 (8th Cir. 1993); *United States v. Askew*, 958 F.2d 806, 810 (8th Cir. 1992); *United States v. Spector*, 793 F.2d 932, 935-36 (8th Cir. 1986). Moreover, "[t]he existence of a single agreement can be inferred if the evidence revealed that the alleged participants shared 'a common aim or purpose' and 'mutual dependence and assistance existed.'" *United States v. DeLuna*, 763 F.2d 897, 918 (8th Cir. 1985) (quoting *United States v. Jackson*, 696 F.2d 578, 582-83 (8th Cir. 1982)); *United States v. Crouch*, 46 F.3d 871, 874 (8th Cir. 1995).

The involvement of a number of separate transactions does not establish the existence of separate conspiracies. *Spector*, 793 F.2d at 935. Likewise, "'[m]ultiple groups and the performance of separate crimes or acts do not rule out the possibility that one overall conspiracy exists.'" *United States v. Dijan*, 37 F.3d 398, 402 (8th Cir. 1994) (quoting *United States v. Roark*, 924 F.2d 1426, 1429 (8th Cir. 1991)). Further, "'[a] division of labor among conspirators in pursuit of a common goal does not necessitate a finding of discrete schemes.'" *United States v. Askew*, 958 F.2d at 810 (quoting *United States v. Gomberg*, 715 F.2d 843, 846 (3d Cir. 1983)). However, a mere overlap of personnel or knowledge of another's illegal conduct is not by itself proof of a single conspiracy. *United States v. Peyro*, 786 F.2d 826, 829 (8th Cir. 1986).

Whether an indictment charges one or more than one conspiracy is determined under a "totality of the circumstances test" under which the following factors are considered:

(1) time;

(2) persons acting as coconspirators;

(3) the statutory offenses charged in the indictments;

(4) the overt acts charged by the government or any other description of the offenses charged which indicate the nature and the scope of the activity which the government sought to punish in each case; and

(5) places where the events alleged as part of the conspiracy took place.

"The essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement, each with a separate object." *United States v. Thomas*, 759 F.2d 659, 662 (8th Cir. 1985) (addressing a double jeopardy claim).

5.06H. CONSPIRACY: WITHDRAWAL [1]

If a person enters into an agreement but withdraws from that agreement before anyone has committed an act in furtherance of it, then the crime of conspiracy was not complete at that time and the person who withdrew must be found not guilty of the conspiracy.

In order for you to find that a person withdrew from a conspiracy, you must find that person took a definite, positive step to disavow or defeat the purpose of the conspiracy. Merely stopping activities or a period of inactivity is not enough. That person must have taken such action before any member of the scheme had committed any act in furtherance of the conspiracy.

The defendant has the burden of proving that [he] [she] withdrew by the greater weight of the evidence. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more convincing. [If the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the defendant. The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.]

Notes on Use

1. This defense is available only to those conspiracies which require the commission of an overt act as an element.

This instruction, if used, should immediately follow the last paragraph of Instruction 5.06A, *supra*.

Committee Comments

Withdrawal requires an affirmative act to defeat or disavow the purpose of the conspiracy. *Hyde v. United States*, 225 U.S. 347, 369 (1912). "In order to withdraw from a conspiracy, a defendant 'must demonstrate that he took affirmative action to withdraw from the conspiracy by making a clean breast to the authorities or by communicating his withdrawal in a manner reasonably calculated to reach his coconspirators.' *United States v. Zimmer,* 299 F.3d 710, 718 (8th Cir. 2002) (citing *United States v. Granados,* 962 F.2d 767, 773 (8th Cir.1992), *United States v. Askew*, 958 F.2d 806, 812-13 (8th Cir.1992)) A cessation of activities, alone, is not sufficient to establish a withdrawal from the conspiracy. *Zimmer*, 299 F.3d at 718 (citing *Granados,* 962 F.2d at 773)." *United States v. Jackson*, 345 F.3d 638. 648 (8th Cir. 2003).

To constitute a defense withdrawal must come before the commission of an overt act. Thus, an instruction on withdrawal is never appropriate in a conspiracy prosecution under a

conspiracy statute which does not require proof of an overt act. *See United States v. Francis*, 916 F.2d 464 (8th Cir. 1990); *United States v. Grimmett*, 150 F.3d 958 (8th Cir. 1998).

In order to be entitled to an instruction on withdrawal, a defendant must have presented some evidence that he acted affirmatively to defeat or disavow the purpose of the conspiracy. *United States v. Wedelstedt*, 589 F.2d 339 (8th Cir. 1978). The burden of proof that the defendant withdrew is on the defendant. *United States v. Boyd*, 610 F.2d 521, 528 (8th Cir. 1979).

5.06I. CONSPIRACY: CO-CONSPIRATOR ACTS AND STATEMENTS [1]

You may consider acts knowingly done and statements knowingly made by a defendant's co-conspirators during the existence of the conspiracy and in furtherance of it as evidence pertaining to the defendant even though they were done or made in the absence of and without the knowledge of the defendant.[1] This includes acts done or statements made before the defendant had joined the conspiracy, for a person who knowingly, voluntarily and intentionally joins an existing conspiracy is responsible for all of the conduct of the co-conspirators from the beginning of the conspiracy.

[Acts and statements which are made before the conspiracy began or after it ended are admissible only against the person making them and should not be considered by you against any other defendant.][2, 3]

Notes on Use

1. This instruction conforms to the Court's ruling in *Bourjaily v. United States*, 483 U.S. 171 (1987). The court decides the admissibility of conspiratorial statements and the jury should not reexamine this ruling. *United States v. de Ortiz*, 907 F.2d 629, 633 (7th Cir. 1990) (*en banc*); *United States v. Petrozzielo*, 548 F.2d 20, 23 (1st Cir. 1977); *United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977); *United States v. Enright*, 579 F.2d 980, 986-87 (6th Cir. 1978); *United States v. Gantt*, 617 F.2d 831, 845-46 (D.C. Cir. 1980); 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 31.06 (5th ed. 2000).

2. This instruction can be used in other situations involving joint conduct such as with respect to co-schemers in a mail fraud case. In such a situation, "conspirator" should be changed to "schemer," and "conspiracy" to "scheme." *See* Instruction 4.07, *supra*.

3. An explicit limiting instruction must be given if evidence of acts or statements by any co-conspirator made before or after the conspiracy began or ended has been admitted. *See United States v. Snider*, 720 F.2d 985, 999 (8th Cir. 1983).

See also Grunewald v. United States, 353 U.S. 391 (1957); *United States v. Steele*, 685 F.2d 793, 800-01 (3d Cir. 1982); *United States v. Del Valle*, 587 F.2d 699 (5th Cir. 1979); *United States v. Payne*, 635 F.2d 643, 645 (7th Cir. 1980). Basically, this line of cases holds that, unless the conspiracy includes an agreement to cover up the conspiracy, once the central purposes of the conspiracy have been accomplished, statements made to cover up the conspiracy are not statements made in furtherance of the conspiracy and cannot be admitted against the other conspirators.

Final Instructions: Criminal Responsibility

Committee Comments

See United States v. Shigemura, 682 F.2d 699, 705 (8th Cir. 1982).

A. *Admissibility*.

Rule 801(d)(2)(E) governs the admissibility of co-conspirator statements. That rule provides that a statement is not hearsay if it is offered against a party and constitutes "a statement by a co-conspirator of [the] party during the course and in furtherance of the conspiracy." Such an out-of-court declaration is admissible against a defendant under this rule if the government demonstrates (1) that a conspiracy existed; (2) that the defendant and the declarant were members of the conspiracy; and (3) that the declarations were made during the course of and in furtherance of the conspiracy. *United States v. Bell*, 573 F.2d 1040, 1043 (8th Cir. 1978).

Rule 104(a) of the Federal Rules of Evidence requires the district court to apply a preponderance of the evidence standard in assessing the admissibility of evidence. *Bourjaily v. United States*, 483 U.S. 171, 176 (1987); *United States v. Meeks*, 857 F.2d 1201, 1203 (8th Cir. 1988). In making its determination as to the admissibility of co-conspirator statements, the district court may consider any relevant evidence, including the hearsay statements sought to be admitted. *Bourjaily*, 483 U.S. at 176-79; *Meeks*, 857 F.2d at 1203.

Although the statements themselves may be considered in determining their admissibility, most courts have held that there must be at least some independent evidence (other than the statements) of the existence of the conspiracy before the statements are admitted. *United States v. Garbett*, 867 F.2d 1132, 1134 (8th Cir. 1989); *United States v. Lindemann*, 85 F.3d 1232, 1238, 1239 (7th Cir. 1996); *United States v. Clark*, 18 F.3d 1337, 1340-41 (6th Cir. 1994); *United States v. Sepulveda*, 15 F.3d 1161, 1181 (1st Cir. 1993); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir. 1988); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988); *United States v. Martinez*, 825 F.2d 1451, 1453 (10th Cir. 1987).

In *Bourjaily*, it was further held that there can be no separate Confrontation Clause challenges to the admissibility of a co-conspirator's out-of-court statement once it is deemed admissible under Rule 801(d)(2)(E). 483 U.S. at 181-84. Thus, the unavailability of the declarant need not be demonstrated, *United States v. Inadi*, 475 U.S. 387 (1986), nor need the court make a separate inquiry into the reliability of the statement. *Bourjaily*, 483 U.S. at 183-84. (Prior to *Inadi* and *Bourjaily*, this circuit had recognized the two-pronged Confrontation Clause inquiry. *See United States v. Massa*, 740 F.2d 629, 638-41 (8th Cir. 1984).)

The procedural steps to be utilized when the admissibility of a co-conspirator's statement is at issue are set forth in the *Bell* opinion, 573 F.2d at 1044.

B. *Jury Instructions*.

The admission of co-conspirator statements into a trial traditionally gave rise to three different jury instructions. One instruction advised the jury it could consider statements of co-conspirators made in the absence of and without the knowledge of the defendant or before he was a member. *See* instruction set out in *United States v. Shigemura*, 682 F.2d at 705 (first two

sentences of first instruction on page 705). This is still a valid instruction. As held in *United States v. Treadwell*, 760 F.2d 327, 338 (D.C. Cir. 1985), such an instruction can be helpful because:

> A lay jury is unlikely to have knowledge or understanding of the vicarious liability principles underlying use of co-conspirator acts and statements or in what circumstances the acts and statements of one person may be imputed to another.

A second instruction sanctioned by this circuit cautioned the jury on the weight to be given to and credibility of a co-conspirator's statement. *See Shigemura*, 682 F.2d at 705 (third sentence of first instruction on page 705); *United States v. Bell*, 573 F.2d at 1044; *United States v. Baykowski*, 615 F.2d 767, 772 (8th Cir. 1980). Such an instruction was approved in *Bell*, and failure to give such an instruction was disapproved in *Baykowski*.

However, Supreme Court decisions holding that reliability can be inferred would eliminate any reason to caution the jury on the weight and credibility to be accorded co-conspirator statements. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), held that: "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." The *Bourjaily* opinion held that the co-conspirator exception to the hearsay rule meets the "firmly rooted" test and that, under *Roberts*, a court need not make an independent inquiry into the reliability of such statements.

See also United States v. Regilio, 669 F.2d 1169, 1176 (7th Cir. 1981), holding that the community of interest of co-conspirators evidences likelihood of reliability. In *Regilio*, the court found no error in the refusal to give a co-conspirator statement instruction which ended as follows:

> If you find that the statement was made, you may give the statement such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care, particularly since the statement in question was not under oath or subject to cross-examination.

669 F.2d at 1178. The court held that, unlike accomplice testimony, out-of-court co-conspirator declarations "are not inherently unreliable because when the statement is made the declarant, unlike a testifying accomplice, has no reason to inculpate his co-conspirator falsely."

After *Bourjaily* it would appear that the only cautionary instruction the jury should be given with respect to such statements would go to the credibility of the witness who testifies to the statements, and then only if an accomplice, informant or immunized witness instruction is applicable. *See* Instructions 6.03-.05, *infra*. In a conspiracy prosecution, the testimony of an accomplice/co-conspirator is not per se unreliable and it is for the jury to decide how much weight such testimony should be given. *United States v. Sopczak*, 742 F.2d 1119, 1121 (8th Cir. 1984); *United States v. Evans*, 697 F.2d 240, 245 (8th Cir. 1983).

It would seem that a cautionary instruction with respect to the statement itself would not come into play unless the credibility of the declarant had been attacked under Rule 806 of the

Federal Rules of Evidence. Then the jury could be given a standard credibility instruction tailored to apply to the nontestifying declarant.

5.06J. CONSPIRACY: "CO-CONSPIRATOR LIABILITY" (*Pinkerton* Charge)

Each member of a conspiracy is responsible for crimes committed by other members of the conspiracy, if the Government proves each of the following elements beyond a reasonable doubt:

One, (name of person) committed the crime of [e.g. kidnaping], [as set forth in instruction number __];

Two, (name of person) was a member of [the] the conspiracy at the time the [e.g. kidnaping] was committed;

Three, (name of person) committed the crime of [e.g. kidnaping] in furtherance of the conspiracy;

Four, the [e.g., kidnaping] was within the scope of the conspiracy, or was reasonably foreseeable as a necessary or natural consequence of the conspiracy;[1] and

Five, (name of the defendant) was also a member of the conspiracy at the time of the [e.g. kidnaping].

[Insert paragraph describing Government's burden of proof; *see* Instruction 3.09 *supra*]

Notes on Use

1. Use when the government pursues a theory of co-conspirator liability. Where this instruction is appropriate, it should be given in conjunction with other applicable conspiracy instructions under this chapter. *United States v. Lucas*, 932 F.2d 1210 (8th Cir. 1991).

Committee Comments

This instruction incorporates the *Pinkerton* principle of co-conspirator liability. *Pinkerton v. United States*, 328 U.S. 640, 645-47 (1946). This instruction is supported by *United States v. Pierce*, 479 F.3d 546 (8th Cir. 2006); *United States v. Navarrete-Barron*, 192 F.3d 786, 792-93 (8th Cir. 1999); *United States v. Golter*, 880 F.2d 91, 93 (8th Cir.1989).

6.00. FINAL INSTRUCTIONS: ELEMENTS OF OFFENSES

Introductory Comment

This section contains elements instructions for many commonly prosecuted criminal offenses. Also included are definitions of particular terms used in the individual elements instructions or statute. Definitions of terms generally applicable to many offenses are included in Section 8, *infra*.

An instruction on the elements of a crime should be as simple and direct as possible. Separating the elements and numbering them should make the instruction both easier to draft and more understandable to the jury. Instruction 3.09 on the government's burden of proof should follow the elements instructions.

If a lesser-included offense is to be submitted to the jury, it should be given immediately after the greater offense. Instruction 3.10, *supra*, contains a format for the lesser-included offense.

Final Instructions: Elements of Offenses

6.18.04. MISPRISION OF A FELONY (18 U.S.C. § 4)

The crime of misprision of a felony, as charged in [Count _____ of] the Indictment, has four elements, which are:

One, (insert name of person other than the defendant) committed the crime of (insert description of felony offense);

Two, the defendant had full knowledge of that fact;

Three, the defendant failed to notify authorities that the crime had been committed; and

Four, the defendant took an affirmative step to conceal the crime.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The defendant must commit some affirmative act to prevent discovery of the earlier felony. Mere failure to make the crime known will not suffice. *Neal v. United States*, 102 F.2d 643, 649 (8th Cir. 1939); *United States v. Adams*, 961 F.2d 505, 508 (5th Cir. 1992); *Lancey v. United States*, 356 F.2d 407, 410 (9th Cir. 1966) (mere silence without an affirmative act of concealment is insufficient to establish commission of the offense).

Committee Comments

Some recent cases suggest that the four elements of the offense can be collapsed into three: (1) the defendant knew that another person had committed the alleged felony; (2) the defendant failed to notify authorities; and (3) the defendant took an affirmative step to conceal the crime. *See, e.g.*, *United States v. Adams*, 961 F.2d at 508. The Eighth Circuit follows the more traditional formulation with four elements. *Neal v. United States*, 102 F.2d at 646; *see also United States v. Cefalu*, 85 F.3d 964, 969 (2d Cir. 1996), *United States v. Baez*, 732 F.2d 780, 782 (10th Cir. 1984), and *United States v. Ciambrone*, 750 F.2d 1416, 1417 (9th Cir. 1984).

It is irrelevant whether at the time of concealment the authorities had knowledge of either the felony crime or the identity of the perpetrator. *Lancey v. United States*, 356 F.2d at 409 (recognizing *Neal v. United States*, 102 F.2d 643 (8th Cir. 1939), as the leading case on the subject).

The crime of misprision typically does not apply to those who participate in the commission of an offense. *United States v. Bolden*, 368 F.3d 1032, 1036-37 (8th Cir. 2004). Subject to Fifth Amendment concerns, however, the misprision statute can be applied to those who participate in the underlying criminal activity. *Roberts v. United States*, 445 U.S. 552, 558 (1980). The valid assertion of a Fifth Amendment privilege against self-incrimination would prevent a misprision prosecution for concealing evidence of one's own crime. *United States v. Caraballo-Rodriquez*, 480 F.3d 62, 72 (1st Cir. 2007) (citing *United States v. Kuh*, 541 F.2d 672, 677 (7th Cir. 1976) ("if the duty to notify federal authorities is precluded by constitutional

privilege, it is difficult to understand how a conviction [under 18 U.S.C. § 4] could be substantiated”)). Similarly, a common law privilege, such as that between an attorney and a client or between a doctor and patient, may excuse or justify the non-disclosure on the grounds of privilege. *United States v. Caraballo-Rodriquez*, 480 F.3d at 72.

Deciding what constitutes concealment is a question of fact for the jury. “Concealment of crime has been condemned throughout our history. The citizen’s duty to ‘raise the hue and cry’ and report felonies to the authorities was an established tenet of Anglo-Saxon law at least as early as the 13th century. Although the term ‘misprision of felony’ now has an archaic ring, gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.” *Roberts v. United States*, 445 U.S. at 558. Disclosing only part but not all of what is known about the crime, or “throwing dust in the eyes” of investigators and thereby providing them with misleading information, qualifies as concealment. *Neal v. United States*, 102 F.2d at 649. Similarly, providing authorities with the false impression that the felony crime had not occurred satisfies the concealment requirement. *Patel v. Mukasey*, 526 F.3d 800, 803 (5th Cir. 2008). Harboring a perpetrator, with full knowledge that they committed a felony crime, can constitute concealment. *Lancey v. United States*, 356 F.2d at 410. The Eighth Circuit has discussed what constitutes “concealment” in the context of a related statute which makes it a crime to harbor or conceal a person for whom an arrest warrant or other process has been issued. *United States v. Hayes*, 518 F.3d 989, 993-95 (8th Cir. 2008) (construing 18 U.S.C. § 1071).

The language of the statute requires the one with actual knowledge that another has committed a felony to come forward and reveal that knowledge “as soon as possible.” The cases have interpreted “as soon as possible” to mean when there is an opportunity to do so. *Lancey v. United States*, 356 F.2d at 411 (recognizing that one held captive by a perpetrator does not have an opportunity to notify authorities). Whether a defendant charged with misprision came forward “as soon as possible” is a question of fact for the jury to resolve and may require the trial court to modify element three to accommodate the facts unique to an individual case. Fear of the perpetrator, without more, does not excuse the failure to notify authorities. *Id.* (recognizing that if fear of the perpetrator were a defense, there seldom could be a misprision conviction).

6.18.111. ASSAULT ON A FEDERAL OFFICER WITH A DANGEROUS OR DEADLY WEAPON (18 U.S.C. § 111)

The crime of assault[1] on a federal officer [with a dangerous or deadly weapon], as charged in [Count ___ of] the Indictment, has [three] [four] elements, which are:

One, the defendant forcibly assaulted (describe federal officer by position and name)[2] [with a deadly or dangerous weapon];[3]

Two, the assault was done voluntarily and intentionally;[4] [and]

[Three, the assault resulted in bodily injury;[5] and]

[Three,] [Four,] at the time of the assault, (name of officer) was doing what he was employed by the Federal Government to do.[6]

An "assault" is any intentional and voluntary attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the attempt is made in fear of immediate bodily harm.[7]

"Forcibly" means by use of force. Physical force is sufficient but actual physical contact is not required. You may also find that a person who, in fact, has the present ability to inflict bodily harm upon another and who threatens or attempts to inflict bodily harm upon such person acts forcibly. In such case, the threat must be a present one.[8]

[A "deadly and dangerous weapon" is an object used in a manner likely to endanger life or inflict serious bodily harm. A weapon intended to cause death or danger but that fails to do so because of a defective component is a deadly or dangerous weapon.][9]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The wording of the introductory paragraph and Elements One and Three (or Four if bodily injury resulted) must be modified to conform to the indictment if forcibly “resists, opposes, impedes, intimidates, or interferes . . . on account of the performance of his (her) official duties” is charged.

2. Whether a person performing the functions delegated to the assault victim is a federal officer or employee within the meaning of section 111 is a question of law for the court. *See United States v. Oakie*, 12 F.3d 1436 (8th Cir. 1993). However, whether the assault victim was in fact acting as an officer or employee, and whether he was performing federal "investigative, inspection, or law enforcement functions" at the time of the alleged assault, are fact questions for

the jury. *United States v. Oakie*, 12 F.3d at 1440. The Committee recommends that the specific title of the federal officer be used.

3. Use this language if the enhanced penalty under section 111(b) for assault with a deadly or dangerous weapon is charged. The question of what constitutes a deadly or dangerous weapon is a question of fact for the jury. *United States v. Czeck*, 671 F.2d 1195, 1197 (8th Cir. 1982). A thorough discussion of this question is found in *United States v. Moore*, 846 F.2d 1163, 1166-67 (8th Cir. 1988).

4. The assault must be intentional, even though the term "willful" is not used in the statute. *United States v. Feola*, 420 U.S. at 684; *Potter v. United States*, 691 F.2d 1275, 1280 (8th Cir. 1982); *United States v. Manelli*, 667 F.2d 695, 696 (8th Cir. 1981). The requirement that the defendant acted "voluntarily and intentionally" would appear to satisfy that element. *United States v. Hanson*, 618 F.2d 1261, 1264-65 (8th Cir. 1980). In *United States v. Sweet*, 985 F.2d 443, 444-45 (8th Cir. 1993), the court stated "[U]nless used in the statute itself or unless the crime falls within that rare type of offense where defendant's knowledge that [s]he is violating the law is an element of the offense, there is no occasion for an instruction defining specific intent." *Id.* at 444-45 (quoting *United States v. Dougherty*, 763 F.2d 970, 974 (8th Cir. 1985)).

The defendant need not know that the victim is a federal officer. *United States v. Feola*, 420 U.S. at 684-86; *United States v. Michalek*, 464 F.2d 442, 443-44 (8th Cir. 1972). If self-defense is raised, however, knowledge of the official capacity of the victim may be an element necessary for conviction. *See United States v. Feola*, 420 U.S. at 686; *United States v. Lynch*, 58 F.3d 389, 391-92 (8th Cir. 1995).

5. Use this bracketed element if the enhanced penalty under section 111(b) if the assault inflicted bodily injury. "Bodily injury" is not defined in section 111 but is defined in 18 U.S.C. § 1365(g)(4) as "(A) a cut, abrasion bruise, burn or disfigurement; (B) physical pain; (C) illness; (D) impairment of the function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary."

6. State, local or tribal officers are federal officers for the purposes of the statute if included within the designation of 18 U.S.C. § 1114 by reason of contract, designation or deputization. *See United States v. Bettelyoun*, 16 F.3d 850, 852 (8th Cir. 1994), and *United States v. Oakie*, 12 F.3d at 1439-40 (tribal law enforcement officers designated by the Bureau of Indian Affairs to perform federal law enforcement functions are federal officers).

The statute uses the phrase "while engaged in . . . the performance of his official duties." This means simply acting within the scope of what that person is employed to do; it is not defined by whether the officer is abiding by laws and regulations in effect at the time of the incident. The test is whether the person is acting within that area of responsibility, that is, whether the officer's actions fall within the agency's overall mission, in contrast to engaging in a personal frolic of his own. *United States v. Street*, 66 F.3d 969, 978 (8th Cir. 1995).

It is also a violation of the statute to assault a federal officer "on account of" or in retaliation for his discharge of his official duties. *E.g.*, *United States v. Lopez*, 710 F.2d 1071, 1074 n.3 (5th Cir. 1983). If this conduct is charged, Element *Three* should be so modified.

7. The statute prohibits any acts or threats of bodily harm that might reasonably that might reasonably deter a federal official from the performance of his or her duties. Even if there is no physical contact, the force requirement is satisfied even if the defendant's conduct places the officer in fear for his life or safety. *See United States v. Yates*, 304 F.3d 818 (8th Cir. 2002); *United States v. Street*, 66 F.3d 969, 975-76 (8th Cir. 1995); *United States v. Wollenzien*, 972 F.2d 890, 891-92 (8th Cir. 1992).

8. The element of force may be satisfied by proof of actual physical contact or by proof of a threat or display of physical aggression toward the officer that would reasonably inspire fear of pain, bodily harm, or death in a reasonable person. No direct contact is required, simply conduct that places the officer in fear for his life or safety. *See United States v. Street*, 66 F.3d at 977.

9. *See* 18 U.S.C. § 111(b). "Serious bodily harm" has been defined as more than minor injury, but not necessarily injury creating a substantial likelihood of death. *Moore*, 846 F.2d at 1166. See also *United States v. Hollow*, 747 F.2d 481, 482 (8th Cir. 1984).

Committee Comments

See United States v. Yates, 304 F.3d 818 (8th Cir. 2002), for a discussion of the categories of assault and the penalty provisions of section 111; it further holds that in the context of section 111, simple assault is conduct in violation of section 111(a), which does not involve actual physical contact, a dangerous weapon, serious bodily injury, or the intent to commit murder or another serious felony.

If "self defense" is raised as an affirmative defense, an appropriate instruction setting forth the defense and the government's burden thereon should be given. *See United States v. Feola*, 420 U.S. 671 (1975); *United States v. Lynch*, 58 F.3d 389, 391-92 (8th Cir. 1995); *United States v. Alvarez*, 755 F.2d 830, 842-43 (11th Cir. 1985). S*ee also* Instructions 3.09, *supra*, and 9.00 and 9.04, *infra*.

6.18.152A. BANKRUPTCY FRAUD - CONCEALMENT OF ASSETS (18 U.S.C. § 152(1))

The crime of bankruptcy fraud has four elements, which are:

One, on or about (specify time alleged in the Indictment) a bankruptcy case was pending in the United States Bankruptcy Court for the _____ District of _____, in which _____ [doing business as _____] was the Debtor;

Two, (describe the property alleged in the Indictment)[1] was a part of the bankruptcy estate of the Debtor;

Three, the defendant knowingly[2] [concealed] [attempted to conceal;[3]] the (describe the property alleged in the Indictment) from the [custodian] [trustee] [Marshal] [some person] charged with the custody and control of that property; and

Four, such [concealment] [attempt to conceal] was done with the intent to defraud.

The term "debtor" means the person or corporation for whom a bankruptcy case has been commenced.

When a debtor files a petition seeking protection from creditors under the bankruptcy laws, a "bankruptcy estate" is created, which is comprised of all property belonging to the debtor, wherever located, and by whomever held, as of the time of the filing of the bankruptcy case. The "bankruptcy estate" also includes proceeds, products, rents, or profits of or from the property of the estate, but it does not include earnings from services performed by an individual after the case is filed.

"Concealment" means not only hiding property or assets, it also includes preventing the discovery of assets, transferring property or withholding information required to be made known. Concealment of property of the estate may include transferring property to a third party or entity, destroying the property, withholding knowledge concerning the existence or whereabouts of the property, or knowingly doing anything else by which the defendant acts to hinder, unreasonably delay or defraud any creditors. The United States need not prove that the concealment was successful.

Final Instructions: Elements of Offenses

To act with "intent to defraud" means to act knowingly and with the intent to deceive someone for the purpose of causing some [financial loss] [loss of property or property rights] to another, or bringing about a financial gain to oneself or another, to the detriment of a third party.

(Insert paragraph describing Government's burden of proof, *see* Instruction 3.09, *supra.*)

Notes On Use

1. The property alleged to have been concealed must be pled with particularity and, therefore, should be sufficiently identified in the instruction. *See United States v. Arge*, 418 F.2d 721, 724 (10th Cir. 1969).

2. It is the opinion of the Committee that the term “knowingly” is a well-known and often used term which does not need to be defined. If a definition is requested and deemed necessary, see the Committee Comments for Instruction 7.03.

3. This bracketed language should be used where an attempted concealment was unsuccessful. It is no defense that the defendant’s attempt to conceal was unsuccessful. *See United States v. Cherek*, 734 F.2d 1248, 1254 (7th Cir. 1984); *United States v. Porter*, 842 F.2d 1021, 1024 (8th Cir. 1988).

Committee Comments

A similar instruction was discussed in *United States v. Christner*, 66 F.3d 922, 925-26 (8th Cir. 1995).

Property which is subject to a bankruptcy proceeding is to be accorded a broad interpretation, and it also includes equitable interests held by the debtor, such as causes of action. *United States v. Brimberry*, 779 F.2d 1339, 1347-48 (8th Cir. 1985) (citing 4 W. Collier, Bankruptcy, ¶ 541.10 (15th ed.)). However, equitable interests subject to the bankruptcy estate include only existing equitable interests, not the right to acquire such an interest. In *Brimberry*, the court concluded that the right to a constructive trust did not provide a basis for conviction under the bankruptcy fraud statute, but where the bankruptcy court imposed a constructive trust on property purchased with embezzled funds, the court concluded the constructive trust was sufficient to satisfy the "property belonging to the estate of the debtor" element of 15 U. S. C. § 78jjj(c)1(C)(I).

The Committee believes that in bankruptcy fraud cases based upon concealment of assets, materiality is not an element of the offense. It is not mentioned in the statute as an element of the offense, and recent decisions of the Supreme Court would tend to indicate that such an element will not be judicially imposed. *See United States v. Wells*, 519 U.S. 482 (1997).

6.18.152B. BANKRUPTCY FRAUD - MAKING A FALSE STATEMENT (18 U.S.C. § 152(2-4))

The crime of bankruptcy fraud has four elements, which are:

One, on or about (specify time alleged in the Indictment) a bankruptcy case was pending in the United States Bankruptcy Court for the _____ District of _____, in which _____ [doing business as _____] was the Debtor;

Two, the defendant [made] [caused to be made] a false [statement] [oath] [account] [regarding a matter material[1] to] [in relation to] the bankruptcy proceeding;

Three, the defendant knew the [statement] [oath] [account] was false when it was made;

Four, the defendant did so with the intent to defraud.

The term "debtor" means the person or corporation for whom a bankruptcy case has been commenced.

To act with "intent to defraud" means to act knowingly and with the intent to deceive someone for the purpose of causing some [financial loss] [loss of property or property rights] to another, or bringing about a financial gain to oneself or another, to the detriment of a third party.

A matter is "material" if it has a natural tendency to influence, or is capable of influencing, the outcome of the bankruptcy proceeding.

(Insert paragraph describing Government's burden of proof, *see* Instruction 3.09, *supra*.)

Notes On Use

1. There is some question as to whether materiality is an element of the offense of bankruptcy fraud. While Title 18 U.S.C. § 152(2-4) does not specifically mention materiality as an element of the offense, the Eighth Circuit has nevertheless held that materiality is an element which the jury must find in order to support a conviction for bankruptcy fraud. This is so even though it was not expressly set out in the statute. *United States v. Yagow*, 953 F.2d 427, 432 n.2 (8th Cir. 1992). However, the continued validity of *Yagow* on the issue of materiality is open to question in light of the Supreme Court's later opinion in *United States v. Wells*, 519 U.S. 482 (1997). The *Wells* case was not a bankruptcy case at all; rather, it dealt with an analogous prosecution for false statements made to a financial institution in violation of 18 U.S.C. § 1014. In *Wells*, the Supreme Court declined to require materiality where the statute did not impose such a right.

6.18.157. BANKRUPTCY FRAUD SCHEME TO COMMIT (18 U.S.C. § 157)

The crime of bankruptcy fraud, as charged in [Count ___ of] the Indictment, has three elements, which are:

One, the defendant voluntarily and intentionally [devised a scheme or plan to defraud] [intended to devise a scheme or plan to defraud] [participated in a scheme or plan to defraud with knowledge of its fraudulent intent] which scheme is described as follows: (describe scheme or plan in summary form or in manner charged in the Indictment);[1]

Two, the defendant did so with the intent to defraud; and

Three, the defendant [filed a petition in][2] [filed a document in][3] [made a material false or fraudulent representation, claim, or promise concerning or in relation to][4] a Title 11 bankruptcy proceeding for the purpose of [executing] [attempting to execute] [concealing] [attempting to conceal] the scheme or plan to defraud.

The phrase "scheme or plan to defraud" includes any plan or course of action intended to deceive or cheat another out of [money, property, or property rights] by [employing material falsehoods] [concealing material facts] [omitting material facts]. It also means the obtaining of [money or property] from another by means of material false representations or promises. A scheme or plan to defraud need not be fraudulent on its face but must include some sort of fraudulent misrepresentation or promise reasonably calculated to deceive a reasonable person.[5]

To act with "intent to defraud" means to act knowingly and with the intent to deceive someone for the purpose of causing some [financial loss] [loss of property or property rights] to another or bringing about some financial gain to oneself or another to the detriment of a third party.[6] The Government does not need to prove that the [defrauded party] suffered any actual harm, that the scheme was successful, or that the defendant obtained any money or property.[7]

[It does not matter whether the filed [petition / document] was itself false or deceptive so long as the bankruptcy proceeding was used as part of the scheme or plan to defraud.][8]

[A representation, claim, or promise is "false" when it is untrue when made or effectively conceals or omits a material fact.][9]

Final Instructions: Elements of Offenses

Notes on Use

1. In a simple case, a brief description of the fraud should be given in the first element. An example of the summary would be: "the defendant pledged fabricated grain receipts as collateral on loans." Some schemes or plans will be too complicated to lend themselves to short descriptions. In those schemes or plans, the court may more fully summarize the scheme or plan, or refer to the description of the scheme contained in the indictment.

The summary must be consistent with the evidence and not create a material and prejudicial variance between what is alleged in the indictment and what is proven at trial.

2. This bracketed language should be used where the defendant is charged with a violation of 18 U.S.C. § 157(1).

3. This bracketed language should be used where the defendant is charged with a violation of 18 U.S.C. § 157(2).

4. This bracketed language should be used where the defendant is charged with a violation of 18 U.S.C. § 157(3).

5. This definition derived from Eighth Circuit Model Criminal Jury Instruction 6.18.1341 (Mail Fraud) and *United States v. Goodman*, 984 F.2d 235, 237 (8th Cir. 1993).

6. This definition derived from Eighth Circuit Model Criminal Jury Instruction 6.18.1341 (Mail Fraud) and *United States v. Ervasti*, 201 F.3d 1029 (8th Cir. 2000). *See also United States v. Radtke*, 415 F.3d 826, 837 (8th Cir. 2005) ("[I]ntent to defraud need not be proved by direct evidence."); *United States v. Snelling*, 862 F.2d 150, 154 (8th Cir. 1988) (explaining the essential elements of intent to defraud and stating that fraudulent intent "may be inferred by a series of acts and relevant circumstances").

7. Success of the scheme and actual harm upon the defrauded party are not elements of this offense. *See United States v. Onkst*, 235 F. App'x 371, 373 (7th Cir. 2007) (noting that "actual harm upon the defrauded party is not an element of [§ 157(1)]"); *United States v. Wagner*, 382 F.3d 598, 613 (6th Cir. 2004) ("[T]here is simply no requirement that the fraudulent filing have its intended effect for a defendant to be liable under § 157(2). 'Success of the scheme is not an element of the crime.' [*United States v.*]*DeSantis*, 237 F.3d [607,] 613 [(6th Cir. 2001)]. . . . The purported SBA mortgage and note are no less fraudulent merely because they were unconvincing."); *DeSantis*, 237 F.3d at 613 ("Filing itself is the forbidden act. . . . Success of the scheme is not an element of the crime.").

8. This bracketed language should be used where the defendant is charged with a violation of 18 U.S.C. § 157(1) or (2), but not when the defendant is charged with a violation of section 157(3).

9. This bracketed language should be used where the defendant is charged with a violation of 18 U.S.C. § 157(3). This definition derived from Eighth Circuit Model Criminal

Final Instructions: Elements of Offenses

Jury Instruction 6.18.1341 (Mail Fraud) and *Preston v. United States*, 312 F.3d 959 (8th Cir. 2002).

Committee Comments

Congress modeled 18 U.S.C. § 157 after the mail fraud and wire fraud statutes (18 U.S.C. §§ 1341 and 1343). 140 Cong. Rec. H10752-01, at H10773, 1994 WL 545773 (daily ed. Oct. 4, 1994).

In *United States v. Canine*, 61 F. App'x 983 (8th Cir. 2003), the Eighth Circuit upheld a conviction under section 157 where the indictment charged the defendant with making "a false and fraudulent representation concerning and in relation to a [bankruptcy] proceeding . . . in that she knowingly and intentionally failed to report funds she and her husband . . . had received as an inheritance from [her husband's] mother's estate." *Id.* at 984 (modifications in original). The district court instructed the jury that to convict, it must find:

> (1) she voluntarily and intentionally devised a scheme to defraud her husband of money or property received by him as an inheritance, (2) to carry out the scheme to defraud she knowingly failed to disclose a material fact in the Canine bankruptcy proceeding, specifically, "the existence of money or property inherited from [her husband's] mother's estate," and (3) she made the false or fraudulent representation with intent to defraud her husband.

Id. (quoting district court's instructions; modification in *Canine*); *see also United States v. Canine*, 30 F. App'x 678, 680 (8th Cir. 2002) (explaining that "to convict [the defendant] of bankruptcy fraud, the Government had to prove she had devised a scheme to defraud, and to execute or conceal the scheme she filed a bankruptcy petition, filed a document in a bankruptcy proceeding, or made a false or fraudulent representation concerning or in relation to a bankruptcy proceeding").

Final Instructions: Elements of Offenses

6.18.201A. BRIBERY OF PUBLIC OFFICIAL (18 U.S.C. § 201(b)(1))

The crime of bribing a [public official] [person who has been selected to be a public official][1], as charged in [Count ___ of] the Indictment, has three elements, which are:

One, the defendant [gave] [offered] [promised][2] something of value to (name of official or selectee);

Two, at that time (name of official or selectee) was [selected to be] a (name official position, e.g., Special Agent of the Federal Bureau of Investigation);[3] and

Three, the defendant did this act corruptly,[4] that is, with intent to [influence] [induce] (name of official or selectee) (describe the official action or fraud to be influenced or induced - e.g., not to arrest the defendant).

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. This instruction does not cover the second clause of section 201(b)(1). Where an offer or promise is made to give something of value to a third person, the instruction should be so modified.

2. All subsections under section 201(b) and (c) provide for acting "directly or indirectly." Where indirect action is charged, the jury instructions should be modified accordingly.

3. By phrasing the instruction in this manner, the court avoids having to further instruct that a person holding the defendant's particular position is a "public official." However, the court should make such a finding on the record.

4. The Committee believes that the element of "corruptly" is adequately defined by setting out the required intent.

Committee Comments

Section 201(a) is “comprehensive statute applicable to all persons performing activities for or on behalf of the United States, whatever the form of delegation of authority.” *Dixson v. United States*, 465 U.S. 482, 296 (1984). *See Vinyard v. United States*, 335 F.2d 176, 181-83 (8th Cir. 1964).

Bribery requires intent “to influence” an official act or “to be influenced” in an official act. It also requires proof of a quid pro quo. *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999).

The defendant must have acted “corruptly.” “Corruptly" has been recognized as having “a longstanding and well-accepted meaning” in criminal law. “It denotes ‘[a]n act done with an

intent to give some advantage inconsistent with official duty and the rights of others. . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another.'" *United States v. Aguilar*, 515 U.S. 593, 616 (1995) (J. Scalia, joined by J. Kennedy and Thomas, concurring in part and dissenting in part) (internal cites omitted), in the context of 18 U.S.C. § 1503. *See also* Committee Comments, Instruction 6.18.1503A, *infra*, for a discussion of "corruptly" in 18 U.S.C. § 1503. The following definition given by district court in *Aguilar* was cited with approval:

> An act is done "corruptly" if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or other benefit to oneself or a benefit of another person.

Id. at 616-17.

It is immaterial whether the public official lacked the legal authority to take the action sought by the defendant, whether the official is not corrupted, or whether the object of the bribe cannot be obtained. *Vinyard v. United States*, 335 F.2d at 182. The statute is violated when a bribe is given or an offer to bribe is made regardless of whether afterward the person "discovers that for some reason or another, be it a mistake on his part or a mistake on the part of some officer or agency of the United States, there was actually no occasion for him to have done it. *Id. at 182*. The illegality of an arrest is not a viable defense in a prosecution for bribery of the arresting officer. *Id.* at 181.

"Public official" is defined in section 201(a)(1). Although the public official must be a federal officer, it is not necessary that the defendant know or believe he is a federal official as long as the defendant believed he was dealing with a government official. *United States v. Jennings*, 471 F.2d 1310, 1313 (2d Cir. 1973). It is not necessary that a person be formally employed or under contract with the United States to be a public official; a person is a public official if he occupies a position of public trust with official federal responsibilities, if he possesses some degree of official responsibility for carrying out a federal program or policy. *Dixson v. United States*, 465 U.S. 482, 496, 498-99 (1984). *See United States v. Hang*, 75 F.3d 1275, 1279-81 (8th Cir. 1996).

"The government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *United States v. Sun-Diamond Growers of California*, 526 U.S. at 414. "Official act" is defined in section 201(a)(3).

Giving an illegal gratuity to a public official is a lesser-included offense of bribery. *United States v. Johnson*, 647 F.2d 815 (8th Cir. 1981); *see* Instruction 6.18.201E, *infra*.

See Instruction 3.10, *supra*, for a form for a lesser-included offense instruction which must be given if the factual element of intent is disputed. Where intent is not in dispute, the lesser-included offense instruction should be withheld.

Final Instructions: Elements of Offenses

6.18.201B. RECEIVING BRIBE BY PUBLIC OFFICIAL (18 U.S.C. § 201(b)(2))

The crime of [soliciting] [receiving] [agreeing to receive] a bribe by a [public official] [person who has been selected to be a public official], as charged in [Count ___ of] the Indictment, has three elements, which are:

One, the defendant was [selected to be] (describe the defendant's official position, e.g., a special agent of the United States Customs Service)[1];

Two, the defendant [asked for] [accepted] [agreed to receive][2] [personally] [for another person or entity] something of value; and

Three, the defendant did so corruptly[3], that is, in return for being [influenced] [induced] to (describe the official act or fraud offered by the defendant, e.g., allow the importation of contraband drugs into the United States).

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. By phrasing the instruction in this manner, the court avoids having to further instruct that a person holding the defendant's particular position is a "public official." However, the court should such a finding on the record.

2. All subsections under section 201(b) and (c) provide for acting "directly or indirectly." Where indirect action is charged, the jury instructions should be modified accordingly.

3. The Committee believes that the element of "corruptly" is adequately defined by setting out the required intent.

Committee Comments

See Committee Comments, Instruction 6.18.201A, *supra*.

Under 18 U.S.C. § 201(b)(2), "the illegal conduct is taking or agreeing to take money for a promise to act in a certain way." *United States v. Brewster*, 408 U.S. 501, 526 (1972). Performance of the promise is not required, simply acceptance or solicitation with knowledge that the donor is paying compensation for an official act. *Id. at 526-27.*

This offense requires corrupt intent, “a quid pro quo – a specific intent to give or receive something of value *in exchange* for an official act.” An offense under section 201(c)(1)(B), which criminalizes illegal gratuities, punishes the receipt of a gratuity paid "for or because of any official act performed or to be performed” by a public official. An illegal gratuity “may constitute merely a reward for some future act that the public official will take (and may already

have determined to take), or for a past act that he has already taken. *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999).

The statutory requirement that the public official was influenced or induced to act in a certain way does not describe the official's subjective intent; instead, it describes the intention conveyed to the briber. Thus, the statute is violated "by giving false promises of assistance to people he believed were offering him money to influence his official actions." *United States v. Myers*, 692 F.2d 823, 842 (2nd Cir. 1982). *See also United States v. Brewster*, 408 U.S. 501 (1972).

Receiving an illegal gratuity is a lesser-included offense of receiving a bribe. *See* Instruction 6.18.201F, *infra*.

See Instruction 3.10, *supra*, for a form for a lesser-included offense instruction which must be given if the factual element of intent is disputed. Where intent is not in dispute the lesser-included offense instruction should be withheld.

Final Instructions: Elements of Offenses

6.18.201C. BRIBING A WITNESS (18 U.S.C. § 201(b)(3))

The crime of bribing a witness, as charged in [Count ____ of] the Indictment, has three elements, which are:

One, (name of witness) was to be a witness under oath or affirmation at (describe proceeding, e.g., a trial before the United States District Court for the District of Nebraska);

Two, the defendant [gave] [offered] [promised] something of value to (name of witness)[1]; and

Three, the defendant did this act corruptly,[2] that is, with the intent to influence [(name of witness') testimony] [(name of witness) to be absent from the proceeding described].

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. This section can also be violated by offering to give something of value to any *other* person or entity.

2. The Committee believes that the element of "corruptly" is adequately defined by setting out the required intent.

Committee Comments

See Committee Comments, Instructions 6.18.201A-B, *supra*.

Final Instructions: Elements of Offenses

6.18.201D. SOLICITING BRIBE BY WITNESS (18 U.S.C. § 201(b)(4))

The crime of [soliciting] [receiving] [agreeing to receive] a bribe by a witness, as charged in [Count _____ of] the Indictment, has three elements, which are:

One, the defendant was to be a witness under oath or affirmation at (describe proceeding, e.g., a hearing before the National Labor Relations Board); and

Two, the defendant [asked for] [accepted] [agreed to receive][1] something of value [personally] [for another person or entity]; and

Three, the defendant did so corruptly,[2] that is, in return for [being influenced in his testimony at the (e.g., hearing)] [absenting himself from the (e.g., hearing)].

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The defendant may also be charged with demanding, exacting, soliciting, seeking or receiving something of value.

2. The Committee believes that the element of "corruptly" is adequately defined by setting out the required intent.

Committee Comments

See Committee Comments, Instructions 6.18.201A-C, *supra*.

6.18.201E. ILLEGAL GRATUITY TO PUBLIC OFFICIAL (18 U.S.C. § 201(c)(1)(A))

The crime of [giving] [offering] [promising] an illegal gratuity[1] to a public official[2], as charged in [Count _____ of] the Indictment, has three elements, which are:

One, the defendant [gave] [offered] [promised] a [payment] [thing of value] not authorized by law to (name of official);

Two, the defendant did so [for] [because of] an official act[3] to be performed by (name of official); and

Three, at that time, (name of official) was a (name official position, e.g., Member of Congress)[3].

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. "Illegal gratuity" is used to describe a violation of section 201(c)(1)(A) in numerous cases, including by the Supreme Court in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398; the phrase is a generally recognized substitute for the more cumbersome phraseology in the statute. However, the statute does not refer to this crime as an "illegal gratuity." If the parties do not want to characterize this conduct as an "illegal gratuity," they may substitute the statutory language.

2. The statute also applies to former public officials and persons who have been selected to be public officials. If one of these alternatives is charged, the language in the elements should be changed accordingly.

3. "Official act" is defined in section 201(a)(3) as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity." It includes "decisions or actions generally expected of the public official. These decisions or actions do not need to be specifically described in any law, rule, or job description to be considered to be an 'official act.'" 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 27.08 (5th ed. 2000).

4. By phrasing the instruction in this manner, the court avoids having to further instruct that a person holding the defendant's particular position is a "public official." However, the court should make such a finding on the record. *See United States v. Hang*, 75 F.3d 1275, 1279 (8th Cir. 1996) ("The classification of an individual as a 'public official' is a legal determination" and is subject to *de novo* review.).

Final Instructions: Elements of Offenses

Committee Comments

See United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999); *United States v. Johnson*, 647 F.2d 815 (8th Cir. 1981).

The subsections to section 201(c) prohibit illegal gratuities. The distinguishing feature between a bribe and an illegal gratuity is the intent element. "Bribery requires intent 'to influence' an official act or 'to be influenced' in an official act, while illegal gratuity requires only that the gratuity be given or accepted 'for or because of' an official act. In other words, for bribery there must be a *quid quo pro* – a specific intent to give or receive something of value *in exchange* for an official act." *United States v. Sun-Diamond Growers of California*, 526 U.S. at 404-05. *See also United States v. Johnson*, 647 F.2d 815, 818 (8th Cir. 1981). For a violation of section 201(c)(1)(A), "the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *United States v. Sun-Diamond Growers of California*, 526 U.S. at 414. Some laws which prohibit receipt of honoraria are subject to challenge on First Amendment grounds. *See United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).

Giving an illegal gratuity is a lesser-included offense of bribery. *United States v. Oseby*, 148 F.3d 1016, 1021 (8th Cir. 1998); *United States v. Johnson*, 647 F.2d at 818. *See also* Instruction 6.18.201A, *supra*.

6.18.201F. RECEIVING ILLEGAL GRATUITY BY PUBLIC OFFICIAL (18 U.S.C. § 201(c)(1)(B))

The crime of [demanding] [receiving] [agreeing to receive][1] an illegal gratuity[2] by a public official[3], as charged in [Count _____ of] the Indictment, has three elements, which are:

One, the defendant was a (describe the defendant's official position, e.g., an employee of the Internal Revenue Service);[4]

Two, the defendant [demanded] [received] [agreed to receive] a [payment] [thing of value] not authorized by law; and

Three, the defendant did so [for] [because of] an official act[5] to be performed by (name of official).

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statute also provides for seeking, accepting and agreeing to accept illegal gratuities. When any of this activity is charged, the appropriate words should be substituted in the instruction.

2. "Illegal gratuity" is used to describe a violation of section 201(c)(1)(A) in numerous cases, including by the Supreme Court in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999); the phrase is a generally recognized substitute for the more cumbersome phraseology in the statute. However, the statute does not refer to this crime as an "illegal gratuity." If the parties do not want to characterize this conduct as an "illegal gratuity," they may substitute the statutory language.

3. The statute also applies to former public officials and persons who have been selected to be public officials. If one of these alternatives is charged, the language in the elements should be changed accordingly.

4. By phrasing the instruction in this manner, the court avoids having to further instruct that a person holding the defendant's particular position is a "public official." However, the court should make such a finding on the record. *See United States v. Hang*, 75 F.3d 1275, 1279 (8th Cir. 1996) ("The classification of an individual as a 'public official' is a legal determination" and is subject to *de novo* review.).

5. "Official act" is defined in section 201(a)(3) as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity." It includes "decisions or actions generally expected of the public official. These decisions or actions do not need to be specifically described in any law, rule, or job description to be

considered to be an 'official act.'" 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 27.08 (5th ed. 2000).

Committee Comments

See Committee Comments, Instruction 6.18.201E, *supra*; *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999); *United States v. Johnson*, 647 F.2d 815 (8th Cir. 1981).

The subsections to section 201(c) prohibit illegal gratuities. The distinguishing feature between a bribe and an illegal gratuity is the intent element. "Bribery requires intent 'to influence' an official act or 'to be influenced' in an official act, while illegal gratuity requires only that the gratuity be given or accepted 'for or because of' an official act. In other words, for bribery there must be a *quid quo pro* – a specific intent to give or receive something of value *in exchange* for an official act." *United States v. Sun-Diamond Growers of California*, 526 U.S. at 404-05. *See also United States v. Johnson*, 647 F.2d 815, 818 (8th Cir. 1981). For a violation of section 201(c)(1)(A), "the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *United States v. Sun-Diamond Growers of California*, 526 U.S. at 414. Some laws which prohibit receipt of honoraria are subject to challenge on First Amendment grounds. *See United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).

Giving an illegal gratuity is a lesser-included offense of bribery. *United States v. Oseby*, 148 F.3d 1016, 1021 (8th Cir. 1998); *United States v. Johnson*, 647 F.2d at 818. *See also* Instruction 6.18.201A, *supra*.

6.18.228. FAILURE TO PAY CHILD SUPPORT OBLIGATION (18 U.S.C. § 228)

The crime of failure to pay a child support obligation, as charged in [Count _____ of] the Indictment, has three elements, which are:

One, the defendant failed to pay a known[1] support obligation;

Two, the defendant acted willfully;[2] and

Three, the support obligation was for a child where the child and the defendant resided in two different states and the support remained unpaid [for a period longer than 1 year] [in an amount greater than $5,000];[3]

or

Three, the support obligation was for a child where the child and the defendant resided in two different states and the support remained unpaid [for a period longer than 2 years] [in an amount greater than $10,000];[4]

or

Three, the support obligation remained unpaid [for a period longer than 1 year] [in an amount greater than $5,000] and the defendant traveled in [interstate] [foreign] commerce with the intent to evade paying the obligation.[5]

The phrase "support obligation" means any amount determined, with use of a court order or an order of an administrative process pursuant to the law of a state or of an Indian tribe, to be due from a person for the support or maintenance of a child, or of a child and the parent with whom the child is living.[6]

To act "willfully" means the defendant knew the support obligation was owed and, nevertheless, the defendant voluntarily and intentionally failed to pay the support obligation despite having an ability to pay.[7]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. For a support obligation to be "known," the Government must introduce some evidence that the defendant was aware of the support obligation at the time it was created or shortly thereafter. *United States v. Crawford*, 115 F.3d 1397, 1407 (8th Cir. 1997) (finding that

proof of knowledge is sufficient where there is evidence that the defendant "knew he had children and knew he was required to make support payments [pursuant to state court orders]"). *See also United States v. Mattice*, 186 F.3d 219, 225-26 (2d Cir. 1999).

2. The statute uses the phrase "willfully fails to pay" and the legislative history of the act states that this phrase was borrowed from the statutes that make willful failure to pay taxes a federal crime. *H.R. Rep. No. 102-771* at 6 (1992).

> In *United States v. Crawford*, 115 F.3d 1397, 1407 (8th Cir. 1997), the Eighth Circuit held that " willfulness" in a § 228 prosecution should be determined by the standard set forth in *Cheek v. United States*, 498 U.S. 192 (1991), which requires proof that the defendant's conduct was the voluntary and intentional violation of a known legal duty. *See also* Instruction 7.02, *supra*, Committee Comments. The government is not required to prove that the defendant knew his failure to pay child support was a violation of a federal criminal statute, but must prove that the defendant knew of his legal duty to pay child support and nevertheless voluntarily and intentionally violated that duty.

3. 18 U.S.C. § 228(a)(1). This violation is a misdemeanor. *See* 18 U.S.C. § 228(c)(1). Proof of either nonpayment for more than one year or a past due unpaid amount in excess of $5,000 is sufficient to establish guilt. Interstate flight by the defendant is not an element of this offense.

4. 18 U.S.C. § 228(a)(3). This violation is a felony. *See* 18 U.S.C. § 228(c)(2). Proof of either nonpayment for more than two years or a past due unpaid amount in excess of $10,000 is sufficient to establish guilt. Interstate flight by the defendant is not an element of this offense.

5. 18 U.S.C. § 228(a)(2). This violation is a felony. *See* 18 U.S.C. § 228(c)(2). To establish guilt there must be proof of either nonpayment for more than one year or a past due unpaid amount in excess of $5,000, along with proof that the defendant traveled in interstate or foreign commerce with the intent to avoid paying the support obligation. The intent to avoid payment of the support obligation need not be the sole reason for the interstate/foreign travel.

6. 18 U.S.C. § 228(f)(3).

7. Although ability to pay is not an explicit element of the offense, the Eighth Circuit has held that ability to pay is a factor in establishing proof of willfulness. *United States v. Harrison*, 188 F.3d 985, 987 (8th Cir. 1999). The legislative history of the statute also indicates that "ability to pay" should be considered in assessing willfulness. *H.R. Rep. No. 102-771* at 6 (1992). A source of income, in whatever form it might exist, is relevant to show ability to pay. *Harrison*, 188 F.3d at 987.

Committee Comments

See United States v. Crawford, 115 F.3d 1397 (8th Cir. 1997); *United States v. Russell*, 186 F.3d 883 (8th Cir. 1999); *United States v. Harrison*, 188 F.3d 985 (8th Cir. 1999).

The statute defines "support obligation" to include "*any amount* . . . determined under a court order . . . to be due from a person for the support and maintenance of a child . . . that has remained unpaid for a period longer than one year." 18 U.S.C. § 228 (emphasis added). Thus, the Committee does not believe the government is required to prove that during the period alleged in the indictment, the defendant had the ability to pay the entire amount of the past due support that is owed. *United States v. Mattice*, 186 F.3d 219 (2d Cir. 1999). The Committee likewise believes that the government's proof does not need to include an arrearage order memorializing the failure to pay and establishing the exact amount of past due child support owed. *United States v. Black*, 125 F.3d 454, 463-64 (7th Cir. 1997). It is for the trier of fact to determine, based upon proof of a court order or agency ruling creating the support obligation, whether the past due support obligation is within the provisions of the charged offense, e.g., any amount unpaid for more than one year, or unpaid in an amount in excess of $5,000. *Black*, 125 F.3d at 464.

The emancipation of the child does not preclude a subsequent child support enforcement prosecution for willful failure to pay that arose prior to the emancipation of the child. "Emancipation ends a child support obligation, but it does not retroactively whisk away any arrearage that accumulated before emancipation." *United States v. Black*, 125 F.3d 454, 468 (7th Cir. 1997), *cited with approval in United States v. Harrison*, 188 F.3d 985 (8th Cir. 1999). "That this debt arose before passage of the CSRA is irrelevant. What is relevant is that it remained unpaid [after the passage of the Act]." *Black* at 466-67. *See also United States v. Russell*, 186 F.3d 883, 886 (8th Cir. 1999).

A prosecution under section 228 "turns only on the defendant's violation of a state court order. It does not turn on the fairness of the order, the reasons underlying the state court's issuance of the order, the defendant's relationship with his children or former spouse, or any other matter involving relitigation of a family law issue. Moreover, there is no language in the [statute] allowing the federal court to look beyond the four corners of the state child support order or permitting the defendant to collaterally attack the state court order in federal court." *United States v. Bailey*, 115 F.3d 1222, 1232 (5th Cir. 1997); *United States v. Harrison*, 188 F.3d at 987 (rejecting defendant's claim that his application for modification of the child support order should be considered as evidence of his inability to pay the amount ordered).

Final Instructions: Elements of Offenses

6.18.287. MAKING A FALSE CLAIM AGAINST THE UNITED STATES (18 U.S.C. § 287)

The crime of making a [false] [fictitious] [fraudulent] claim against the United States, as charged in [Count _____] of the Indictment, has four elements, which are:

One, the defendant [made] [presented] to (name of U.S. officer or agency)[1] a claim against [the United States] [(name of department or agency of the United States)];

Two, the claim was [false] [fictitious] [fraudulent][2] in that (describe how claim was false, etc.);

Three, the defendant knew the claim was [false] [fictitious] [fraudulent]; and

Four, the [false] [fictitious] [fraudulent] matter was material to (name of U.S. officer or agency).

[A claim is "false" or "fictitious" if any part of it is untrue when made, and then known to be untrue by the person making it or causing it to be made.] [A claim is "fraudulent" if any part of it is known to be untrue, and made or caused to be made with the intent to deceive the governmental agency to which submitted.][3]

A claim is "material" if it has a natural tendency to influence, or is capable of influencing the (name of U.S. officer or agency). [However, whether a claim is "material" does not depend on whether (name of U.S. officer or agency) was actually deceived.][4]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. By naming the agency in the elements, the court avoids having to further instruct that the agency is an agency of the United States. However, the court should make such a finding on the record, because that is an issue of law which the court must decide. The jury must decide whether it was material.

2. In some cases, the claim may be charged to be false in more than one way in a single count of an indictment. In those cases, the jury should be instructed as follows:

> You need not find that the claim is false in all of the ways alleged. Instead, you must find unanimously and beyond a reasonable doubt that the claim is false in at least one of the ways set out in a particular count of the Indictment.

3. Definitions of "false," "fictitious" and "fraudulent" should be given. *See* 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 30.05 (5th ed. 2000);

United States v. Milton, 602 F.2d 231, 233 (9th Cir. 1979) on which the instruction is based. *See also* 18 Am. Crim. L. Rev. at 283-84.

4. Materiality is an element of the second ("false claim") clause of 18 U.S.C. § 287, even though the statute, on its face, has no materiality requirement. *United States v. Wells*, 63 F.3d 745, 750 (8th Cir. 1995) (citing *United States v. Adler*, 623 F.2d 1287, 1291 n.5 (8th Cir. 1980)). As an element, the question of materiality must be submitted to the jury and it is a constitutional violation and reversible error for the trial court to refuse to submit this issue to the jury. *United States v. Gaudin*, 515 U.S. 506, 523 (1995) (unanimous opinion).

Committee Comments

The following matters are questions of law to be determined by the court. The court may instruct the jury as to its findings on these matters:

a. Claim. The question of whether the matter submitted constitutes a claim against the United States is a question of law for the court. *United States v. John Bernard Industries*, 589 F.2d 1353, 1360 (8th Cir. 1979) (jury instructed that the submission of sales slips constituted a claim); *United States v. Wertheimer*, 434 F.2d 1004, 1006 (2d Cir. 1970) (jury instructed that the submission of invoices constituted a claim).

b. "Against the United States." The question of whether the entity to which a claim is submitted is a department or agency of the United States is a question of law. 18 U.S.C. § 6 (department or agency defined); *see also* 5 U.S.C. § 101 (executive departments); *United States v. Madeoy*, 912 F.2d 1486, 1494 (D.C. Cir. 1990) (if the court reaches a "conclusion through an exercise in statutory interpretation" about a particular issue, the conclusion is a legislative fact that need not be submitted to the jury). The legal relationship between a private entity to whom a claim is submitted and a governmental agency alleged to have jurisdiction over it is also a question of law. *United States v. Catena*, 500 F.2d 1319, 1325 (3d Cir. 1974).

"Willfulness" is not in the statute and accordingly the Committee has not included it as an element. *See* Committee Comments to Instructions 7.01 and 7.02. "Willfulness" has been specifically held not to be an element of a section 287 offense. *United States v. Cook*, 586 F.2d 572, 574-75 (5th Cir. 1978); *United States v. Beasley*, 550 F.2d 261, 270 n.12 (5th Cir. 1977). Both cases held the portion of the opinion in *United States v. Johnson*, ruling on the constitutionality of section 287, should not be construed to mean that willfulness should be added as a separate element. *See also White Collar Crime: False Claims*, 18 Am. Crim. L. Rev. at 285 (1980).

Courts of Appeals in the past have approved instructions under section 287 which contain the word "willfully"; however, this approval does not mean more than that from a defendant's point of view an instruction containing a willfulness requirement is not erroneous, not that a new element, not mandated by the statute was being judicially created. *United States v. Irwin*, 654 F.2d at 681-82.

The Committee has considered the opinion in *United States v. Martin*, 772 F.2d 1442 (8th Cir. 1985), a fraudulent claim case, and does not believe that the court meant to add an element of "intent to deceive" to the elements of a false or fictitious claim case. In *Martin*, the defendant raised the issue of "intent to deceive" by arguing that his claim was not "fraudulent," of which "intent to deceive" is part of the definition. This distinction was not made clear in the opinion. Since both parties treated "intent to deceive" as an issue, the court was never asked to decide how it became an issue. Thus, the Committee is treating the unanalyzed and unsupported statement in the opinion that "intent to deceive" is an element as dicta and not controlling with respect to false or fictitious claims. *See United States v. Marvin*, 687 F.2d 1221, 1225 (8th Cir. 1982).

Final Instructions: Elements of Offenses

6.18.471. COUNTERFEITING (18 U.S.C. § 471)

The crime of counterfeiting, as charged in [Count __] of the Indictment, has two elements, which are:

One, the defendant [falsely made] [forged] [counterfeited] [altered] a (specify U.S. obligation or security); and

Two, the defendant did so with intent to defraud.

To act with "intent to defraud" means to act with the intent to deceive or cheat, for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant or another. It is not necessary, however, to prove that the United States or anyone else was in fact defrauded.[1]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. *See United States v. Hall*, 801 F.2d 356, 357-60 (8th Cir. 1986); 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 32.01-.13 (5th ed. 2000).

Committee Comments

Whether or not a specific security or obligation is an obligation or security of the United States is a question of law and is to be decided by the trial court. *See* 18 U.S.C. § 8; *United States v. Anzalone*, 626 F.2d 239, 242 (2d Cir. 1980).

The generally accepted definition of "counterfeit" means made in order to bear such a likeness or resemblance to (a genuine obligation of the United States) (currency of the United States) that it is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person who is (presumed) (believed) (supposed) to be honest and upright. *See United States v. Hall*, 801 F.2d 356, 357-60 (8th Cir. 1986); 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 32.11 (5th ed. 2000). If a fact issue exists as to whether the instrument meets this test, a separate instruction should be submitted.

See United States v. Hall, 801 F.2d at 358, for a discussion of "altered."

An intent to defraud unknown third parties is sufficient. *United States v. Pitts*, 508 F.2d 1237, 1240 (8th Cir. 1974).

Final Instructions: Elements of Offenses

6.18.472. PASSING COUNTERFEIT OBLIGATIONS (18 U.S.C. § 472)

The crime of [passing] [selling] [attempting to [pass] [sell]][1] counterfeit obligations, as charged in [Count __ of] the Indictment, has three elements, which are:

One, the defendant [passed] [sold] [attempted to [pass] [sell]] (specify the security or obligation involved, e.g., three counterfeit ten dollar bills);

Two, the defendant knew that (describe security or obligation, e.g., the ten dollar bills) were counterfeit when [he] [she] [passed] [sold] [attempted to [pass] [sell] them; and

Three, the defendant did so with intent to defraud.

To act with "intent to defraud" means to act with the intent to deceive or cheat, for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant or another. It is not necessary, however, to prove that the United States or anyone else was in fact defrauded.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. Section 472 of Title 18, United States Code, specifically provides that an attempt to commit the act constitutes a violation of law just as when the act has been completed. The Committee is of the opinion that the statutory terms "utter" and "publish" are adequately covered by "passing" or "attempting to pass." It may be appropriate in some circumstances to define "attempt." *United States v. Joyce*, 693 F.2d 838 (8th Cir. 1982).

Committee Comments

See United States v. Armstrong, 16 F.3d 289, 292 (8th Cir. 1994); *United States v. Hall*, 801 F.2d 356, 357-60 (8th Cir. 1986); 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 32.06 (5th ed. 2000).

Only obligations or securities of the United States are covered by the statute, and are defined by 18 U.S.C. § 8. *See United States v. Anzalone*, 626 F.2d 239, 242 (2d Cir. 1980).

The generally accepted definition of "counterfeit" is an item bearing such a likeness or resemblance to genuine currency as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person supposed to be honest and upright. *See United States v. Hall*, 801 F.2d 356, 357-60 (8th Cir. 1986). Should a fact issue exist as to whether the instrument meets this test, a separate instruction should be submitted.

An intent to defraud unknown third parties is sufficient. *United States v. Pitts*, 508 F.2d 1237, 1240 (8th Cir. 1974). The cases do not require that the recipient think that the bills are true and genuine. *See United States v. Berry*, 599 F.2d 267, 268 (8th Cir. 1979) (recipients immediately noticed bills were "funny"). A defendant can be convicted of passing to a recipient who knows of the bills' counterfeit character where the bills will eventually be put into circulation. *United States v. Patterson*, 739 F.2d 191, 196 (5th Cir. 1984); *United States v. Hagan*, 487 F.2d 897 (5th Cir. 1973); *United States v. Wolfe*, 307 F.2d 798 (7th Cir. 1962).

Knowledge of the counterfeit character of the obligation is an element of the offense. *See, e.g., United States v. Carll*, 105 U.S. 611, 613 (1881); *United States v. Baker*, 650 F.2d 936, 937 (8th Cir. 1981); *United States v. Pitts*, 508 F.2d at 1240; *United States v. Tucker*, 820 F.2d at 236-37. Knowledge may be shown by circumstantial evidence. *United States v. Armstrong*, 16 F.3d at 292; *United States v. Berry*, 599 F.2d 267, 268-69 (8th Cir. 1979). A mere attempt to pass a bill does not support an inference that the defendant knew it was counterfeit. *United States v. Armstrong*, 16 F.3d at 292; *United States v. Castens*, 462 F.2d 391, 393 (8th Cir. 1972). Depending on the circumstances, however, the appearance of a bill may be sufficient to prove the defendant's guilty knowledge. *United States v. Baker*, 650 F.2d at 937. Acts from which guilty knowledge may be inferred include a rapid series of passings, the passing of counterfeit money at different establishments (even though the accused is not positively identified at other places in the vicinity), the use of large counterfeit bills for small purchases rather than change received in prior purchases, and the segregation of counterfeit bills from genuine bills. *United States v. Armstrong*, 18 F.3d at 292; *United States v. Olson*, 697 F.2d 273, 275 (8th Cir. 1983). Mere possession of a counterfeit obligation will not sustain a conviction. *United States v. Olson*, 697 F.2d 273, 275 (8th Cir. 1983), *on appeal after remand*, 730 F.2d 544 (8th Cir. 1984).

"Passing" and "uttering" are sometimes treated as synonymous. However, "passing" does not require any declaration that the note is good nor does it require an attempt to place it in circulation. "Uttering" may require either or both of these additional elements. *See* 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 32.06 (5th ed. 2000); Committee Comments, Instruction 6.18.495B, *infra*.

It is not necessary to allege or prove that anything of value was actually received for the counterfeit currency. *United States v. Holmes*, 453 F.2d 950, 952 (10th Cir. 1972) (citing *Rader v. United States*, 288 F.2d 452, 453 (8th Cir. 1961)), a forgery case under 18 U.S.C. § 500.

Final Instructions: Elements of Offenses

6.18.495A. FORGERY (18 U.S.C. § 495) (First Paragraph)

The crime of forgery,[1] as charged in [Count __ of] the Indictment, has four elements, which are:

One, the defendant wrote the signature of [payee] on a (specify the document);

Two, the defendant did so without authority;

Three, the defendant did so in order to [obtain money] [enable another to obtain money] from the United States; and

Four, the defendant did so with intent to defraud the United States.

To act with "intent to defraud" means to act with the intent to deceive or cheat, for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant or another. It is not necessary, however, to prove that the United States or anyone else was in fact defrauded, or that anyone actually obtained money from the United States.[2]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The first paragraph of section 495 also covers false making, altering and counterfeiting. If any of these alternatives are charged, elements one and two should be changed accordingly.

2. *See United States v. Speaks*, 453 F.2d 966, 969 n.9 (1st Cir.1972) for this definition of "intent to defraud."

Committee Comments

See 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 32.01-.13 (5th ed. 2000).

The jury should be instructed that intent to defraud the United States is an element of this offense. *See Prussian v. United States*, 282 U.S. 675, 680 (1931); *United States v. Hester*, 598 F.2d 247, 249 (D.C. Cir. 1979); *United States v. Bates*, 468 F.2d 1252, 1255 (5th Cir. 1972). *But see United States v. Dimond*, 445 F.2d 866, 867 (9th Cir. 1971) (proof of intent to interfere with governmental functions is sufficient).

Signing "without authority" is usually part of the definition of forgery. However, there are cases where a forgery can be accomplished with authority. *See United States v. McGovern*, 661 F.2d 27 (3d Cir. 1981; *United States v. Price*, 655 F.2d 958 (9th Cir. 1981).

It is not necessary that anyone actually received money or anything of value from the United States as a result of the forgery. *Hammerschmidt v. United States*, 265 U.S. 182, 188

(1924); *United States v. Rader*, 185 F. Supp. 224, 230 (W.D. Ark. 1960), *aff'd*, 288 F.2d 452 (8th Cir. 1961); *United States v. Price*, 655 F.2d 958, 960 (9th Cir. 1981). In appropriate cases, the jury may be so instructed. *See* 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 32.11 (5th ed. 2000).

6.18.495B. UTTERING A FORGED WRITING (18 U.S.C. § 495) (Second Paragraph)

The crime of uttering a [false] [forged] [altered] [counterfeited] document, as charged in [Count __ of] the Indictment, has three elements, which are:

One, the defendant used or attempted to use (describe document) and in doing so stated or implied, directly or indirectly, that the (specify document) was genuine;

Two, the defendant did so knowing that the (specify document or matter forged or altered, e.g., the endorsement of the payee) was [false] [forged] [altered] or [counterfeited]; and

Three, the defendant did so with intent to defraud the United States.

"Intent to defraud" means to act with the intent to deceive or cheat, for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant or another. It is not necessary, however, to prove that the United States or anyone else was, in fact, defrauded, or that anyone actually obtained money from the United States.[1]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. *See United States v. Speaks*, 453 F.2d 966, 969 n.9 (1st Cir. 1972) for a definition of "intent to defraud" under this statute.

Committee Comments

See 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 32.01-.13 (5th ed. 2000).

The Committee is satisfied that Element *Three* correctly sets out the required mental state. *See Ross v. United States*, 374 F.2d 97, 101 (8th Cir. 1967).

The crime of uttering under 18 U.S.C. § 495 requires proof of an attempt to circulate a check by means of a fraudulent representation that it is "genuine." *United States v. Rivamonte*, 666 F.2d 515 (11th Cir. 1982); *United States v. DeJohn*, 638 F.2d 1048, 1055-56 (7th Cir. 1981) and *United States v. Smith*, 631 F.2d 391, 396 (5th Cir. 1980). It is not necessary that anything of value be actually received in exchange for the written instrument. Merely offering the instrument is sufficient. *United States v. Rader*, 185 F. Supp. 224, 230 (W.D. Ark. 1960), *aff'd*, 288 F.2d 452 (8th Cir. 1961). "'Uttering and publishing' . . . is the putting forth or attempt to circulate the false or forged Treasury check." *United States v. Watts*, 532 F.2d 1215, 1218 n.2 (8th Cir. 1976).

The distinction between "falsely made" and "forged" is addressed in *United States v. Hagerty*, 561 F.2d 1197 (5th Cir. 1977).

The Devitt and Blackmar definition of "forgery," former § 53.05 (*see* now 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 32.12 (5th ed. 2000)), was held adequate in *United States v. Mercer*, 853 F.2d 630, 633 (8th Cir. 1988). The *Mercer* case further held that a theory of defense instruction identical to one required in *United States v. Lewis*, 592 F.2d 1282, 1285 (5th Cir. 1979) was merely cumulative and not required where the jury was adequately instructed on intent to defraud.

Final Instructions: Elements of Offenses

6.18.641. THEFT OF GOVERNMENT MONEY OR PROPERTY (18 U.S.C. § 641)

The crime of theft of Government [property][1] as charged in the Indictment has three elements which are:

One, the defendant voluntarily, intentionally and knowingly [embezzled] [stole] [converted] [money] [thing of value][2] [to [his] [her] [their] own use or to the use of another]; and

Two, the [money] [thing of value][3] belonged to the United States and had a value in excess of One Thousand Dollars ($1,000);[4] and

Three, the defendant did so with intent to deprive the owner of the use or benefit of the [money] [thing of value][5] or property so taken.

The word "value" means the face, par, or market value, or cost price, either wholesale or retail, whichever is greater.[6]

A "thing of value" can be tangible or intangible property.[7]

It is not necessary to prove that the defendant knew that the Government owned the property at the time of the wrongful taking so long as it is established, beyond a reasonable doubt, that the Government did in fact own the money or property involved, that it had a value in excess of One Thousand Dollars ($1,000), and that the defendant knowingly and willfully [embezzled] [stole] [converted] it.

[To "embezzle" means voluntarily and intentionally to take or to convert to one's use the property of another which property came into the defendant's possession lawfully.]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1., 2., 3., 5. The statute covers "record," "voucher," "money," "thing of value," or "property made or being made under [federal] contract." Whichever form is applicable should be used.

4. The statute provides for both a felony offense and a misdemeanor offense. Section 641 was amended by section 606 of The Economic Espionage Act of 1996, Pub. L. 104-294, 110 Stat. 3511, to make value in excess of $1,000 the felony threshold. The Committee recommends that the jury specifically find that the amount embezzled or misapplied exceeded $1,000. If this issue is controverted, the misdemeanor offense should be included in the instructions as a lesser-included offense. Alternatively, a special interrogatory could be submitted to the jury asking it

whether it finds, beyond a reasonable doubt, that the item had a value of more than $1,000 at the time of the alleged offense.

6. 18 U.S.C. § 641.

7. *United States v. May*, 625 F.2d 186, 190-91 (8th Cir. 1980). *See also United States v. DiGilio*, 538 F.2d 972 (3d Cir. 1976) (copying F.B.I. documents and selling the copies held to violate the statute) and *United States v. Morison*, 604 F. Supp. 655, 663-64 (D. Md. 1985), *aff'd*, 844 F.2d 1057 (4th Cir. 1988) (statute applied to unauthorized disclosures of classified information).

Committee Comments

See United States v. Walker, 563 F. Supp. 805 (S.D. Iowa 1983).

The Committee believes that the intent required by 18 U.S.C. § 641 is adequately covered by Elements One and Three. *United States v. May*, 625 F.2d 186 (8th Cir. 1980); *United States v. Denmon*, 483 F.2d 1093 (8th Cir. 1973).

In this statute, steal or stealing has been given broader meaning than larceny at common law. The statute applies to any taking whereby a person dishonestly obtains anything of value belonging to another with the intent to deprive the owner of the rights and benefits of ownership. *Crabb v. Zerbst*, 99 F.2d 562 (5th Cir. 1938). *See also Morissette v. United States*, 342 U.S. 246, 267-69 n.28 (1952).

6.18.656. EMBEZZLEMENT AND MISAPPLICATION OF BANK FUNDS (18 U.S.C. § 656)

The crime of [embezzlement] [misapplication] of bank funds, as charged in [Count _ of] the Indictment, has five elements, which are:

One, the defendant was (describe position and name of bank, e.g., a trust officer at First National Bank);

Two, the defendant [embezzled] [misapplied] the [funds] [credits][1] of the bank;

Three, the amount so [embezzled] [misapplied] was more than $1,000.00;[2]

Four, the defendant did so with the intent [to injure] [to defraud] the bank[3]; and

Five, the bank was (describe federal relation, e.g., insured by the FDIC).[4]

["Embezzlement" means the voluntary and intentional taking, or conversion to one's own use, of the property of another, which property came into the defendant's possession lawfully, by virtue of some office, employment, or position of trust which the defendant held.][5]

["Misapplication" means the unauthorized, or unjustifiable or wrongful use of a bank's funds. Misapplication includes the wrongful taking or use of money of the bank by a bank officer or employee for his own benefit or for the use and benefit of some other person.][6]

[To act with "intent to injure" means to act with intent to cause pecuniary loss.][7] [To act with "intent to defraud" means to act with intent to deceive or cheat, for the purpose of causing a financial loss to someone else or bringing about a financial gain to the defendant or another.][8]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statute also covers "money, funds, assets or securities entrusted to the custody or care" of the bank. If the embezzlement or the misapplication of any of these is charged, the instruction should be changed accordingly.

A more detailed description of the property embezzled or misapplied can be used instead of the general statutory language.

2. The statute provides for both a felony offense and a misdemeanor offense. The Committee recommends that the jury specifically find that the amount embezzled or misapplied exceeded $1,000.00. If this issue is controverted, the misdemeanor offense should be included in

the instructions as a lesser-included offense. Alternatively, a special interrogatory could be submitted to the jury asking it whether it finds, beyond a reasonable doubt, that the item had a value of more than $1,000.00 at the time of the alleged offense.

3. Several cases have held that the required intent could alternatively be intent to deceive the bank's officers, directors, or examiners. *United States v. Steffen*, 641 F.2d 591, 597 (8th Cir. 1981); *United States v. Krepps*, 605 F.2d 101, 107 n.21 (3d Cir. 1979). Both of these cases involved situations where the misapplication was accomplished by a bank officer circumventing policies regarding loans to officers by setting up loans to third parties from which the officer was to receive the proceeds. Judge Devitt has included "intent to deceive" the bank's officers, etc. in jury instructions which are set out in *United States v. Dougherty*, 763 F.2d 970 (8th Cir. 1985). That case involved a misapplication accomplished by a bank officer who issued banker's acceptances to certain bank customers without obtaining loan committee approval. These cases indicate that an instruction on "intent to deceive" may be appropriate in misapplication cases of this nature.

4. Absent a stipulation between the government and the defendant, this instruction must include the element that the victim financial institution fell into one of the categories listed in the statute.

5. *See United States v. Sayklay*, 542 F.2d 942 (5th Cir. 1976); *Woxberg v. United States*, 329 F.2d 284 (9th Cir. 1964); 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 33.04 (5th ed. 2000).

6. *See United States v. Moraites*, 456 F.2d 435 (3d Cir. 1972); *United States v. Bevans*, 496 F.2d 494 (8th Cir. 1974); *United States v. Beran*, 546 F.2d 1316 (8th Cir. 1976); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 33.05 (5th ed. 2000). Conversion of bank funds is encompassed within the definition of misapplication. *United States v. Beran*.

7. *See United States v. Arthur*, 544 F.2d 730, 736 (4th Cir. 1976); *United States v. Blackwood*, 735 F.2d 142, 144-46 (4th Cir. 1984).

8. *See* Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 19 (1997).

Committee Comments

See 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 33.01-.06 (5th ed. 2000); *United States v. Bevans*, 496 F.2d 494, 499 n.4 (8th Cir. 1974); *United States v. Farrell*, 609 F.2d 816, 818 (5th Cir. 1980).

Misapplication and embezzlement are separate and distinct offenses. *United States v. Holmes*, 611 F.2d 329, 331 (10th Cir. 1979). Embezzlement requires a conversion of property for the defendant's own use while misapplication may be accomplished by diverting funds for the use of others, *United States v. Beran*, 546 F.2d 1316, 1320 (8th Cir. 1976), or by improperly structuring a loan to third parties for the defendant's personal benefit. *United States v. Angelos*, 763 F.2d 859, 861 (7th Cir. 1985); *United States v. Steffen*, 641 F.2d 591, 597 (8th Cir. 1981). A

check kiting scheme can constitute misapplication. *United States v. Young*, 618 F.2d 1281 (8th Cir. 1980). *See United States v. Gens*, 493 F.2d 216 (1st Cir. 1974) for a comprehensive review of the cases construing the word "misapplied."

Intent to injure or defraud the bank is an element of embezzlement, *United States v. Scheper*, 520 F.2d 1355 (4th Cir. 1975), as well as misapplication. *United States v. Cooper*, 577 F.2d 1079, 1082-83 (6th Cir. 1978). Courts have read this requirement back into section 656 after it was inadvertently dropped from the statute in the course of a technical revision of the federal criminal code. *United States v. Angelos*, 763 F.2d at 861; *Seals v. United States*, 221 F.2d 243, 245 (8th Cir. 1955).

This circuit has specifically held that the element of "intent to defraud" is sufficient and the concept of specific intent or a definition thereof is not appropriate in a section 656 case (or in any other, unless used in the statute itself). *United States v. Dougherty*, 763 F.2d 970, 973-74 (8th Cir. 1985).

Intent to injure is distinct from intent to defraud. *Angelos*, 763 F.2d at 861, which case further held that intent to defraud can mean to take financial advantage of a confidential relationship. Intent to injure under section 656 means intent to cause pecuniary loss. *United States v. Arthur*, 544 F.2d 730, 736 (4th Cir. 1976); *United States v. Blackwood*, 735 F.2d 142, 144-46 (4th Cir. 1984).

Intent to injure or defraud the bank is proved by showing a "knowing voluntary act by the defendant, the natural tendency of which may have been to injure the bank even though such may not have been his motive." *United States v. Farrell*, 609 F.2d at 820.

The defendant's criminal intent may be shown by circumstantial evidence. *Seals v. United States*, 221 F.2d at 248; *see, e.g., United States v. Mohr*, 728 F.2d 1132, 1134-35 (8th Cir. 1984). The government need not prove that the defendant knew he was violating the law. *United States v. Dougherty*, 763 F.2d at 973-74.

Whether the defendant planned to return the money or whether the bank actually sustained a loss is immaterial to guilt under section 656. *United States v. Angelos*, 763 F.2d at 861; *United States v. Scheper*, 520 F.2d at 1358.

Final Instructions: Elements of Offenses

6.18.659A. THEFT FROM INTERSTATE SHIPMENT (18 U.S.C. § 659) (First Paragraph)

The crime of theft from an [interstate] [foreign] shipment, as charged in [Count __ of] the Indictment, has three elements, which are:

One, the defendant [embezzled] [stole] [obtained by fraud or deception][1] the property of another[2] from a (describe interstate or foreign carrier);

Two, at that time this property [was moving as] [was part of] [constituted] a[n] [interstate] [foreign] shipment;

Three, at that time the value of the property was more than $1,000.00;[3] and

Four, the defendant acted with the intent to convert the property temporarily or permanently to his own use.

[To "embezzle" means voluntarily and intentionally to take, or to convert to one's own use, the property of another, which property came into the defendant's possession lawfully.]

[To "steal" means to take with the intent to deprive the owner permanently or temporarily of the rights and benefits of ownership.]

A shipment becomes a[n] [interstate] [foreign] shipment as soon as it is assembled for movement across a [state line] [United States border] and remains one until it arrives at its final destination and is delivered.[4]

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.[5]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statute may also be violated by "unlawfully" "taking," "carrying away" or "concealing." If one of the "unlawful" alternatives is charged and a definition of "unlawfully" is requested, "unlawfully" should be defined in terms of the specific manner in which the conduct is alleged to be unlawful.

2. A more specific description of the property may be used instead of the general statutory language.

3. If there is a dispute over whether the value is greater or less than $1,000.00, a lesser-included offense instruction may be given. If there is no dispute, a lesser-included offense

instruction is not necessary. *United States v. Price*, 447 F.2d 23 (2d Cir. 1971). Alternatively, a special interrogatory could be submitted to the jury asking it whether it finds, beyond a reasonable doubt, that the item had a value of more than $1,000.00 at the time of the alleged offense.

4. *United States v. Crum*, 663 F.2d 771 (8th Cir. 1981); 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 34.05, 34.07 (5th ed. 2000);.

The eighth paragraph of section 659 reads as follows:

> To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

This circuit has found that the following instruction complies with that statute and the applicable constitutional test of a statutory presumption:

> Section 659 of Title 18 of U.S.C.A. further provides that:
>
> To establish the interstate . . . commerce character of any shipment . . . the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.
>
> "Prima facie evidence" means sufficient evidence, unless outweighed by other evidence in the case. In other words, waybills, or bills of lading, or other shipping documents such as invoices, if proved, are sufficient to show the interstate commerce character of the shipment, in the absence of evidence in the case which leads the jury to a different or contrary conclusion.

United States v. Franklin, 568 F.2d 1156, 1157 (8th Cir. 1978). *See further* Committee Comments, Instruction 4.13, *supra*, relating to instructions on statutory inferences. *See also* 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 34.05, 34.07 (5th ed. 2000).

5. This definition of value is contained in 18 U.S.C. § 641 and has been held applicable to section 659. *United States v. Watson*, 570 F.2d 282, 283-84 (8th Cir. 1978).

Committee Comments

See 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 34.01-.08 (5th ed. 2000).

In this and other federal statutes the word "steal" or "stolen" has been given a broader meaning than larceny at common law. Accordingly this statute applies to any taking whereby a person dishonestly obtains goods belonging to another with the intent to deprive the owner of the rights and benefits of ownership. *United States v. DeNormand*, 149 F.2d 622, 624 (2d Cir.

1945); *United States v. Scott*, 592 F.2d 1139, 1143 (10th Cir. 1979). *See also United States v. Turley*, 352 U.S. 407, 410-17 (1957). Thus, the government need not prove that the defendant intended permanently to deprive an owner of property, which is an element of larceny. *United States v. Shackelford*, 777 F.2d 1141, 1143-45 (6th Cir. 1985); *United States v. Waronek*, 582 F.2d 1158, 1160-62 (7th Cir. 1978).

"Embezzle" is defined in *United States v. Scott*, 592 F.2d at 1143. *See also* Instruction 6.18.656, *supra*.

The determination of whether goods are moving as an interstate shipment is to be based on practical considerations rather than technical distinctions. *United States v. Crum*, 663 F.2d 771 (8th Cir. 1981). An "interstate shipment" exists if the goods have been physically segregated for such shipment, even where interstate transport has not actually commenced in the sense of over-the-road travel. *See United States v. Henneberry*, 719 F.2d 941 (8th Cir. 1983); *United States v. Gollin*, 176 F.2d 889, 893-95 (3d Cir. 1949). An interstate shipment does not lose its interstate character until it arrives at its final destination and is delivered. *Crum*, 663 F.2d at 771. *See also United States v. Wetzel*, 488 F.2d 153 (8th Cir. 1973).

6.18.659B. PURCHASE, RECEIPT OR POSSESSION OF PROPERTY STOLEN FROM AN INTERSTATE SHIPMENT (18 U.S.C. § 659) (Second Paragraph)

The crime of receiving property which has been stolen from an [interstate] [foreign] shipment, as charged in [Count __ of] the Indictment, has four elements, which are:

One, property[1] was [embezzled] [stolen] [obtained by fraud or deception][2] from a (describe interstate or foreign carrier) while it [was moving as] [was part of] [constituted] a[n] [interstate] [foreign] shipment;

Two, the defendant [bought] [received] [possessed] that property;

Three, at that time the value of the property was more than $1,000.00;[3] and

Four, at the time that the defendant [bought] [received] [possessed] such property, he knew that it had been [embezzled] [stolen] [obtained by fraud or deception].

[Property has been "embezzled" if it has been voluntarily and intentionally taken or converted to the use of someone other than the owner, after it came into that person's possession lawfully.]

[Property has been "stolen" if it has been taken with the intent to permanently or temporarily deprive the owner of the rights and benefits of ownership.]

A shipment becomes a[n] [interstate] [foreign] shipment as soon as it is assembled for movement across a [state line] [United States border] and remains one until it arrives at its final destination and is delivered.[4]

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.[5]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. A more specific description of the property may be used instead of the more general statutory language.

2. The statute may also be violated by receiving property that has been "unlawfully" "taken," "carried away" or "concealed." If any one of the "unlawful" alternatives is charged, and a definition of "unlawfully" is requested, "unlawfully" should be defined in terms of the specific manner in which the conduct is alleged to be unlawful.

3. If there is a dispute over whether the value is greater or less than $1,000.00, a lesser-included offense instruction may be given. If there is no dispute, a lesser-included offense instruction is not necessary. *United States v. Price*, 447 F.2d 23 (2d Cir. 1971). Alternatively, a special interrogatory could be submitted to the jury asking it whether it finds, beyond a reasonable doubt, that the item had a value of more than $1,000.00 at the time of the alleged offense.

4. *United States v. Crum*, 663 F.2d 771 (8th Cir. 1981); 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 34.05, 34.07 (5th ed. 2000).

The eighth paragraph of section 659 reads as follows:

> To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

This circuit has found that the following instruction complies with that statute and the applicable constitutional test of a statutory presumption:

> Section 659 of Title 18 of U.S.C.A. further provides that:
>
> To establish the interstate . . . commerce character of any shipment . . . the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.
>
> "Prima facie evidence" means sufficient evidence, unless outweighed by other evidence in the case. In other words, shipping documents such as invoices, if proved, are sufficient to show the interstate commerce character of the shipment, in the absence of evidence in the case which leads the jury to a different or contrary conclusion.

United States v. Franklin, 568 F.2d 1156, 1157 (8th Cir. 1978). *See further* Committee Comments, Instruction 4.13, *supra*, relating to instructions on statutory inferences. *See also* 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 34.05, 34.07 (5th ed. 2000).

5. This definition of value is contained in 18 U.S.C. § 641 and has been held applicable to section 659. *United States v. Watson*, 570 F.2d 282, 283-84 (8th Cir. 1978).

Committee Comments

See United States v. Beck, 659 F.2d 875 (8th Cir. 1981); *United States v. Mavrick*, 601 F.2d 921, 927 (7th Cir. 1979).

See Committee Comments, Instruction 6.18.659A, *supra*.

The goods must be part of an interstate shipment only when stolen; it is not necessary that they be so when the receiving or possession occurs. *United States v. Tyers*, 487 F.2d 828,

830 (2d Cir. 1973); *Winer v. United States*, 228 F.2d 944, 947 (6th Cir. 1956); *United States v. Gollin*, 166 F.2d 123, 125 (3d Cir. 1948).

The defendant must know that the goods were stolen, but need not know they were stolen from an interstate shipment. *United States v. Allegretti*, 340 F.2d 243, 247 (7th Cir. 1964). Possession of recently stolen goods gives rise to a permissible inference of knowledge that the goods are stolen unless possession is otherwise explained. *United States v. Humphrey*, 696 F.2d 72, 74 (8th Cir. 1982); *United States v. Dugan*, 477 F.2d 140, 142 (8th Cir. 1973). *See* Committee Comments, Instruction 4.13, *supra*.

Possession may be sole or joint and includes both actual and constructive possession. *United States v. Dugan*, 477 F.2d at 141, which defined constructive possession as "knowingly having both the power and the intention at a given time to exercise dominion or control over the property." *See* Instruction 8.02, *infra*, for an instruction defining possession.

If the defendant claims innocent possession the burden is on the defendant to produce such evidence and raise it as a defense; it is not an element of the crime to be proved by the government. *United States v. Mavrick*, 601 F.2d 921, 926-27 (7th Cir. 1979).

6.18.666A. THEFT CONCERNING A PROGRAM RECEIVING FEDERAL FUNDS (18 U.S.C. § 666(a)(1)(A))

The crime of [embezzlement] [theft] [fraud] [conversion] [misapplication] concerning a program receiving federal funds, as charged in [Count ___ of] the Indictment, has four elements, which are:

One: the defendant was an agent of (name of organization, agency or governmental unit);

Two: [on or about (insert date)] [during the period between (insert beginning and ending dates)], the defendant [embezzled] [stole] [obtained by fraud] [converted to the use of (name of person) without authority] [intentionally misapplied][1] property of a value[2] of $5,000 or more [as part of a single scheme or plan];[3]

Three: the property was [owned by] [under the (care) (custody) (control)] of (name of organization, agency or governmental unit);

Four: (name of organization, agency or governmental unit) received benefits in excess of $10,000 in the one-year period beginning (insert date), pursuant to a federal program involving a [grant] [contract] [subsidy] [loan] [guarantee] [insurance] [(describe some other form of federal assistance)].

As used in this instruction, the term "agent" means a person authorized to act on behalf of (insert name of organization, agency or governmental unit) and includes [(an) (a)] [employee] [partner] [director] [officer] [manager] [representative].[4]

[To "embezzle" means knowingly, voluntarily and intentionally to take, or to convert to one's own use, the property of another which came into the defendant's possession lawfully.][5]

[To "steal" means knowingly to take with the intent to deprive the owner permanently or temporarily of the rights and benefits of ownership.][6]

[To "obtain by fraud" means to act knowingly and with intent to deceive or cheat, usually for the purpose of causing a financial loss to someone else or bringing about a financial gain to oneself or another.][7]

Final Instructions: Elements of Offenses

["Conversion" means the deliberate taking or retaining of the money or property of another with the intent to deprive the owner of its use or benefit either temporarily or permanently. Conversion includes the misuse or abuse of property as well as use in an unauthorized manner or to an unauthorized extent.][8]

[To "misapply" means to use the funds or property of (name of organization, agency or governmental unit) knowing that such use is unauthorized, or unjustifiable or wrongful. Misapplication includes the wrongful taking or use of the money or property of (name of organization, agency or governmental unit) by its agent for [(his) (her) own benefit] [the use or benefit of some other person][9] [an unauthorized purpose, even if such use benefitted (name of organization, agency or governmental unit)].[10]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. When alternative means of commission of the crime are charged and submitted, *see* Fed. R. Crim. P. 7(c)(1) and Committee Comments to Instruction 11.02, *infra*; Note 2, Instruction 6.18.1341, *infra*; and Note 4, Instruction 6.18.1951, *infra*. If two or more means are submitted to the jury, consideration should be given to whether a unanimity instruction is appropriate.

2. A definition of the term "value" can be found in Instruction 6.18.641, *supra*.

3. "Under section 666, where multiple conversions are part of a single scheme, it seems appropriate to aggregate the value of property stolen in order to reach the $5,000 minimum required for prosecution." *United States v. Sanderson*, 966 F.2d 184, 189 (6th Cir. 1992); *see also United States v. Billingslea*, 603 F.2d 515, 520 (5th Cir. 1979) ("[F]ormulation of a plan or scheme or setting up of a mechanism which, when put into operation, will result in the taking or diversions of sums of money on a recurring basis will produce but one crime [under § 665]."); *United States v. Brown*, 521 F. Supp. 511 (W.D. Wis. 1981) (a continuing course of conduct reflecting a single intent may be prosecuted in a single aggregate count for violations of 18 U.S.C. § 665).

4. *See* 18 U.S.C. § 666(d)(1). The Committee recommends that the definition of "agent" be tailored to conform to the facts of each case by selecting one or more of the alternatives in section 666(d)(1) that have been established by the evidence.

5. *See* Instruction 6.18.641, *supra*. This definition should be used if the term "embezzled" is used in Element Two.

6. *See* Instruction 6.18.659A, *supra*; *Morissette v. United States*, 342 U.S. 246, 271 (1952). This definition should be used if the term "stole" is used in Element Two.

7. *See* Instruction 6.18.1341, *infra*. This definition should be used if the term "obtained by fraud" is used in Element Two.

8. *See* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 16.03 (5th ed. 2000). This definition should be used if the term "converted" is used in Element Two.

9. The Dictionary Act, 1 U.S.C. § 1, provides in relevant part "that 'in determining the meaning of any Act of Congress, unless the context indicates otherwise' 'person' includes 'associations' and other artificial entities such as corporations and societies." *Rowland v. California Men's Colony*, 506 U.S. 194 (1993).

10. *See* Instruction 6.18.656, *supra*; *United States v. Urlacher*, 979 F.2d 935, 938 (2d Cir. 1992); Instruction 6.18.2314, *infra*; *United States v. Miller*, 725 F.2d 462, 468 (8th Cir. 1984). This definition should be used if the term "misapplied" is used in Element Two.

Committee Comments

Section 666 was "designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies which are disbursed to private organizations or State and local governments pursuant to a federal program." S. Rep. No. 225, at 369, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3510. "Thus it seems Congress intended this statute to augment the prosecutorial powers of 18 U.S.C. §§ 641 and 665." *United States v. Sanderson*, 966 F.2d 184, 188 (6th Cir. 1992).

The Committee believes that where a violation of 18 U.S.C. § 666 requires proof of a specific intent element, the requisite intent is set forth in the applicable definition. As the instruction is drafted, the definition of the term used in Element Two is required to supply the appropriate specific intent.

"Conversion . . . may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact." *Morissette v. United States*, 342 U.S. 246, 271-72 (1952). The Committee believes that in most cases "conversion" is among the types of criminal activities subsumed within the ambit of "misapplication." *See United States v. Krepps*, 605 F.2d 101, 104 (3d Cir. 1979), 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 16.01, 16.03 (5th ed. 2000).

"The language in Section 666 is clear that it is not an element of this crime that the government trace the $5,000 to specific federal government funds." *United States v. Smith*, 659 F. Supp. 833, 835 (S.D. Miss. 1987). "Congress specifically chose . . . [to] enact a criminal

statute that would eliminate the need to trace the flow of federal monies and that would avoid inconsistencies caused by the different ways that various federal programs disburse funds and control their administration." *United States v. Westmoreland*, 841 F.2d 572, 576 (5th Cir. 1988) (Congress desired to protect the integrity of federal funds by assuring the integrity of the organization or agencies that receive them); *see also United States v. Rooney*, 986 F.2d 31, 34 (2d Cir. 1993).

"The principal policy objective behind § 666 is to protect the integrity of the vast sums of money distributed through Federal programs." *United States v. Rooney*, 986 F.2d 31, 34 (2d Cir. 1993). The Senate Judiciary Committee Report accompanying the statute states that "[t]he Committee intends that the term 'Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance or another form of Federal Assistance' be broadly construed, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery. However, the concept is not unlimited. The term 'Federal program' means that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives." S. Rep. No. 225, 98th Cong., 2d Sess. 369 (1984); *see also United States v. Peery*, 977 F.2d 1230, 1232 (8th Cir. 1992).

"The term 'in any one-year period' means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense." 18 U.S.C. § 666(d)(5).

Section 666(c) was added by amendment in 1986 to avoid the possible application of the statute to acceptable commercial and business practices, and the provision closely parallels the bank bribery provision found in 18 U.S.C. § 215. *See* H.R. Rep. No. 797, 99th Cong., 2d Sess. 1986, *reprinted in* 1986 U.S. Code Cong. & Admin. News, 6138, 6153. However, this provision does not exempt from criminal liability the willful misappropriation of funds that are used for otherwise legitimate purposes. "Section 666(a)(1)(A) prohibits embezzling, stealing, obtaining by fraud, converting, or intentionally misapplying funds. The first four prohibitions cover any possible taking of money for one's own use or benefit. Intentional misapplication, in order to avoid redundancy, must mean intentional misapplication for otherwise legitimate purposes; if it were for illegitimate purposes, it would be covered by the prohibitions against embezzlement, stealing, obtaining by fraud, or conversion." *United States v. Urlacher*, 979 F.2d 935, 938 (2d Cir. 1992).

6.18.666B. SOLICITATION OR ACCEPTANCE OF A BRIBE BY AN AGENT OF A PROGRAM RECEIVING FEDERAL FUNDS (18 U.S.C. § 666(a)(1)(B))

The crime of [soliciting] [demanding] [accepting] [agreeing to accept] a bribe by an agent of a program receiving federal funds, as charged in [Count ___ of] the Indictment, has four elements, which are:

One: the defendant was an agent of (name of organization, agency or governmental unit);

Two: [on or about (insert date)] [during the period between (insert beginning and ending dates)], the defendant corruptly [[solicited] [demanded] for the benefit of [(name of person or entity)] [another person][1]] [[accepted] [agreed to accept] from (name of person or entity)], something of value, that is (describe the thing of value), in connection with (briefly describe in summary form the business, transaction, or series of transactions, e.g., a contract for the purchase of office supplies);

Three: the (business, transaction(s), e.g., the contract) involved something of a value[2] of $5,000 or more;

Four: (name of organization, agency or governmental unit) received benefits in excess of $10,000 in the one-year period beginning (insert date), pursuant to a federal program involving a [grant] [contract] [subsidy] [loan] [guarantee] [insurance] [(describe some other form of federal assistance)].

As used in this instruction, the term "agent" means a person authorized to act on behalf of (insert name of organization, agency or governmental unit) and includes [(an) (a)] [employee] [partner] [director] [officer] [manager] [representative].[3]

As used in this instruction, the term "corruptly"[4] means that the defendant acted voluntarily and intentionally and[, at least in part,][5] in return for being [influenced to] [induced to] [rewarded for] (describe the action to be rewarded, influenced or induced, e.g., award a contract for the purchase of office supplies).

Final Instructions: Elements of Offenses

[A "thing of value" can be tangible or intangible property. Intangible property rights include any valuable right considered as a source of wealth, and include the right to exercise control over how money is spent.][6]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The Dictionary Act, 1 U.S.C. § 1, provides in relevant part "that 'in determining the meaning of any Act of Congress, unless the context indicates otherwise' 'person' includes 'associations and other artificial entities such as corporations and societies.'" *Rowland v. California Men's Colony*, 506 U.S. 194, 195 (1993). The Committee believes that the term "person" as defined in 1 U.S.C. § 1 applies in section 666, and that the instructions should be modified accordingly when the intended beneficiary of the bribe is an artificial entity.

2. A definition of the term "value" can be found in Instruction 6.18.641, *supra*.

3. *See* 18 U.S.C. § 666(d)(1). The Committee recommends that the definition of "agent" be tailored to conform to the facts of each case by selecting one or more of the alternatives in section 666(d)(1) that have been established by the evidence.

4. *See* Instruction 6.18.201B, *supra*.

5. Where the defendant introduces evidence that his motive was proper, it is appropriate for the court to use the phrase "at least in part" when defining the term "corruptly" in the section 666 verdict directing instruction. *See United States v. Coyne*, 4 F.3d 100, 113 (2d Cir. 1993); *United States v. Biaggi*, 909 F.2d 662, 683 (2d Cir. 1990). ("[A] valid purpose that partially motivates a transaction does not insulate participants in an unlawful transaction from criminal liability.")

6. *See* Note 7, Instruction 6.18.641, *supra*; *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir. 1990). Where the evidence establishes that intangible property rights were illegally usurped by the defendant, the jury instructions should be modified accordingly.

Committee Comments

Section 666 was "designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies which are distributed to private organizations or State and local governments pursuant to a Federal program." S. Rep. No. 225 at 369, 98th Cong., 2d. Sess., *reprinted in* 1984 U.S. Code Cong. & Admin. News, 3182, 3510. Congress intended that this statute augment the prosecutorial powers of 18 U.S.C. §§ 201, 641 and 665. *Id.*; *see also United States v. Sanderson*, 966 F.2d 184, 188 (6th Cir. 1992).

Section 666 applies to both illegal gratuities and bribes. Under the former version of section 666, where the payment was illegal if it was made "for or because of" the recipient's official conduct, the statute applied to "both past acts supporting a gratuity theory and future acts

necessary for a bribery theory." *United States v. Crozier*, 987 F.2d 893, 898-99 (2d Cir. 1993). "[U]nder the current version, the payment must be 'to influence or reward' the official conduct. Thus, the current statute continues to cover payments made with intent to reward past official conduct, so long as the intent to reward is corrupt." *United States v. Bonito*, 57 F.3d 167 (2d Cir. 1995).

"The term 'thing of value' used in § 666[(a)(1)(B) and (a)(2)] . . . has long been construed in other federal criminal statutes to embrace intangibles. . . . The valuation of intangibles is a traditional challenge which has routinely been met by courts in the past, e.g., with respect to the jurisdictional amount requirements for diversity jurisdiction under 28 U.S.C. § 1332, and indeed, in federal question cases under 28 U.S.C. § 1331 prior to 1980. The value of a right to engage in a business activity has been recognized as subject to reasonable estimation." *United States v. Mongelli*, 794 F. Supp. 529, 531 (S.D.N.Y. 1992); *see also United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996), *cert. granted sub nom., Salinas v. United States*, 522 U.S. 52 (1997); *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. May*, 625 F.2d 186, 191 (8th Cir. 1980).

"The term 'in any one-year period' means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense." 18 U.S.C. § 666(d)(5).

The circuits are split on the issue of whether the United States must show a tracing of federal funds in bribery cases charged under section 666(a)(1)(B). *Compare United States v. Simas*, 937 F.2d 459, 463 (9th Cir. 1991) (in cases charged under section 666, federal funds need not be traced to project affected by bribe, nor is it necessary to show that the defendant had authority to administer federal funds); *United States v. Foley*, 73 F.3d 484, 492 (2d Cir. 1996) (no violation of section 666(a)(1)(B) where the conduct at issue affects neither the federal program funds received by a protected organization nor the receiving organization's financial interests. The Supreme Court has granted *certiorari* to examine the question of what kinds of cases involving state employees are subject to prosecution under the Federal Bribery Statute and whether such cases include those where no federal funds are disbursed or impinged. *United States v. Marmole*jo, 89 F.3d 1185 (5th Cir. 1996), *cert. granted sub nom. Salinas v. United States*, 522 U.S. 52 (1997).

"Corruptly" has been defined as offering anything of value "for the purpose of influencing official action." Seventh Circuit Federal Jury Instructions: Criminal at .216-17 (1999). In *Bonito*, "[t]he court specifically instructed that the government had to prove that [the defendant] acted with corrupt intent, which it defined as acting

> voluntarily and intentionally and with the purpose, at least in part, of accomplishing either an unlawful end result or a lawful end result by some unlawful method or means. A person acts corruptly, for example, when he gives or offers to give something of value intending to influence or reward a government agent in connection with his official duties."

United States v. Bonito, 57 F.3d at 171; *see also* Committee Comments to Instruction 6.18.201B, *supra*, for a discussion of "corruptly" in 18 U.S.C. § 201, bribery of a public official.

The Senate Judiciary Committee Report accompanying the statute states that "[t]he Committee intends that the term 'Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance or another form of Federal Assistance' be broadly construed, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery. However, the concept is not unlimited. The term 'Federal program' means that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives." S. Rep. No. 225, 98th Cong., 2d Sess. 369 (1984); *see also United States v. Peery*, 977 F.2d 1230, 1232 (8th Cir. 1992).

Section 666(c) was added by amendment in 1986 to avoid the possible application of the statute to acceptable commercial and business practices, and the provision closely parallels the bank bribery provision found in 18 U.S.C. § 215. *See* H.R. Rep. No. 797, 99th Cong., 2d Sess. 1986, *reprinted in* 1986 U.S. Code Cong. & Admin. News, 6138, 6153.

6.18.666C. BRIBERY OF AN AGENT OF A PROGRAM RECEIVING FEDERAL FUNDS (18 U.S.C. § 666(a)(2))

The crime of bribery of an agent of a program receiving federal funds, as charged in [Count ___ of] the Indictment, has four elements, which are:

One: (name of agent) was an agent of (name of organization, agency or governmental unit);

Two: the defendant corruptly [gave] [offered] [agreed to give] (describe the thing of value) to (name of recipient) in connection with (briefly describe in summary form the business, transaction, or series of transactions, e.g., a contract for the purchase of office supplies);

Three: the (describe business or transaction(s), e.g., the contract) involved something of a value[1] of $5,000 or more;

Four: (name of organization, agency or governmental unit) received benefits in excess of $10,000 in the one-year period beginning (insert date), pursuant to a federal program involving a [grant] [contract] [subsidy] [loan] [guarantee] [insurance] [(describe some other form of federal assistance)].

As used in this instruction, the term "agent" means a person authorized to act on behalf of (insert name of organization, agency or governmental unit) and includes [(an) (a)] [employee] [partner] [director] [officer] [manager] [representative].[2]

As used in this instruction, the term "corruptly"[3] means that the defendant acted voluntarily and intentionally and[, at least in part,][4] to [influence] [induce] [reward] (name of agent) [to] [for] (describe the action to be rewarded, influenced or induced, e.g., award a contract for the purchase of office supplies).

[A "thing of value" can be tangible or intangible property. Intangible property rights include any valuable right considered as a source of wealth, and include the right to exercise control over how money is spent.][5]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Final Instructions: Elements of Offenses

Notes on Use

1. A definition of the term "value" can be found in Instruction 6.18.641, *supra*.

2. *See* 18 U.S.C. § 666(d)(1). The Committee recommends that the definition of "agent" be tailored to conform to the facts of each case by selecting one or more of the alternatives in section 666(d)(1) that have been established by the evidence.

3. *See* Instruction 6.18.201A, *supra*, and Committee Comments to Instruction 6.18.201A, *supra*, for a discussion of "corruptly" in 18 U.S.C. § 201, bribing a public official.

4. Where the defendant introduces evidence that his motive was proper, it is appropriate for the court to use the phrase "at least in part" when defining the term "corruptly" in the section 666 verdict directing instruction. *See United States v. Coyne*, 4 F.3d 100, 113 (2d Cir. 1993); *United States v. Biaggi*, 909 F.2d 662, 683 (2d Cir. 1990). ("[A] valid purpose that partially motivates a transaction does not insulate participants in an unlawful transaction from criminal liability.")

5. *See* Note 7, Instruction 6.18.641, *supra*; *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir. 1990). Where the evidence establishes that intangible property rights were illegally usurped by the defendant, the jury instructions should be modified accordingly.

Committee Comments

See Committee Comments in Instruction 6.18.666B, *supra*.

Final Instructions: Elements of Offenses

6.18.751. ESCAPE FROM CUSTODY (18 U.S.C. § 751(a))

The crime of escape from custody, as charged in [Count _ of] the Indictment, has three elements, which are:

One, the defendant was [in the custody[1] of (describe the custodian, e.g., the Attorney General, the Bureau of Prisons, a Special Agent of the Federal Bureau of Investigation)] [confined in (name of the institution in which the defendant was confined)];

Two, the [custody] [confinement] was by virtue of (describe the authority for the custody, e.g., a felony conviction, an arrest for a misdemeanor, etc.)[2]; and

[*Two*] [*Three*], the defendant [left] [attempted[3] to leave] custody without authorization; and

[*Three*] [*Four*], in so doing, the defendant knew that he was [leaving] [attempting to leave] custody without authorization.

(Insert paragraph describing Government's burden of proof, *see* Instruction 3.09, *supra*.)

Notes on Use

1. In routine cases where custody is obvious, no definition of "custody" should be needed. In other cases, where custody is minimal or constructive, a definition may be appropriate.

2. If the defendant is to be subject to the five-year maximum sentence, the jury must find as an element of the offense that he was in custody or confinement by virtue of an arrest on a charge of felony, or conviction of any offense. *See Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000).

3. If the defendant is charged with attempt, the instructions must incorporate Model Instruction 8.01 on attempt.

Committee Comments

See 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 35.01-.07 (5th ed. 2000).

As an element of the offense, the government is obligated to establish *both* the fact of custody *and* the authority for the custody. *United States v. Richardson*, 687 F.2d 952 (7th Cir. 1982); *see also United States v. Payne*, 529 F.2d 1353, 1354-55 (8th Cir. 1976). The custody may be minimal and, indeed, may be constructive. *United States v. Cluck*, 542 F.2d 728, 731,

736 (8th Cir. 1976). The defendant cannot raise the invalidity or impropriety of his confinement as a defense. *Id.* at 732.

Out of an abundance of caution, many courts had included willfulness as an element of this offense. *See, e.g., United States v. Tapio*, 634 F.2d 1092, 1094 (8th Cir. 1980); *United States v. Cluck*. However, the Committee believes that there now is clear precedent for requiring only knowledge as the mental state for this offense. *See United States v. Bailey*, 444 U.S. 394, 407-08 (1980). "[S]pecific intent is not an element of the offense of escape under section 751." *United States v. Tapio*, 634 F.2d at 1094.

An intentional failure to return to confinement is an "escape" in violation of section 751. *United States v. Bailey*, 444 U.S. at 413.

As the Supreme Court noted in *Bailey*, 444 U.S. at 409-13, a defense of duress or necessity is theoretically available in escape situations. Two elements are involved in such a defense: (a) that the defendant, while in confinement, was confronted with a threat (presumably limited to threats of death or serious bodily harm) so imminent that leaving custody was his only reasonable alternative; and (b) that the defendant made a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force. *See United States v. Jackson*, 838 F.2d 301, 302 (8th Cir. 1988). As with the defense of duress in other settings, once the defendant has introduced sufficient evidence on *both* these points to put the defense in issue, the burden may be upon the defense to prove these defenses by a preponderance of the evidence. *See Dixon v. United States*, 548 U.S. 1 (2006). *See generally* Instruction 9.02, *infra*.

Final Instructions: Elements of Offenses

6.18.844. ARSON OF PROPERTY USED IN OR AFFECTING INTERSTATE COMMERCE (No Personal Injury Involved) (18 U.S.C. § 844(i))

It is a crime for a person to commit arson. This crime, [as charged in Count __], has three elements:

One, on or about (date), the defendant maliciously [damaged] [destroyed] [attempted to (damage) (destroy)] (specify the particular building, vehicle, real or personal property alleged in the Indictment);

Two, by [fire] [using an explosive][1];

Three, at the time of the [fire] [explosion], (specify the particular building, vehicle, real or personal property alleged in the Indictment) [was used in (interstate) (foreign) commerce][2] [was used in an activity affecting interstate commerce].

"Interstate or foreign commerce" means business or trade taking place between people or entities located in two or more states, or between people and entities in the United States and another country(ies). The Government must prove that the property was actually used for a function involving or affecting interstate or foreign commerce. Property "used in an activity affecting interstate commerce" means active use of the property for a real commercial purpose, not just a passive, passing, or past connection to this sort of trade. [You may find an effect on [interstate] [foreign] commerce has been proven if you find from the evidence beyond a reasonable doubt that (describe Government's evidence at trial of effect on interstate or foreign commerce, *e.g.*, that the building was used as rental property.)] [3]

To act maliciously means to act with the intent that, or with willful disregard of, the likelihood that damage or injury would result.[4]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The term "explosive" is defined in 18 U.S.C. § 844(j) as including "gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices . . . and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions,

quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device, or any part thereof may cause an explosion."

2. In *United States v. Rea*, 169 F.3d 1111, 1113 (8th Cir. 1999), *vacated on other grounds*, 530 U.S. 1201 (2000), the Eighth Circuit unequivocally confirmed that the interstate commerce requirement of the statute is an element of the offense which must be found by the jury, rather than a prerequisite to subject matter jurisdiction.

3. In *United States v. Jones*, 529 U.S. 848, 855 (2000), the Supreme Court determined that section 844(i)'s qualification that a building must, *inter alia*, be used "in any activity affecting interstate or foreign commerce" means "active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." The Court concluded that the proper inquiry "'is into the function of the building itself, and then a determination of whether that function affects commerce.'" *Id.* at 854 (quoting *United States v. Ryan*, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C.J., concurring, in part, and dissenting, in part)). Clearly, under *Jones*, arson of an owner-occupied residential property connected to interstate commerce solely by virtue of interstate receipt of utilities, a mortgage and an insurance policy does not fall under section 844(i). Further, the Eighth Circuit has made clear that all buildings must be "used in" commerce in order to meet the requirements of section 844(i). *United States v. Rea*, 223 F.3d 741 (8th Cir. 2000) (church). This issue is discussed in more detail in *United States v. Rea (Rea III)*, 300 F.3d 952 (8th Cir. 2002). *Compare United States v. Harris*, 221 F.3d 1048, 1050 n.2 (8th Cir. 2000). The mere status of being owned by an out-of-state resident does not constitute active employment in interstate commerce, nor does the fact that the building is about to be placed on the market for sale, nor that it is leased by a person to his wholly-owned company in a passive legal arrangement, nor that it receives natural gas from an out-of-state provider. *United States v. Ryan*, 227 F.3d 1058 (8th Cir. 2000).

4. "Malicious" is not defined within the statute. After reviewing the legislative history, the Fourth Circuit determined that Congress contemplated the common law meaning of the word "malicious." *See United States v. Gullett*, 75 F.3d 941, 947-48 (4th Cir.1996). Specifically, the Fourth Circuit held that a person who burned a business, resulting in a death, had acted "intentionally, or with willful disregard of the likelihood that damage or injury would result from his action." *Id.* The Eighth Circuit cited this definition with approval in *United States v. Whaley*, 552 F.3d 904, 907 (8th Cir. 2009). The *Whaley* court concluded that a Missouri charge of felony burning was a crime of violence, in light of the Congressional history of 18 U.S.C. § 844(i), because the common law and generic forms of arson proscribe the malicious burning of real or personal property of another, where maliciousness means acting with willful disregard that damage or injury would result. *Id.* at 907.

Committee Comments:

The Committee believes that arson involving serious bodily injury or death should follow the same approach adopted by the United States Supreme Court in *Jones v. United States*, 526 U.S. 227 (1999), in which increased penalties for "serious bodily injury" and "death" are "distinct elements, each of which must be charged by indictment, proven beyond a reasonable

doubt, and submitted to a jury for its verdict." *See also Apprendi v. New Jersey*, 530 U.S. 466 (2000).

The Committee believes that the phrase "active employment for commercial purposes" can lead to jury confusion in certain cases because activities that courts have found to constitute active employment (such as use of the building as rental property) may be assumed by the jury to be passive in nature. In *Jones v. United States*, 529 U.S. 848 (2000) (quoting from *Russell v. United States*, 471 U.S. 858 (1985)), the Supreme Court stated "the *Russell* opinion went on to observe however that 'by its terms § 844(i) applies only to property that is used in an activity that affects commerce. The rental of real estate is unquestionably such an activity.'" 529 U.S. 848, 856. The Committee therefore believes that the following language should also be added in an appropriate case:

> [You may find an effect on [interstate] [foreign] commerce has been proven if you find from the evidence beyond a reasonable doubt: (describe Government's evidence at trial of effect on interstate or foreign commerce, *e.g.*, that the building was used as rental property.)]

If this form of instruction is used, the judge should make a finding outside the presence of the jury that the particular use of the property is a sufficient use to affect interstate commerce.

6.18.912. IMPERSONATION OF A FEDERAL OFFICER OR EMPLOYEE - [ACTING AS] [DEMANDING SOMETHING OF VALUE] (18 U.S.C. § 912)

The crime of impersonation of a federal [officer] [employee],[1] as charged in [Count __ of] the Indictment, has three elements, which are:

One, the defendant pretended to be (describe the pretense, e.g., a special agent of the F.B.I.); and

Two, such pretense was false and the defendant knew it was false;[2] and

Three, the defendant, while so pretending, [acted with the intent to cause a person to follow some course of action or inaction][3] [[demanded] [obtained] some [money] [paper] [document] [thing of value]].[4]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statute does not label the crime "impersonation of a federal officer"; however, that is the title usually associated with a violation of 18 U.S.C. § 912.

2. Although the statute and cases do not expressly state that the defendant must know the pretense was false, that is implicit in the word "pretend." *See* 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 38.04 (5th ed. 2000).

3. Use this language if the defendant is charged with "acting as" a federal officer. The specific language setting forth what the victim did or did not do may be substituted for the more general language of "following some course of action or inaction." The exact language of *Robbins*, 613 F.3d at 691, that "to 'act as such' would be the equivalent of causing 'the deceived person to follow some course he would not have pursued but for the deceitful conduct,'" is not used because it is confusing and because the government is not required to prove that the victim would not have followed the course of action "but for the pretense."

The Committee does not believe that *Robbins* intended to create a new causation requirement for this statute. The first bracketed matter set forth in Element *Three* is a mental-state requirement, not a causation requirement. *United States v. Gilbert*, 143 F.3d 397, 398 (8th Cir. 1998) (jury could reasonably infer that the defendant attempted to avoid receiving a traffic ticket by impersonating a federal agent and falsely implying that he was on the way to a work-related emergency. "There was more here than a naked representation, more than mere bravado or puffing.")

4. Use this language if the charge is that the defendant obtained something of value. Obtaining property by impersonating a federal official is a separate and distinct offense from

"acting as" a federal official. *United States v. Lepowitch*, 318 U.S. 702, 704-05 (1943); *United States v. Robbins*, 613 F.2d 688, 690 (8th Cir. 1979). The gravamen of the offense is the acquisition of something of value because of the defendant's representation that he was a federal officer or employee. *United States v. Etheridge*, 512 F.2d 1249, 1253 (2d Cir. 1975). The "thing of value" obtained by the defendant need not to be tangible; information can be a thing of value. *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980). Similarly, forbearance by a police officer of issuing a traffic ticket is a thing of value. *United States v. Rippee*, 961 F.2d 677, 679 (7th Cir. 1992).

Committee Comments

See 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 38.01-.06 (5th ed. 2000). *See generally United States v. Robbins*, 613 F.2d 688 (8th Cir. 1979); *United States v. Gilbert*, 143 F.3d 397 (8th Cir. 1998).

An "intent to defraud" need not be specifically alleged; it is automatically present any time the other elements of the offense are proven, *United States v. Gayle*, 967 F.2d 483, 486-87 (11th Cir. 1992); instead, all that is required is that the defendant sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct. *United States v. Robbins*, 613 F.2d at 690-92.

It is immaterial that the officer impersonated lacked the authority to do what the defendant did or purported to do, *Thomas v. United States*, 213 F.2d 30, 31-32 (9th Cir. 1954), or that the benefits accrued to the defendant in his personal capacity rather than in his purported official capacity. *United States v. Rippee*, 961 F.2d 677, 679 (7th Cir. 1992).

Final Instructions: Elements of Offenses

6.18.922A. FELON IN POSSESSION OF FIREARM (18 U.S.C. § 922(g))

It is a crime for a felon[1] to possess a firearm, as charged in [Count __ of] the Indictment. This crime has three elements, which are:

One, the defendant had been convicted of a crime punishable by imprisonment for more than one year;

Two, after that, the defendant knowingly[2] [possessed] [received] a firearm, that is (describe weapon); and

Three, the firearm was transported across a state line at some time during or before the defendant's possession of it.

[You are instructed that (list convictions of the defendant, *e.g.*, burglary, robbery) [is] [are each] [a] crime[s] punishable by imprisonment for more than one year under the laws of (list jurisdiction, *e.g.*, State of Missouri).][3]

[You are instructed that the Government and the defendant have agreed that the defendant has been convicted of a crime punishable by imprisonment for more than one year under the laws of (list jurisdiction, *e.g.*, State of Missouri), and you must consider the first element as proven.]

If you have found beyond a reasonable doubt that the firearm in question was manufactured in a state other than (name state in which possession occurred) and that the defendant possessed that firearm in the State of (name state in which possession occurred), then you may, but are not required to, find that it was transported across a state line.[4]

The term "firearm" means any weapon (including a starter gun) which will or is designed to or may be readily converted to expel a projectile by the action of an explosive.[5]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. A misdemeanor crime involving domestic abuse may also be actionable under this section. *See* 18 U.S.C. §§ 921(33)(A) and 922(g)(9).

2. "Knowingly" is found in the penalty section of the statute, section 924.

3. Crimes included are defined in section 921.

Final Instructions: Elements of Offenses

4. Adapted generally from the instruction used in *Barrett v. United States*, 423 U.S. 212 (1976).

5. This definition is taken from 18 U.S.C. § 921(a)(3). Other portions of this definition should be used where appropriate.

Committee Comments

See Scarborough v. United States, 431 U.S. 563 (1977); *Barrett v. United States*, 423 U.S. 212, 215 n.4 (1976); 2A Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions*: Criminal §§ 39.09-.15 (5th ed. 2000).

The Firearms Owners' Protection Act of 1986 amended prior section 922 by incorporating with it related provisions of 18 U.S.C. App. § 1202(a)(l). *See* House Rep. #99-495, reprinted in 1986 U.S. Code Cong. & Admin. News 1327, 1349. *See generally* Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585 (1987), for an extensive discussion of the legislative history of this amendment.

In amending section 922(g), Congress intended both to "enhance the ability of law enforcement to fight violent crime" and to "relieve the nation's sportsmen and firearms owners and dealers from unnecessary burdens under the Gun Control Act of 1968." House Report at 1327. These potentially conflicting goals, coupled with a long and, at times confusing, legislative history, can make interpretation of this statute difficult.

Pursuant to the statute, it is unlawful for any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year to possess or receive a firearm where the required interstate commerce nexus is established. The defendant need not know the firearm was transported across state lines. *United States v. Valiant*, 873 F.2d 205 (8th Cir. 1989). Challenges to the constitutionality of section 922(g) on the theory that Congress did not have constitutional authority to criminalize possession of a weapon by a felon just because the weapon had been transported in interstate commerce have been unsuccessful. *United States v. Lopez*, 514 U.S. 549 (1995). *See, e.g., United States v. Monteleone*, 77 F.3d 1086 (8th Cir. 1996); *United States v. Rankin*, 64 F.3d 338, 339 (8th Cir. 1995); *United States v. Mosby*, 60 F.3d 454, 456 (8th Cir. 1995).

Section 921(a)(20) indicates that what constitutes a conviction is to be determined by reference to the law of the jurisdiction in which proceedings were held. Moreover, the section provides that, where a conviction has been expunged or set aside, or where a person has had his or her civil rights restored, there is no conviction for the purposes of this statute. With regard to restoration of civil rights, the Eighth Circuit has held that substantial, not total, restoration is required to remove a defendant from the reach of the statute, but further held that disqualification from serving as a juror and in certain law enforcement positions did not constitute substantial restoration. *Presley v. United States*, 851 F.2d 1052 (8th Cir. 1988). For a discussion of the differences in the various statutory schemes for the restoration of rights in other jurisdictions within this circuit, *see United States v. Traxell*, 914 F.2d 119 (8th Cir. 1990); *United States v. Woodall*, 120 F.3d 880 (8th Cir. 1997). For a discussion of the restoration of the right to possess

a firearm, *see Caron v. United States*, 524 U.S. 308 (1998). Any state limitation on possession of a particular type of firearm by an offender "activates the uniform federal ban on possessing any firearms at all." *Caron v. United States*, 524 U.S. at 312. The mere absence of a statute prohibiting firearm possession by ex-felons does not constitute a restoration of civil rights for purposes of section 921(a)(20). *United States v. Moore*, 108 F.3d 878 (8th Cir. 1997).

In *Old Chief v. United States*, 519 U.S. 172 (1997), the Supreme Court held that it was error for the trial court to refuse to accept a defendant's offer of stipulation to the fact of a prior felony conviction over the objection of the prosecution in any case "in which the prior conviction is for an offense likely to support conviction on some improper ground." In appropriate cases, under *Old Chief*, the trial court may be compelled to accept an offer to stipulate to the fact of a prior felony conviction. *See, e.g., United States v. Blake*, 107 F.3d 651 (8th Cir. 1997); *but see Old Chief*, 519 U.S. at 196 (Justice O'Connor dissenting).

The Eighth Circuit has not decided whether justification and coercion can be defenses to a charge under section 922(g). See *United States v. Blankenship*, 67 F.3d 673, 677 (8th Cir. 1995) for a discussion of the elements of both defenses.

The Eighth Circuit held in *United States v. Richardson*, 439 F.3d 421 (8th Cir. 2006), that convictions under § 922(g)(1) and (g)(3) arising out of the same act of possession should have been merged for sentencing, because Congress did not intend multiple punishments for a single act of possession of a firearm.

6.18.922B. DRUG USER IN POSSESSION OF FIREARM (18 U.S.C. § 922(g)(3))

The crime of being a [drug user] [drug addict] in possession of a firearm, as charged in [Count __ of] the Indictment, has three elements, which are:

One, the defendant [was an unlawful user of a controlled substance, that is, (name of substance)][1] [was a drug addict][2];

Two, the defendant knowingly[3] [possessed] [received] [a firearm] [ammunition], that is (describe weapon or ammunition), while [he] [she] was [an unlawful user of a controlled substance] [a drug addict]; and

Three, the [firearm] [ammunition] was transported across a state line at some time during or before the defendant's possession of it.

If you have found beyond a reasonable doubt that the firearm in question was manufactured in a state other than (name state in which possession occurred) and that the defendant possessed that firearm in the State of (name state in which possession occurred) then you may, but are not required to, find that it was transported across a state line.[4]

The term "firearm" means any weapon (including a starter gun) which will or is designed to or may be readily converted to expel a projectile by the action of an explosive.[5]

[The phrase "unlawful user of a controlled substance" means a person who uses a controlled substance in a manner other than as prescribed by a licensed physician. The defendant must have been actively engaged in use of [a] controlled substance[s] during the time [he] [she] possessed the [firearm] [ammunition], but the law does not require that [he] [she] used the controlled substance[s] at the precise time [he] [she] possessed the [firearm] [ammunition]. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. [An inference that a person [was] [is] a user of a controlled substance may be drawn from evidence of a pattern of use or possession of a controlled substance that reasonably covers the time the [firearm] [ammunition] was possessed.][6]

[The term "drug addict" means any individual who habitually uses any controlled substance so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of a controlled substance as to have lost the power of self-control with reference to [his] [her] addiction.][7]

You are instructed that [name of substance(s)] is a controlled substance.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. This instruction's definition of an unlawful user of a controlled substance is based upon the definition utilized by the Treasury Department in its firearms regulations, 27 C.F.R. § 478.11, which provides in pertinent part as follows:

> [A]ny person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year; multiple arrests for such offenses within the past 5 years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year.

The Eighth Circuit in *United States v. Turnbull*, 349 F.3d 558, 562 (8th Cir. 2003) found the Treasury Department's definition "entirely consistent with any standard for unlawful use to be gleaned from our prior decisions" and that the district court acted within its discretion when it incorporated §478.11's definition in its instructions. The Eighth Circuit has held that the government need not prove that the defendant was actually using drugs at the precise moment he possessed the firearm. Rather, the "plain language [of § 922(g)(3)] requires that the government only prove [the defendant] was an 'unlawful user' . . . during the time he possessed firearms." *United States v. McIntosh*, 23 F.3d 1454, 1458 (8th Cir. 1994).

2. This definition is taken from 21 U.S.C. § 802(1).

3. "Knowingly" is found in the penalty section of the statute, section 924.

4. Adapted generally from the instruction used in *Barrett v. United States*, 423 U.S. 212, 225 (1976).

5. This definition is taken from 18 U.S.C. § 921(a)(3). Other portions of this definition should be used where appropriate.

6. *See* Note 1.

7. *See* Note 2.

Committee Comments

The Firearms Owners' Protection Act of 1986 amended prior section 922 by incorporating with it related provisions of 18 U.S.C. App. § 1202(a)(l). *See* House Rep. #99-495, reprinted in 1986 U.S. Code Cong. & Admin. News 1327, 1349. *See generally* Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585 (1987), for an extensive discussion of the legislative history of this amendment.

In amending section 922(g), Congress intended both to "enhance the ability of law enforcement to fight violent crime" and to "relieve the nation's sportsmen and firearms owners and dealers from unnecessary burdens under the Gun Control Act of 1968." House Report at 1327. These potentially conflicting goals, coupled with a long and, at times confusing, legislative history, can make interpretation of this statute difficult.

Pursuant to the statute, it is unlawful for any person who is a user of or addicted to a controlled substance to possess or receive a firearm where the required interstate commerce nexus is established. The defendant need not know the firearm was transported across state lines. *United States v. Valiant*, 873 F.2d 205 (8th Cir. 1989). Challenges to the constitutionality of section 922(g) on the theory that Congress did not have constitutional authority to criminalize possession of a weapon by a felon just because the weapon had been transported in interstate commerce have been unsuccessful. *United States v. Lopez*, 514 U.S. 549 (1995). *See, e.g.*, *United States v. Monteleone*, 77 F.3d 1086 (8th Cir. 1996); *United States v. Rankin*, 64 F.3d 338, 339 (8th Cir. 1995); *United States v. Mosby*, 60 F.3d 454, 456 (8th Cir. 1995).

The Eighth Circuit held in *United States v. Richardson*, 439 F.3d 421 (8th Cir. 2006), that convictions under § 922(g)(1) and (g)(3) arising out of the same act of possession should have been merged for sentencing, because Congress did not intend multiple punishments for a single act of possession of a firearm.

6.18.924. FIREARMS -POSSESSION IN FURTHERANCE OF A CRIME OF VIOLENCE/ DRUG TRAFFICKING OFFENSE (18 U.S.C. § 924(c))

The crime of possessing a firearm[1] in furtherance of a [crime of violence][2] [drug trafficking crime] as charged in [Count _____ of] the Indictment has [two] [three] elements, which are:[3]

One, the defendant committed the crime[s] of (describe crime[s]);[4] and

Two, the defendant knowingly[5] possessed a firearm in furtherance of [that] [those] crime[s] [and]

[*Three*, the firearm was a[n] (describe, e.g., semi-automatic assault weapon, short-barreled rifle, short-barreled shotgun, machine gun, destructive device, or firearm equipped with a silencer or muffler).][6]

[*Three*, the defendant used the firearm to cause the death of (specify person killed).][7]

[The phrase "in furtherance of" should be given its plain meaning, that is, the act of furthering, advancing, or helping forward. The phrase "in furtherance of" is a requirement that the defendant possess the firearm with the intent that it advance, assist or help commit the crime, not that it actually did so.][8]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. *See* 18 U.S.C. §§ 921(a)(3), 921(a)(23) and 921(a)(24) and 26 U.S.C. § 5845(b). "Firearm" normally will not require definition for the jury. Under 18 U.S.C. § 924(c)(1), the penalty for use of a machine gun, silencer or muffler has been substantially increased, e.g., thirty (30) years. Under 18 U.S.C. § 924(c)(1), the penalty for use of a semi-automatic assault weapon has been increased to ten (10) years. The definition of these weapons can be rather technical and not necessarily intuitive. *See, e.g.*, 18 U.S.C. §§ 921(a)(30) & 922, Appendix and 26 U.S.C. § 5645. Where the third optional element is included in this instruction because the government seeks an enhanced penalty for use of an assault weapon, machine gun, silencer or muffler, or destructive device, the Committee recommends that the jury should be instructed as to the statutory definitions at the request of either party. Where more than one firearm is charged in the same count, a special verdict may be helpful. *See* Instruction 11.03. *Cf. United States v. Friend*, 50 F.3d 548, 554 (8th Cir. 1995) (government did not object to lesser-included offense instruction of using a firearm with no silencer).

2. Currently defined by 18 U.S.C. § 924(c)(3); *see also* 18 U.S.C. § 16.

3. The committee has omitted “use” and “carry” from the main body of the instruction because it believes that the prosecution will opt for the generally broader “possess in furtherance” language of the statute in formulating charges in indictments. However, in those instances in which the indictment charges the “ use” of a firearm, the following definition of that term should be included in the instruction:

> [The phrase "used [a] firearm[s]" means that the firearm was actively employed in the course of the commission of the (insert crime[s]). You may find that a firearm was used during the commission of the crime[s] of (insert crime) if you find that (it was [brandished] [displayed] [bartered] [used to strike someone] [fired]) (the defendant [attempted to fire the firearm] [traded or offered to trade a firearm without handling it] [made references to a firearm that was in the defendant's possession]) (describe other conduct consistent with the active-employment use of a firearm).]

The United States Supreme Court, in *Bailey v. United States*, 516 U.S. 137, 145 (1995), has determined that "the language, context, and history of section 924(c)(1) indicate that the Government must show active employment of the firearm" when the case is submitted under the "use" prong of the statute. This holding overrules an established line of cases that utilized the "accessibility and proximity test" previously employed by this and other circuits. The language of section 924(c)(1), supported by its history and context, compels the conclusion that Congress intended “use” in the active sense of “to avail oneself of." *Id.*

In order to meet this requirement, the firearm need not have a role in the crime as a weapon. *See Smith v. United States*, 508 U.S. 223, 241 (1993) (holding that a criminal who trades his firearm for drugs "uses" it during and in relation to a drug trafficking offense within the meaning of section 924(c)). *Bailey*, 516 U.S. at 145.

Where “carry” is charged in the indictment, it should be noted, "carrying" does not require that the defendant had the weapon on his person. *United States v. Nelson*, 109 F.3d 1323 (8th Cir. 1997); *United States v. Barry*, 98 F.3d 373, 378 (8th Cir. 1996),. "Carries," within the meaning of section 924(c)(1), includes carrying a weapon in a vehicle. *United States v. Nelson*; *United States v. Freisinger*, 937 F.2d 383, 387 (8th Cir. 1991). It is not necessary to show that the defendant used the weapon in any affirmative manner to prove that the defendant carried the weapon. *Bailey v. United States*, 516 U.S. at 145 (a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction).

Courts have held that it is not plain error to fail to give a definition of "carrying" because it is a commonly understood term. *See United States v. Rhodenizer*, 106 F.3d 222, 225 (8th Cir. 1997); *United States v. Behler*, 100 F.3d 632 (8th Cir. 1996) (where the defendant fails to offer an instruction defining "carry," the ordinary meaning of the word should apply).

If a definition of "carrying" is to be given, the Committee recommends the following be inserted after element *Three*:

> [You may find that a firearm was "carried" during the commission of the crime[s] of (insert crime) if you find that the defendant [had a firearm on his

> person] [was transporting a firearm in a vehicle] [(describe other included conduct consistent with carrying a firearm)].

For additional discussion of the scope of the term "carry," *see Smith v. United States*, 508 U.S. 223 (1993); *United States v. White*, 81 F.3d 80 (8th Cir. 1996); *United States v. Willis*, 89 F.3d at 1379.

The use or carrying of a "firearm," as defined in 18 U.S.C. § 921(a)(3), clearly is a statutory element of the offense which must be submitted to the jury. Element *Two*, *supra*. *See also United States v. Rodriguez*, 841 F. Supp. 79 (E.D.N.Y. 1994) (whether a firearm threaded for a silencer next to a silencer was "equipped" with a silencer within the meaning of the statute was an issue for the jury), *aff'd*, 53 F.3d 545, 546 (2d Cir. 1995).

The "in relation to" element must be included in the instructions in those instances where “use” or “carry” is charged. *Smith v. United States*, 508 U.S. 223, 237 (1993).

In *Bradshaw* v. *United States*, 153 F.3d 704, 707 (8th Cir. 1998) this circuit approved the following language:

> In determining whether a defendant used or carried a firearm, you may consider all of the factors received in evidence in the case including the nature of the underlying drug trafficking crime alleged, the proximity of the defendant to the firearm in question, the usefulness of the firearm to the crime alleged, and the circumstances surrounding the presence of the firearm.

In *Bailey v. United States*, 516 U.S. 137 (1995), the Court enumerated various examples of conduct that would constitute the active employment of a firearm in relation to the predicate offense and also stated that a firearm could "be used without being carried, e.g., when an offender has a gun on display during a transaction or barters with a firearm without handling it." *Id.* The Committee believes that other conduct can also constitute active employment of a firearm and that latitude should be accorded to the trial court to fashion an appropriate instruction when the evidence supports submission on the issue of "use."

4. The question of whether the crime is a crime of violence or a drug trafficking crime is a question of law for the court. *United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994) (district judge correctly applied a categorical analysis to the elements of involuntary manslaughter as defined in 18 U.S.C. § 1112 and determined as a matter of law that it was a crime of violence). The trial court should make its finding on the record.

5. Section 924(c) as written does not require that possession, use or carrying of a weapon be done "knowingly." However, “the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *Staples v. United States*, 511 U.S. 600, 605 (1994). Most jurisdictions that have addressed the issue require knowledge. The Eighth Circuit has implied that knowingly is required. *See Bradshaw v. United States*, 153 F.3d 704 (8th Cir. 1998); *United States v. Coyle*, 998 F.2d 548, 551 (8th Cir. 1993). *See also United States v. Wilson*, 884 F.2d 174, 178-79 (5th Cir. 1989). Other circuits’ pattern

jury instructions require knowingly also. *See* 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 39.16-.20 (5th ed. 2000). Thus, the Committee believes that "knowingly" is required even though section 924(c) does not expressly require that the act be done knowingly.

6. This element should be considered only when the government seeks an enhanced sentence associated with a particular type of firearm, e.g., a semi-automatic assault weapon or a machine gun. *See United States v. Simms*, 18 F.3d 588, 592 (8th Cir. 1994) (generally the prosecution must prove only that the defendant used or carried a firearm and did so in relation to the predicate, e.g., drug trafficking, crime); *United States v. Warren*, 16 F.3d 247, 252 (8th Cir. 1994) (a section 924(c) conviction requires that a defendant use or carry a firearm during and in relation to either a drug trafficking crime or a crime of violence). Where an enhanced sentence is sought, the government must prove that the firearm was not just any firearm, but of the type specifically proscribed.

The Committee believes that actual knowledge of the specific characteristics of the firearm resulting in enhancement of the punishment is not required in an 18 U.S.C. § 924(c) prosecution. *United States v. Harris*, 959 F.2d 246, 257-61 (D.C. Cir. 1992). Although it may be argued that the rationale of *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) requires a *mens rea* finding as to the characteristics of the firearm, it is the Committee's opinion that the *X-Citement Video* rationale does not apply to an "element" that only establishes applicability of an enhanced penalty, as opposed to liability for violation of the statute. *X-Citement Video* involved a prosecution under 18 U.S.C. § 2252, and the Court held that the government needed to prove not only that the defendant knew the depiction was sexually explicit, but also that the defendant knew the performer was a minor.

The Committee also believes that *Staples v. United States*, 511 U.S. 600 (1994) is distinguishable. Where a defendant is charged with merely possessing a proscribed firearm such as a sawed-off shotgun or machine gun under 26 U.S.C. § 5861(d), there is no doubt that the mens rea requirement of the offense includes knowledge that the firearm possessed had characteristics that make it a "firearm" under that statute. The Court in Staples held that Congress would have spoken more clearly if it had intended to permit severe punishment of "traditionally lawful conduct" and of those "wholly ignorant of the offending characteristics of their weapons." Before a defendant can be found guilty under 18 U.S.C. § 924(c), however, the government must first prove that the defendant committed a "crime of violence" or a "drug trafficking crime." *See United States v. Hawkins*, 59 F.3d 723, 729 (8th Cir. 1995) ("mere possession" of a firearm is insufficient); *United States v. Simms*, 18 F.3d 588, 592 (8th Cir. 1994). The distinction between the scienter requirements of 26 U.S.C. § 5861 and 18 U.S.C. § 924(c) were carefully analyzed in *United States v. Harris*, 959 F.2d 246, 257-61 (D.C. Cir. 1992). Employing the same analysis the Supreme Court later used in *Staples*, the D.C. Circuit concluded that the defendant's conviction for using a machine gun in violation of 18 U.S.C. § 924(c) could stand without proof that the defendant "knew the precise nature of the weapon," but that the conviction for possessing the same weapon in violation of 26 U.S.C. § 5861 could not. *Harris*, 959 F.2d at 259 (finding that knowingly using a firearm in relation to a drug

distribution offense established the required mental state and analogizing to cases where the defendants receive enhanced penalties based on possession of different kinds of illegal drugs without the government showing the defendant knew the exact nature of a given illegal substance.

A defendant may be held liable under section 924(c) for the acts of others, based not on actual knowledge, but that the use or carrying of the firearm was reasonably foreseeable in furtherance of the offense, e.g., a drug conspiracy. *United States v. Friend*, 50 F.3d 548, 554 (8th Cir. 1995); *United States v. Lucas*, 932 F.2d 1210, 1220 (8th Cir.) (citing *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946)). The *mens rea* requirement is satisfied by the defendant's agreement to join in an agreement to commit other crimes; however, there is no requirement that the defendant have actual knowledge of the specific type of firearm. *See Friend*, 50 F.3d at 554 (evidence supported foreseeability of firearm but not silencer). The Committee recommends that the reasonable foreseeability requirement be given if the jury is to be given a vicarious liability *Pinkerton* instruction or Instruction 5.01 (aiding and abetting). *See Friend*, 50 F.3d at 554; *United States v. Comeaux*, 955 F.2d 586, 591 (8th Cir. 1992) (*Pinkerton* vicarious liability instruction where the defendants were indicted as aiders and abettors).

7. Title 18 U.S.C. § 924(j) is not independent of section 924(c) and the punishment provisions of that section. Section 924(j) is an additional aggravating punishment for the scheme set out in section 924(c). "Although section 924(j) does not explicitly contain the same express mandatory cumulative punishment language as found in section 924(c), it incorporates section 924(c) by reference without disclaiming the cumulative punishment scheme which is so clearly set out in section 924(c). *United States v. Allen*, 247 F.3d 741,769, (8th Cir. 2001).

Where the indictment charges a violation of section 924(c) which caused death of a person under section 924(j), the Court must instruct the jury, consistent with the facts of the case, on the elements of murder, voluntary manslaughter and involuntary manslaughter since the maximum sentence to be imposed is dependent on a determination of the nature of the crime committed which caused the death. *See* 18 U.S.C. §§ 924(j)(1) and (2).

This circuit has not decided whether a specific intent to kill is an element of the offense of murder in the first degree committed during a violation of section 924(c). *United States v. Allen*, 247 F.3d at 783-84 (citations omitted). The element of "malice aforethought" may be established may be established under a felony murder theory. "We agree with the Tenth Circuit's interpretation of section 1111(a) in a case such as this one (murder committed during armed bank robbery) that 'first degree murder is defined as including any murder which is either premeditated or committed in the perpetration of any of the listed felonies, which include robbery.'" *Id.* Further, an instruction requiring a jury to find, beyond a reasonable doubt, that a defendant was aware that a serious risk of death may occur in the course of an armed robbery is adequate to support a conviction. *Id.* at 785. The panel's decision in *Allen* also concluded that the aiding and abetting instructions on each count given by the District Court were sufficient to supply a specific intent element as a matter of law. *Id.* Aiding and abetting a violation of 924(j) the government must prove: (1) the defendant must "have known the offense of using or carrying

a firearm during and in relation to a bank robbery was being committed or going to be committed;" (2) the defendant "intentionally acted in some way for the purpose of causing, encouraging, or aiding the commission of using or carrying of a firearm during and in relation to a bank robbery and that . . . was murdered in the perpetration of that robbery;" and (3) the defendant "was aware of a serious risk of death attending his conduct. *Id.* at 784, n.19 (8th Cir. 2001).

8. *United States v. Kent*, 531 F.3d 642 (8th Cir. 2008).

Committee Comments

Brandishing and discharge of a weapon are sentencing enhancements and not elements of this offense and thus, do not need to pleaded and proven to a jury beyond a reasonable doubt. *Harris v. United States*, 536 U.S. 545 (2002).

Final Instructions: Elements of Offenses

6.18.1001A. CONCEALING A MATERIAL FACT FROM A GOVERNMENTAL AGENCY (18 U.S.C. § 1001)

The crime of [falsifying a material fact] [concealing a material fact] in a matter with a governmental agency, as charged in [Count _____ of] the Indictment, has four elements, which are:

One, the defendant knowingly, voluntarily and intentionally [falsified] [concealed] (describe material fact falsified or concealed, e.g., the true purchase price of the ABC Building) in (describe the matter within agency jurisdiction, e.g., a loan closing statement submitted to XYZ Association);[1]

Two, the defendant did so by use of a [trick] [scheme] [device], that is, a course of action intended to deceive others;[2]

Three, the fact was material to the (name agency, e.g., Federal Home Loan Bank Board);[3] and

Four, the (describe matter, e.g., loan closing statement) was a matter within the jurisdiction of (name agency, e.g., Federal Home Loan Bank Board).[4] You may find that this element has been satisfied if you find that the (name of agency)'s function includes (describe evidence adduced to show agency jurisdiction, e.g., "reviewing lending practices of XYZ Association").

A fact is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the agency. [However, whether a fact is "material" does not depend on whether a course of action intended to deceive others actually succeeded.][5]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. Attention must be paid to sufficiently describing the matter within federal jurisdiction. The example given in Element *One* of this instruction suggests a way to characterize a matter involving a document submitted to a local agency. The examples given in Element *One* of Instruction 6.18.1001B and Element *One* of Instruction 6.18.1001C suggest a way to characterize a matter involving a statement made directly to a federal agency.

2. This element contains the definition of "scheme or device" from Seventh Circuit Federal Jury Instructions: Criminal at 242 (1999).

3. Materiality is an element of the second ("false statement") clause of 18 U.S.C. § 1001 and it is a constitutional violation and reversible error for the trial court to refuse to submit the issue to the jury. *United States v. Gaudin*, 515 U.S. 506, 523 (1995) (unanimous opinion). Three justices might have reached a different conclusion regarding the second clause of 18 U.S.C. § 1001, if the government had not conceded that materiality is an element. *Id.* at 523 (Rehnquist, C.J., concurring). Because the first ("concealment") clause explicitly refers to a "material fact," there can be no doubt that *Gaudin* also requires that the issue of materiality be submitted to the jury in "concealment" cases.

4. The statutory requirement that the matter be "within the jurisdiction" of any department or agency of the United States appears to be an element of the offense. Traditionally, this issue has been treated as a question of law for the court. *Terry v. United States*, 131 F.2d 40, 44 (8th Cir. 1942) (decided under 18 U.S.C. § 80, a predecessor to sections 287 and 1001). However, the logic applied in *United States v. Gaudin* to the issue of "materiality," may similarly apply to the issue of departmental/agency jurisdiction. Accordingly, the Committee recommends that the third element be added to previous versions of this instruction. However, the Committee believes that whether an entity is a department or agency of the United States need not be determined by the jury, but is a question of law which should be found by the Court, on the record, before submitting the case to the jury. "Department or agency" is defined in 18 U.S.C. § 6; *see also* 5 U.S.C. § 101 (executive departments); *United States v. Gould*, 536 F.2d 216 (8th Cir. 1976) (if the court reaches a "conclusion through an exercise in statutory interpretation" about a particular issue, the conclusion is a legislative fact that need not be submitted to the jury).

5. *See United States v. Gaudin*, 515 U.S. at 508 (agreed definition); *United States v. Adler*, 623 F.2d 1287, 1292 n.7 (8th Cir. 1980) ("A writing or document is materially false if such writing has a natural tendency to influence or is capable of influencing the decision of the government agency making the determination required in the matter."); *United States v. Johnson*, 937 F.2d 392, 396 (8th Cir. 1991) ("[a]ctual reliance by the government is not necessary"); *Blake v. United States*, 323 F.2d 245, 247 (8th Cir. 1963) (same).

Committee Comments

See United States v. Swaim, 757 F.2d 1530, 1533 (5th Cir. 1985); *United States v. Diogo*, 320 F.2d 898, 902 (2d Cir. 1963).

See Committee Comments, Instruction 6.18.1001B, *infra*.

The requirement of a "trick, scheme, or device" is discussed in *United States v. London*, 550 F.2d 206, 211-14 (5th Cir. 1977). "Willfully" and "knowingly" are defined in *United States v. Markham*, 537 F.2d 187, 194 (5th Cir. 1976).

The government must prove an affirmative act by which a material fact is actively concealed. *United States v. Shannon*, 836 F.2d 1125, 1130 (8th Cir. 1988).

Nondisclosure or partial disclosure may constitute concealment under section 1001. *United States v. Olin Mathieson*, 368 F.2d 525 (2d Cir. 1966). However, in such cases the government must prove that the defendant had a legal duty to disclose. *United States v. Larson*, 796 F.2d 244, 246 (8th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676, 682-83 (1st Cir. 1985); *United States v. Irwin*, 654 F.2d 671, 678-79 (10th Cir. 1981). Whether the defendant had a legal duty to disclose is a question of law for the court. *United States v. DeRosa*, 783 F.2d 1401, 1407 (9th Cir. 1986).

In *Hubbard v. United States*, 514 U.S. 695, 715 (1995), the Supreme Court held that "a federal court is neither a ‘department’ nor an ‘agency’ within the meaning of § 1001," overruling *United States v. Bramblett*, 348 U.S. 503 (1955), which had held that the word "department" used in section 1001 was meant to extend the statute’s reach to all three branches of government. The False Statements Accountability Act of 1996, Pub. L. 104-292, HR 3166 (Oct. 11, 1996), revised section 1001 to cover statements that are made to all three branches of the federal government, effectively overruling *Hubbard*.

6.18.1001B. FALSE STATEMENT TO A FEDERAL AGENCY (18 U.S.C. § 1001)

It is a crime to make a [false] [fraudulent] material [representation] [statement] to an agency of the United States or about a matter within the agency's jurisdiction. This crime, as charged in Count ___ of the Indictment, has five elements:

One, the defendant knowingly and intentionally made the [statement] [representation] [as charged];

Two, that [statement] [representation] was [false] [fraudulent];

Three, the [statement] [representation] concerned a material fact;

Four, the [statement] [representation] was made about a matter within the jurisdiction of the [name of the federal agency]; and

Five, the defendant knew it was untrue when [he] [she] made the [statement] [representation].

A statement is "false" if it was untrue when it was made. [A statement is "fraudulent" if the defendant made it with the intent to deceive.]

A "material fact" is a fact that would naturally influence or is capable of influencing a decision of the agency. Whether a [statement] [representation] is "material" does not depend on whether the agency was actually deceived or misled.

(Insert paragraph describing Government's burden of proof, *see* Instruction 3.09, *supra*.)

Notes on Use

1. Attention must be paid to sufficiently describing the matter within federal jurisdiction. For example, making a false statement about your true name or criminal history on an immigration document could be described in element one as "The defendant knowingly and intentionally claimed that he had never been arrested in his country of origin."

2. The issue of materiality is an element of the offense which must be decided by the jury. Following the Supreme Court decision in *United States v. Gaudin*, 515 U.S. 506 (1995), the statute was revised and materiality was explicitly added to each clause of § 1001(a). *See also Johnson v. United States*, 520 U.S. 461 (1997).

3. The statutory requirement that the matter be "within the jurisdiction" of any department or agency of the United States appears to be an element of the offense. Traditionally, this issue was treated as a question of law for the court. *Terry v. United States*, 131 F.2d 40, 44

(8th Cir. 1942) (decided under 18 U.S.C. § 80, a predecessor to sections 287 and 1001); *see also Friedman v. United States*, 374 F.2d 363, 371 (8th Cir. 1967). The Eighth Circuit has not addressed this issue since 1967. However, the logic applied in *United States v. Gaudin* to the issue of "materiality," may similarly apply to the issue of departmental/agency jurisdiction. Accordingly, the Committee recommends that the jury be required to decide this issue, and therefore it is treated as an element of the offense.

However, the Committee believes that whether an entity is a department or agency of the United States need not be determined by the jury, but is a question of law which should be found by the court, on the record, before submitting the case to the jury. "Department or agency" is defined in 18 U.S.C. § 6; *see also* 5 U.S.C. § 101 (executive departments); *United States v. Gould*, 536 F.2d 216 (8th Cir. 1976) (if the court reaches a "conclusion through an exercise in statutory interpretation" about a particular issue, the conclusion is a legislative fact that need not be submitted to the jury).

4. "Materiality involves only the capability of influencing an agency's governmental functions, i.e., does the statement have a 'natural tendency to influence or is it capable of influencing agency decision.'" *United States v. Whitaker*, 848 F.2d, 914, 916 (8th Cir. 1988); *see also United States v. Baker*, 200 F.3d 558, 561 (8th Cir. 2000); *United States v. Johnson*, 937 F.2d 392, 396 (8th Cir. 1991). *Gaudin* did not disturb this well-recognized definition. 515 U.S. at 508. *See also United States v. Baker*, 200 F.3d 558, 561 (8th Cir. 2000) ("The materiality inquiry focuses on whether the false statement had a natural tendency to influence, or was capable of influencing the government agency or official."); *United States v. Phythian*, 529 F.3d 807, 813 (8th Cir. 2008) (same). Neither actual reliance by the government, nor success of the attempted deception is necessary. *See United States v. Johnson*, 937 F.2d 392, 396 (8th Cir. 1991); *Blake v. United States*, 323 F.2d 245, 247 (8th Cir. 1963).

5. In order to fall within a federal agency's jurisdiction, it is not necessary that the false statement be presented directly to a federal agency; it is sufficient if the statement is made in some intended relationship to a matter within an agency's jurisdiction. *United States v. Richmond*, 700 F.2d 1183, 1187-88 (8th Cir. 1983). *See also United States v. Rodgers*, 466 U.S. 475 (1984); *United States v. Bass*, 472 F.2d 207, 212 (8th Cir. 1973), and cases cited therein.

The defendant need not have actual knowledge that he is making a statement within the jurisdiction of a federal agency. *United States v. Yermian*, 468 U.S. 63, 75 (1984); *United States v. Hildebrandt*, 961 F.2d 116, 119 (8th Cir. 1992); *see also United States v. McNeally*, 132 Fed. App'x 63, 64 (8th Cir. 2005). Nor must the intended victim of the deceit be the federal government. *Hildebrandt*, 961 F.2d at 119.

6. The statute explicitly requires that the acts must be done "knowingly and willfully." The term "knowingly" is not defined in this instruction because it should be given its everyday meaning.

The term "willfully" is incorporated into the fifth element of the instructions, which requires that the government prove that the defendant knew the statements were false.

"Willfully" is construed as requiring that the conduct be intentional, i.e., that the statements at issue be intentionally false. *United States v. Yermian*, 468 U.S. 63, 64 (1984); *United States v. Pirani*, 406 F.3d 543, 555 (8th Cir. 2005). Although fraudulent intent can be proof of willfulness, intent to defraud is not required for proof of a false statement. *See United States v. Yermian*, 468 U.S. 63, 68-70 (1984); *United States v. Hildebrandt*, 961 F.2d 116, 118-19 (8th Cir. 1992)("It is not necessary that the defendant act with the intent to deceive the United States. . . .").

7. In addition to being one of the ways in which willfulness can be established, the issue of "intent to deceive" also arises where "fraudulent" statements are charged, as opposed to "false" or "fictitious" ones. "Fraudulent" is standardly defined as in this instruction, and does require proof of intent to deceive.

8. The statute criminalizes statements which are "false, fictitious or fraudulent." *See* 18 U.S.C. § 1001(a)(2). However, the terms "false" and "fictitious" were described as synonymous in the previous version of this instruction. The two terms have also been treated as synonymous and interchangeable in the case law. *See, e.g.*, *United States v. Baker*, 200 F.3d 558, 561 (8th Cir. 2000) (referring to "fictitious" address as "false"); *United States v. Popow*, 821 F.2d 483, 486-89 (8th Cir. 1987) (referring to interchangeably to "false" and "fictitious" names and identities). In the interest of simplicity, the Committee recommends using just "false" instead of "false and fictitious," unless the language of the indictment or the unique circumstances of the case require otherwise.

Committee Comments

Until recently, the Eighth Circuit Jury Instructions advised using three elements instead of five for false statement. However, Eighth Circuit jurisprudence routinely describes a violation of 18 U.S.C. § 1001 as having five elements which are essentially the same as those set forth above. *See United States v. McCreary*, 628 F.3d 1010, 1018 (8th Cir. 2011); *United States v. Love*, 516 F.3d 683, 688 (8th Cir. 2008); *United States v. Rice*, 449 F.3d 887, 892 (8th Cir. 2006). In the interest of clarity and simplicity, the Committee has now separated two previous single elements which contained multiple essential ideas into distinct elements.

Final Instructions: Elements of Offenses

6.18.1001C. USING A FALSE DOCUMENT (18 U.S.C. § 1001)

The crime of [making] [using] a false [writing] [document] in a matter within the jurisdiction of a governmental agency, as charged in [Count _____ of] the Indictment, has four elements, which are:

One, the defendant voluntarily and intentionally [made] [used] a [writing] [document] containing a [false] [fictitious] [fraudulent] [statement] [entry] in (describe matter within agency jurisdiction, e.g., an application for an S.B.A. loan);[1]

Two, at the time the defendant did so, he knew that the [writing] [document] contained a [false] [fictitious] [fraudulent] [statement] [entry];

Three, the [false] [fictitious] [fraudulent] [statement] [entry] was material to the (name of agency, e.g., Small Business Administration)[2]; and

Four, the (describe matter, e.g., an application for an S.B.A. loan) was a matter within the jurisdiction of the (name agency, e.g., Small Business Administration).[3] (You may find that this element has been satisfied if you find that the (name of agency)'s function includes (describe evidence adduced to show agency jurisdiction, e.g., "acting on applications for loans.")

[A statement or entry is "fraudulent," if known by the defendant to be untrue, and made or used by the defendant with the intent to deceive the governmental agency to whom submitted.][4]

A [writing] [document] is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the agency. [However, whether a [writing] [document] is "material" does not depend on whether the [agency] was actually deceived.][5]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. Attention must be paid to sufficiently describing the matter within federal jurisdiction. The example given in Element *One* of Instruction 6.18.1001A suggests a way to characterize a matter involving a document submitted to a local agency. The examples given in Element *One* of Instruction 6.18.1001B, *supra*, and Element *One* of this instruction suggest a way to characterize a matter involving a statement made directly to a federal agency.

2. Materiality is an element of the second ("false statement") clause of 18 U.S.C. § 1001 and it is a constitutional violation and reversible error for the trial court to refuse to submit the

issue to the jury. *United States v. Gaudin*, 515 U.S. 506, 523 (1995) (unanimous opinion). Three justices might have reached a different conclusion regarding the second clause of 18 U.S.C. § 1001, if the government had not conceded that materiality is an element. *Id.* at 2320 (Rehnquist, C.J., concurring). Because the first ("concealment") clause explicitly refers to a "material fact," there can be no doubt that *Gaudin* also requires that the issue of materiality be submitted to the jury in "concealment" cases.

3. The statutory requirement that the matter be "within the jurisdiction" of any department or agency of the United States appears to be an element of the offense. Traditionally, this issue has been treated as a question of law for the court. *Terry v. United States*, 131 F.2d 40, 44 (8th Cir. 1942) (decided under 18 U.S.C. § 80, a predecessor to sections 287 and 1001). However, the logic applied in *Gaudin* to the issue of "materiality," may similarly apply to the issue of departmental/agency jurisdiction. Accordingly, the Committee recommends that the third element be added to previous versions of this instruction. However, the Committee believes that whether an entity is a department or agency of the United States need not be determined by the jury, but is a question of law which should be found by the Court, on the record, before submitting the case to the jury. "Department or agency" is defined in 18 U.S.C. § 6; *see also* 5 U.S.C. § 101 (executive departments); *United States v. Gould*, 536 F.2d 216 (8th Cir. 1976) (if the court reaches a "conclusion through an exercise in statutory interpretation" about a particular issue, the conclusion is a legislative fact that need not be submitted to the jury).

4. The definition of "false and fictitious" is not given because the definition contains nothing that is not already in the elements. *See* Instruction 6.18.1001B, *supra*. "Fraudulent" is defined. *See* 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 40.08 (5th ed. 2000).

5. *See United States v. Gaudin*, 515 U.S. at 508 (agreed definition); *United States v. Adler*, 623 F.2d 1287, 1292 n.7 (8th Cir. 1980) ("A writing or document is materially false if such writing has a natural tendency to influence or is capable of influencing the decision of the governmental agency making the determination required in the matter."); *United States v. Johnson*, 937 F.2d 392, 396 (8th Cir. 1991) (actual reliance by the government or success of the attempted deception is not necessary); *Blake v. United States*, 323 F.2d 245, 247 (8th Cir. 1963) (same).

Committee Comments

See 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 40.09-.12 (5th ed. 2000); *United States v. Hicks*, 619 F.2d 752, 754 (8th Cir. 1980); *Ebeling v. United States*, 248 F.2d 429, 438 (8th Cir. 1957).

In *Hicks*, the court states that "willfully" should be interpreted "as that term is now generally understood in the field of federal criminal law," referring to former § 14.06 of Devitt & Blackmar (now 1A Kevin E. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 17.05 (5th ed. 2000)) and cases cited therein. These cases support a definition of

"voluntarily and intentionally." Alternatively, "deliberately" could be used. *See* Committee Comments, Instruction 6.18.1001B, *supra*. "Knowingly and intentionally" was used in the instruction in *Ebeling*.

The specific knowledge required by this clause of the statute is set forth in Element *Two*.

In *Ebeling*, the court held that the false documents themselves did not have to be submitted to the government if it was intended "to bear a relation or purpose as to some matter which is within the jurisdiction of a department or agency of the United States." 248 F.2d at 434. In that case, the court found that phony purchase orders, shipping tickets and invoices created by a government contractor and its subcontractor as backup for a false amount claimed under the contract were covered section by 1001, even though the backup was not directly submitted for payment.

In *Hubbard v. United States*, 514 U.S. 695, 715 (1995), the Supreme Court held that "a federal court is neither a ‘department’ nor an ‘agency’ within the meaning of § 1001," overruling *United States v. Bramblett*, 348 U.S. 503 (1955), which had held that the word "department" used in section 1001 was meant to extend the statute’s reach to all three branches of government. The False Statements Accountability Act of 1996, Pub. L. 104-292, HR 3166 (Oct. 11, 1996), revised section 1001 to cover statements that are made to all three branches of the federal government, effectively overruling *Hubbard*.

6.18.1005. FALSE ENTRY IN BANK RECORDS (18 U.S.C. § 1005) (Third Paragraph)

The crime of making a false entry in bank records, as charged in [Count _____ of] the Indictment, has four elements, which are:

One, that the defendant[1] made or caused to be made a false entry [concerning a material fact][2] in a [book] [report] [statement] of (name of bank or other covered institution)[3];

Two, the defendant knew the entry was false;

Three,[4] [the defendant did so with the intent [to injure] [to defraud] [the bank] [(or describe other entity or person covered by the statute allegedly intended to be injured or defrauded, i.e., "any other company, body politic or corporate, or any individual person")];]

[the defendant did so with the intent to deceive an officer of the bank (or describe other entity or person covered by the statute allegedly intended to be deceived, i.e., "the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank or company, or the Board of Governors of the Federal Reserve System");] and

Four, the bank was (describe federal relation, e.g., insured by the FDIC).

An entry is "false" if untrue when made. An entry may be false if it records a transaction which did not occur, or fails to record a transaction which did occur and should have been accurately recorded, or inaccurately reports or records a transaction.

[To act with "intent to injure" means to act with intent to cause pecuniary loss.] [To act with "intent to defraud" means to act with intent to deceive or cheat, ordinarily for the purpose of causing a financial loss to someone else or bringing about a financial gain to the defendant or another.] [To act with "intent to deceive" means to act with intent to mislead or to cause a person to believe that which is false.][5]

[A fact is "material" if it has a natural tendency to influence, or is capable of influencing the decision of the institution. (Whether a fact is material does not depend on whether a course of action intended to deceive others actually succeeded.)][6]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Final Instructions: Elements of Offenses

Notes on Use

1. The Federal Judicial Center Pattern Jury Instructions list as an element that the defendant be an employee of the bank. The third paragraph of the statute does not make this distinction and proscribes "whoever," not merely officers, from making false entries. *United States v. Edick*, 432 F.2d 350, 352-53 (4th Cir. 1970).

2. Although neither 18 U.S.C. § 1005 nor § 1006 expressly require the false statement or entry to be of a "material fact," both the Eleventh Circuit and the Fifth Circuit impose such a requirement, albeit without much discussion. *United States v. Rapp*, 871 F.2d 957, 963-64 (11th Cir. 1989) (citing *United States v. Jackson*, 621 F.2d 216, 219 (5th Cir. 1980)) (section 1005); *United States v. Beuttenmuller*, 29 F.3d 973, 982 (5th Cir. 1994) (section 1006). Both circuits suggest using the definition of materiality approved for section 1001 instructions. The Eighth Circuit has not specifically addressed this issue. In *Feingold v. United States*, 49 F.3d 437 (8th Cir. 1995), the court mentioned the requirement of materiality in conjunction with a section 1001 charge, but did not make any reference to a materiality issue in a section 1005 charge that was discussed in the preceding sentence. The issue apparently was not raised, and was not discussed in the appellate opinion.

In section 1001, materiality is important because the statute requires that the statement be of a material fact and no intent to deceive or defraud is required for conviction. The statutory language in sections 1005 and 1006 does not include a requirement of materiality, but does impose a requirement that the government prove an intent to defraud or deceive. Materiality of the statement would seem less significant if the individual seeks to deceive or defraud. The requirement of materiality was arguably intentionally left out of sections 1005 and 1006 for that reason, although no court has yet so stated. In the absence of case law on point, the Committee recommends requiring that materiality be found by the jury. If it is an element, under the holding o*f United States v. Gaudin*, 515 U.S. 506 (1995), it is a jury issue and must be instructed.

3. The types of institutions covered include the Federal Reserve Bank, member banks of the Federal Reserve System, national banks, bank holding companies, and any state bank, banking association, trust company or savings bank, the deposits of which are insured by the Federal Deposit Insurance Corporation.

4. Intent to deceive rather than defraud or injure may be alleged in the indictment, and the jury should be instructed accordingly. The defendant does not have to know that his act violates the law and is not entitled to an instruction defining "specific intent." *United States v. Dougherty*, 763 F.2d 970, 973-74 (8th Cir. 1985).

In the event the indictment alleges and the evidence at trial supports the submission to the jury of more than one mental state, for example, intent to defraud the bank and intent to deceive the comptroller of currency, the jury may be instructed that they can find the defendant guilty if they find unanimously and beyond a reasonable doubt that the government has proven at least one theory. *See generally United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977); *United States v. Frazin*, 780 F.2d 1461, 1468 (9th Cir. 1977).

5. "Intent to deceive" is defined according to *United States v. Godwin*, 566 F.2d 975 (5th Cir. 1978).

6. *See United States v. Gaudin*, 515 U.S. at 508 (agreed definition); *United States v. Adler*, 623 F.2d 1287, 1292 n.7 (8th Cir. 1980) ("A writing or document is materially false if such writing has a natural tendency to influence or is capable of influencing the decision of the governmental agency making the determination required in the matter."); *United States v. Johnson*, 937 F.2d 392, 396 (8th Cir. 1991) ("Actual reliance by the government is not necessary."); *Blake v. United States*, 323 F.2d 245, 247 (8th Cir. 1963) (same).

Committee Comments

See 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 41.03 (5th ed. 2000). *United States v. Biggerstaff*, 383 F.2d 675 (4th Cir. 1967).

"[S]ection 1005 is intended to be broad enough to cover any document or record of the bank that would reveal pertinent information for the officers or directors of the bank." *United States v. Foster*, 566 F.2d 1045, 1052 (6th Cir. 1977).

"The essence of the offense is making or causing to be made a bank entry which represents what is not true or does not exist." *United States v. Steffen*, 641 F.2d 591, 597 (8th Cir. 1981). "An omission where an honest entry would otherwise be made can be a false entry for section 1005 purposes." *United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir. 1987). For example, omitting information that would show the true nature of a transaction can be a violation. *United States v. Austin*, 823 F.2d 257 (8th Cir. 1987). For other examples of false entries, *see United States v. Dougherty*, 763 F.2d 970 (8th Cir. 1985) (failure to record improper issuance of bankers' acceptances); *United States v. Mohr*, 728 F.2d 1132 (8th Cir. 1984) (exceeding loan limit and concealing documents); *United States v. Ness*, 665 F.2d 248 (8th Cir. 1981) (check-rolling without deposits to customer accounts, which were not really legitimate loans); *United States v. Steffen*, 641 F.2d 591 (8th Cir. 1981) (forged minutes of board of directors' meeting); *United States v. Bevans*, 496 F.2d 494 (8th Cir. 1974) (rollover of insufficient fund checks and their treatment as new checks each day to avoid posting as overdrafts).

Coffin v. United States, 156 U.S. 432, 463 (1895), held that "the making of a false entry is a concrete offense which is not committed where the transaction entered actually took place, and is entered exactly as it occurred." However, the *Coffin* holding has been modified, and a literally true and accurate entry may still be false if it records a fraudulent transaction, contains a half truth, or conceals a material fact. *Agnew v. United States*, 165 U.S. 36, 52-54 (1897); *United States v. Walker*, 871 F.2d 1298, 1308 (6th Cir. 1989); *United States v. Gleason*, 616 F.2d 2, 29 (2d Cir. 1979); *United States v. Krepps*, 605 F.2d 101, 109 (3d Cir. 1979).

The person responsible for the false entries need not have actually made the entry himself; it is enough that he set into motion the actions that necessarily resulted in the making of the entry in the normal course of business. *United States v. Wolf*, 820 F.2d 1499, 1504 (9th Cir. 1987); *United States v. Krepps*, 605 F.2d 101, 109 n.28 (3d Cir. 1979).

Intent to injure, defraud, or deceive is an element. No other definition of "specific intent," i.e., willfulness in the sense of a purpose to violate the law is necessary. *United States v. Dougherty*, 763 F.2d 970, 973-74 (8th Cir. 1985). Consistent with the *Dougherty* opinion, and with the recommendation in Instruction 7.02, "willfully" is not included in the description of the mental element for this offense. Cases that include "willfully" in the description of the mental element of a section 1005 offense use the term in the sense of acting voluntarily and intentionally rather than as a "specific intent" requirement of the statute. For example, the Fifth Circuit instruction does not include "willfully" as part of the mental element of a section 1005 violation, and *United States v. Jackson*, 621 F.2d 216, 219 (5th Cir. 1980), lists section 1005 elements without mentioning "willfully." A recent case, *United States v. Kington*, 875 F.2d 1091, 1104 (5th Cir. 1989), cites *Jackson* in listing section 1005 elements. However, in denying a rehearing in *Kington*, the court stated at 878 F.2d 815, 817, "[w]e note in particular that the district court's intent instruction on the section 1005 count required both willfulness *and* an intent to injure or defraud." Also, in a recent case, the Eleventh Circuit said, "[t]o substantiate the [section 1005 violations] the government must prove . . . that Rapp *knowingly* and *willfully* made, or directed or authorized the making of, a false entry concerning a material fact in a book or record . . . with knowledge of its falsity and with the intent to defraud or deceive . . . ." *United States v. Rapp*, 871 F.2d 957, 963 (11th Cir. 1989) (citing *Jackson* as the source of these elements). Under paragraph three of section 1005 it is error to give a "reckless disregard" instruction, since "reckless disregard" does not adequately reflect the statutorily required mental state. *See United States v. Welliver*, 601 F.2d 203, 210 (5th Cir. 1979); *United States v. Adamson*, 700 F.2d 953, 964 (5th Cir. 1983). Although materiality is not statutorily required, some circuits have imposed the requirement. *See* cases cited in Note 2, *supra*. Until the Eighth Circuit addresses the issue, the Committee recommends including materiality in the jury instructions and allowing the jury to decide the issue.

In cases where violations of civil rules and regulations are shown by the evidence, it may be appropriate to instruct the jury that they are not to consider violations of such regulations as a crime. *See United States v. Kindig*, 854 F.2d 703, 707 n.1 (5th Cir. 1988).

6.18.1006A. FALSE ENTRIES IN FEDERAL CREDIT INSTITUTION RECORDS (18 U.S.C. § 1006) (First Paragraph)

The crime of making a false entry in credit institution records, as charged in [Count _____ of] the Indictment, has [four] [five] elements, which are:

One, the defendant was [an officer of] [an agent of] [an employee of] [connected in a capacity with][1] (name of covered agency or institution);[2]

Two, the defendant made or caused to be made a false entry [concerning a material fact][3] in a [book of] [report of] [statement of or to] (name of agency or institution);

Three, the defendant knew the entry was false;

Four,[4] the defendant did so with the intent to [defraud the institution (or describe other covered entity or person allegedly intended to be defrauded, i.e., "any other company, body politic or corporate, or any individual");] [deceive an [officer] [auditor] [examiner] [agent] of [the institution] [department or agency of the United States.][5]

[*Five*, (name of institution) was (describe federal relation, e.g., accounts insured by the Administrator of the National Credit Union Administration).][6]

An entry is "false" if untrue when made. An entry may be false if it records a transaction which did not occur, or fails to record a transaction which did occur and should have been accurately recorded, or inaccurately reports or records a transaction.

[To act with "intent to defraud" means to act with intent to deceive or cheat, ordinarily for the purpose of causing a financial loss to someone else or bringing about a financial gain to the defendant or another.] [To act with "intent to deceive" means to act with intent to mislead or to cause a person to believe that which is false.][7]

[A fact is "material" if it has a natural tendency to influence, or is capable of influencing the decision of the institution. (Whether a fact is material does not depend on whether a course of action is intended to deceive others actually succeeded.)][8]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Final Instructions: Elements of Offenses

Notes on Use

1. The language in the statute, "connected in any capacity with," is construed broadly to effectuate congressional intent by protecting federally insured lenders from fraud. *United States v. Prater*, 805 F.2d 1441, 1446 (11th Cir. 1986); *United States v. Payne*, 750 F.2d 844, 853 (11th Cir. 1985).

2. The types of agencies and institutions covered include among others: Federal Deposit Insurance Corporation, National Credit Union Administration, Office of Thrift Supervision, Resolution Trust Corporation, and any lending, mortgage, insurance, credit or savings and loan corporation or association acting under the laws of the United States or any institution the accounts of which are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration Board.

3. Although neither 18 U.S.C. § 1005 nor § 1006 expressly require the false statement or entry to be of a "material fact," both the Eleventh Circuit and the Fifth Circuit impose such a requirement, albeit without much discussion. *United States v. Rapp*, 871 F.2d 957, 963-64 (11th Cir. 1989) (citing *United States v. Jackson*, 621 F.2d 216, 219 (5th Cir. 1980)) (section 1005); *United States v. Beuttenmuller*, 29 F.3d 973, 982 (5th Cir. 1994) (section 1006). Both circuits suggest using the definition of materiality approved for section 1001 instructions. The Eighth Circuit has not specifically addressed this issue. In *Feingold v. United States*, 49 F.3d 437 (8th Cir. 1995), the court mentioned the requirement of materiality in conjunction with a section 1001 charge, but did not make any reference to a materiality issue in a section 1005 charge that was discussed in the preceding sentence. The issue apparently was not raised, and was not discussed in the appellate opinion.

In section 1001, materiality is important because the statute requires that the statement be of a material fact and no intent to deceive or defraud is required for conviction. The statutory language in sections 1005 and 1006 does not include a requirement of materiality, but does impose a requirement that the government prove an intent to defraud or deceive. Materiality of the statement would seem less significant if the individual seeks to deceive or defraud. The requirement of materiality was arguably intentionally left out of sections 1005 and 1006 for that reason, although no court has yet so stated. In the absence of case law on point, the Committee recommends requiring that materiality be found by the jury. If it is an element, under the holding o*f United States v. Gaudin*, 515 U.S. 506 (1995), it is a jury issue and must be instructed.

4. The jury should be instructed on intent to defraud or to deceive according to the allegations of the indictment.

5. Intent to injure, defraud, or deceive is an element. No other definition of "specific intent," i.e., willfulness in the sense of a purpose to violate the law is necessary. *United States v. Dougherty*, 763 F.2d 970, 973-74 (8th Cir. 1985). Consistent with the *Dougherty* opinion, and with the recommendation in Instruction 7.02, *infra*, "willfully" is not included in the description of the mental element for this offense. Cases that include "willfully" in the description of the mental element of a section 1005 violation, and *United States v. Jackson*, 621 F.2d 216, 219 (5th

Cir. 1980), list section 1005 elements without mentioning "willfully." *United States v. Kington*, 875 F.2d 1091, 1104 (5th Cir. 1989), cites *Jackson* in listing section 1005 elements. However, in denying a rehearing in *Kington*, the court stated at 878 F.2d 815, 817, "[w]e note in particular that the district court's intent instruction on the section 1005 count required both willfulness *and* an intent to injure or defraud." Also, the Eleventh Circuit said, "[t]o substantiate the [section 1005 violations] the government must prove . . . that Rapp *knowingly* and *willfully* made, or directed or authorized the making of, a false entry concerning a material fact in a book or record . . . with knowledge of its falsity and with the intent to defraud or deceive . . . ." *United States v. Rapp*, 871 F.2d 957, 963 (11th Cir. 1989) (citing *Jackson* as the source of these elements).

6. Use this paragraph where the false entry is in a report of a lending institution rather than one of the federal agencies named in the statute. The Federal Savings and Loan Insurance Corporation was abolished in 1989. Institutions formerly insured by FSLIC are now insured by FDIC. Section 1006 was amended one year later to account for this change and the legal effect of the delay is unclear.

7. "Intent to deceive" is defined according to *United States v. Godwin*, 566 F.2d 975 (5th Cir. 1978).

8. *See United States v. Gaudin*, 515 U.S. at 508 (agreed definition); *United States v. Adler*, 623 F.2d 1287, 1292 n.7 (8th Cir. 1980) ("A writing or document is materially false if such writing has a natural tendency to influence or is capable of influencing the decision of the government agency making the determination required in the matter."); *United States v. Johnson*, 937 F.2d 392, 396 (8th Cir. 1991) ("Actual reliance by the government is not necessary."); *Blake v. United States*, 323 F.2d 245, 247 (8th Cir. 1963) (same).

Committee Comments

See United States v. Tullos, 868 F.2d 689, 693-94 (5th Cir. 1989); *United States v. Stovall*, 825 F.2d 817, 822 (5th Cir.), *opinion amended*, 833 F.2d 526 (5th Cir. 1987).

A false entry in the records of a federal lending institution in violation of section 1006 and willful misapplication of the funds of a federal lending institution in violation of section 657 are separate offenses. *United States v. Stovall*, 825 F.2d at 822-23.

Failure to disclose a bank officer's interest in a loan, and failure to disclose nominee status of a borrower, constitute false entries. *United States v. Rochester*, 898 F.2d 971, 978 (5th Cir. 1990); *United States v. Tullos*, 868 F.2d at 694 n.6.

United States v. Payne, 750 F.2d 844, 861 (11th Cir. 1985), holds that the "exculpatory no" doctrine, which developed as an exception to 18 U.S.C. § 1001, is applicable to prosecutions under section 1006.

Tullos and *Stovall* include "knowingly and willfully" in defining the mental element of a section 1006 offense. The Committee believes that the reasoning of *United States v. Dougherty*, 763 F.2d 970, 973-74 (8th Cir. 1985), applies, and that there is no need to instruct on an element of willfulness. Intent to defraud or to deceive correctly defines the mental element of the

offense. *See, e.g.*, *United States v. Rochester*, 898 F.2d 971, 979 (5th Cir. 1990); *United States v. Payne*, 750 F.2d 844, 858 (11th Cir. 1989); *United States v. Chenaur*, 552 F.2d 294, 297 n.3 and 299 n.7 (9th Cir. 1977); *United States v. Hykel*, 461 F.2d 721, 723 (3d Cir. 1972); *Beaudine v. United States*, 368 F.2d 417, 420 n.4 (5th Cir. 1966). Although materiality is not statutorily required, some circuits have imposed the requirement. *See* cases cited in Note 2, *supra*. Until the Eighth Circuit addresses the issue, the Committee recommends including materiality in the jury instructions and allowing the jury to decide the issue.

In cases where violations of civil rules and regulations are shown by the evidence, it may be appropriate to instruct the jury that they are not to consider violations of such regulations as a crime. *See United States v. Kindig*, 854 F.2d 703, 707 n.1 (5th Cir. 1988).

Final Instructions: Elements of Offenses

6.18.1006B. PARTICIPATION IN FEDERAL CREDIT INSTITUTION TRANSACTIONS (18 U.S.C. § 1006, Third Paragraph)

The crime of (describe offense charged, e.g., receiving benefits through a transaction of a credit institution), as charged in [Count _____ of] the Indictment, has [three] [four] elements, which are:

One, the defendant was [an officer of] [an agent of] [an employee of] [connected in a capacity with][1] (name of covered agency or institution)[2];

Two, the defendant [participated in] [shared in] [directly or indirectly received] any [money] [profit] [property] [benefit] through [a transaction] [a loan] [a commission] [a contract] [an act] of (name of covered agency or institution);

Three, the defendant did so with the intent to defraud [the United States] [an agency of the United States] (name of covered agency or institution);

[*Four*, (name of institution) was (describe federal relation, e.g., accounts insured by the Administrator of the National Credit Union Administration).][3]

To act with "intent to defraud" means to act with intent to deceive or cheat, ordinarily for the purpose of causing a financial loss to someone else or bringing about a financial gain to the defendant or another.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. Title 18 U.S.C. § 1005 was amended by the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989 to include a paragraph similar to the third clause of 18 U.S.C. § 1006. Presumably, this instruction can serve as a pattern for section 1005 offenses under the new provision. The language in the statute, "connected in any capacity with," is construed broadly to effectuate congressional intent by protecting federally insured lenders from fraud. *United States v. Prater*, 805 F.2d 1441, 1446 (11th Cir. 1986); *United States v. Payne*, 750 F.2d 844, 853 (11th Cir. 1985).

2. The types of agencies and institutions covered include among others: Federal Deposit Insurance Corporation, National Credit Union Administration, Office of Thrift Supervision, Resolution Trust Corporation, and any lending, mortgage, insurance, credit or savings and loan corporation or association acting under the laws of the United States or any institution the accounts of which are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration Board.

3. Use this paragraph where the illegal participation or receipt of benefits is in connection with a transaction of a lending institution rather than one of the federal agencies named in the statute. The Federal Savings and Loan Insurance Corporation was abolished in 1989. Institutions formerly insured by FSLIC are now insured by FDIC. Section 1006 was amended one year later to account for this change, and the legal effect of the delay is unclear.

Committee Comments

See United States v. Griffin, 579 F.2d 1104, 1108 (8th Cir. 1978); *United States v. Chenaur*, 552 F.2d 294, 297 n.3 (9th Cir. 1977); *United States v. Hykel*, 461 F.2d 721, 723 (3d Cir. 1972).

Participation or benefit with intent to defraud is sufficient; there is no need to show actual loss to the institution. *United States v. Rice*, 645 F.2d 691 (9th Cir. 1981); *United States v. Chenaur*, 552 F.2d at 299; *Beaudine v. United States*, 368 F.2d 417, 420 (5th Cir. 1966).

The offense of misapplication of funds (18 U.S.C. § 657) is different from the offense of fraudulent participation in the benefits of a loan (18 U.S.C. § 1006). *United States v. Rochester*, 898 F.2d 971, 980 (5th Cir. 1990).

Although case law discusses willfulness as an intent element of a section 1006 violation, *see, e.g., United States v. Rochester*, 898 F.2d at 978-79, the Committee believes the rationale of *United States v. Dougherty*, 763 F.2d 970, 973-74 (8th Cir. 1985), controls, and that a "specific intent" instruction should not be given. *Griffin* lists as the fourth element of a section 1006 violation "that such act or acts were done knowingly and willfully." 579 F.2d at 1108. However, *Dougherty* was decided after *Griffin*, and "specific intent," apart from intent to defraud or deceive, does not appear to be required by section 1006.

See also Committee Comments and Notes on Use, Instruction 6.18.1006A, *supra*.

Final Instructions: Elements of Offenses

6.18.1014. FALSE STATEMENT TO A FINANCIAL INSTITUTION (18 U.S.C. § 1014)

The crime of making a false statement to a financial institution,[1] as charged in [Count _____ of] the Indictment, has three elements, which are:[2]

One, the defendant knowingly made a false statement (describe the alleged false statement, *e.g.*, that the defendant had no current indebtedness to another financial institution) to (name of financial institution);

Two, the defendant made the false statement for the purpose of influencing the action of (name of financial institution) upon (describe transaction, *e.g.*, an application for a loan);

Three, that (name of financial institution) was (describe federal relation, e.g., insured by the FDIC) at the time the statement was made.[3]

A statement is "false" if untrue when made.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. "Financial institution" is defined in 18 U.S.C. § 20 to include businesses other than banks, *e.g.*, the Federal Housing Administration, the Federal Crop Insurance Corp., the Federal Reserve Bank, the Small Business Administration, federal credit unions, and mortgage lending businesses that make federally-related mortgage loans. If the fraud was against a financial institution other than a bank, this phrase should be modified accordingly throughout the instruction.

2. Materiality is not an element of section 1014. *United States v. Wells*, 519 U.S. 482 (1997). "[A]ny reference to materiality in the jury instruction is unnecessary and has the potential to cause confusion." *United States v. Wells*, 127 F.3d 739, 744 (1997) (on remand).

3. Proof of federal relation is required. *United States v. Carlisle*, 118 F.3d 1271, 1274 (8th Cir. 1997); *United States v. Chandler*, 66 F.3d 1460, 1466 (8th Cir. 1995) (quoting *United States v. White*, 882 F.2d 250, 253-54 (7th Cir. 1989)).

Committee Comments

Reliance is not an element of a section 1014 violation. It is not necessary to prove that the financial institution was influenced by or actually relied on the false statement. *United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir. 1987); *United States v. Huntress*, 956 F.2d 1309, 1317 (5th Cir. 1992). Materiality, likewise, is not an element of section 1014. *United States v. Wells*, 519 U.S. 482 (1997).

Multiple false statements in a single document constitutes only one violation of section 1014. *United States v. Sue*, 586 F.2d 70 (8th Cir. 1978).

6.18.1028A. AGGRAVATED IDENTITY THEFT (18 U.S.C. § 1028A(a)(1))

The crime of aggravated identity theft, as charged in [Count ___ of] the Indictment, has four elements,[1] which are:

One, the defendant knowingly [transferred] [possessed] [used][2] the (specify means of identification transferred, possessed, or used, e.g., Social Security number);[3]

Two, the defendant knew that the (specify means of identification) the defendant [transferred] [possessed] [used] belonged to another person;[4, 5]

Three, the defendant [transferred] [possessed] [used] the (specify means of identification) without lawful authority; and,

Four, the defendant [transferred] [possessed] [used] the (specify means of identification) during and in relation to the crime of (list predicate felony from 18 U.S.C. § 1028A(c), e.g., mail fraud) [as charged in Count ___ of the Indictment].

A person commits the crime of (list predicate felony from 18 U.S.C. § 1028A(c)) if [he] [she] (insert elements of predicate felony from 18 U.S.C. § 1028A(c)).

The phrase "without lawful authority" means that defendant [transferred] [possessed] [used] another's (specify means of identification) [without that person's permission] [having obtained that person's permission illegally].[6]

The phrase "during and in relation to" means that the (specify means of identification transferred, possessed, or used) was [transferred] [possessed] [used] in furtherance of the commission of the crime of (insert predicate felony from 18 U.S.C. § 1028A(c)); it must have been used to some purpose or effect with respect to the commission of the crime of (insert predicate felony from 18 U.S.C. § 1028A(c)); the presence or involvement of the (specify means of identification transferred, possessed, or used) in the commission of the (specify predicate felony) cannot be the result of accident or coincidence. [The (specify means of identification transferred, possessed, or used) must facilitate or have the potential to facilitate commission of the (specify predicate felony).[7]

(Insert paragraph describing Government's burden of proof, *see* Instruction 3.09, *supra*.)

Final Instructions: Elements of Offenses

Notes on Use

1. *See United States v. Hines*, 472 F.3d 1038, 1039 (8th Cir. 2007).

2. If more than one theory is submitted to the jury, they should be instructed that they may convict the defendant only if they find unanimously and beyond a reasonable doubt that at least one of the theories was proven by the government. *See, e.g., United States v. Vickerage*, 921 F.2d 143, 147 (8th Cir. 1990) (finding no error where district court instructed jury it had to agree unanimously on which of two offenses the defendant conspired to commit). For an example of an unanimity instruction, *see* Instruction 6.18.1341, *infra*, n.2.

3. "Means of identification" is defined at 18 U.S.C. § 1028(d)(7).

4. In *Flores-Figueroa v. United States*, ___ U.S. ___, 129 S. Ct. 1886, 1888 (2009), the Supreme Court held that 18 U.S.C.§ 1028A(a)(1) requires the government to show that the defendant knew the means of identification which the defendant unlawfully transferred, possessed, or used, in fact belonged to another person.

5. "Actual person" includes both living and deceased persons. *United States v. Kowal*, 527 F.3d 741, 746-47 (8th Cir. 2008).

6. Use when there is evidence that the means of identification belonged to an actual person, and that person did not consent to the use of the means of identification. *See United States v. Hines*, 472 F.3d 1038, 1039 (8th Cir. 2007). Hines further found that "without lawful authority" includes consent obtained illegally. *Hines* at 1039 (where consent obtained in exchange for illegal drugs, use is without lawful authority). *See also United States v. Hurtado*, 508 F.3d 603, 607 (11th Cir. 2007) (abrogated on other grounds (by *Flores-Figueroa*)) (the phrase "without lawful authority" includes more than just theft or stealing; while recognizing that "there are other ways someone could possess or use another person's identification, yet not have "lawful authority to do so," the court did not attempt to define every situation; and the 11th Circuit found its reading of the phrase to be consistent with the 8th Circuit's decision in *Hines*).

7. *See United States v. Bailey*, 235 F.3d 1069, 1073 (8th Cir. 2000) (defining the same phrase as it relates to 18 U.S.C. § 924(c)).

Final Instructions: Elements of Offenses

6.18.1030A. COMPUTER FRAUD [OBTAINING NATIONAL SECURITY INFORMATION] (18 U.S.C. § 1030(a)(1))

The crime of accessing a computer to obtain national security information, as charged in [Count __] of the Indictment, has four essential elements, which are:[1]

One, the defendant knowingly accessed a computer [without authorization][2] [exceeding authorized access][3];

Two, the defendant obtained information[4] that [has been determined by the United States Government by [Executive Order] [statute] to require protection against unauthorized disclosure for reasons of [national defense] [foreign relations]] [was restricted data[5] regarding the design, manufacture or use of atomic weapons];

Three, the defendant had reason to believe that the information obtained could be used to the injury of the United States or to the advantage of any foreign nation;[6] and

Four, the defendant [[voluntarily and intentionally] [attempted to] [communicate[d]] [deliver[ed]] [transmit[ted]] the information to a person[7] not entitled to receive it] [voluntarily and intentionally retained the information and failed to deliver the information to the [officer] [employee] of the United States entitled to receive the information].[8]

The Government is not required to prove that the information obtained by the defendant was in fact used to the injury of the United States or to the advantage of any foreign nation.

[You are further instructed regarding the crime[s] charged in [Count[s] ____ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1030I, unless the Indictment charges multiple computer fraud violations and there will be no confusion in adding the definitions common to all counts after all of the substantive computer fraud instructions).][9]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. If an attempt to commit an offense under this subsection has been charged, *see* 18 U.S.C. § 1030(b), the instruction should be modified accordingly.

2. "Without authorization" is not defined in section 1030 but is commonly understood to refer to persons who have no permission or authority to do a thing whatsoever. *Condux Intern., Inc. v. Haugum*, 2008 WL 5244818 at *4 (D. Minn. Dec. 15, 2008) (citations omitted).

3. Although Congress did not squarely address the issue in the legislative history of section 1030, the Committee is of the opinion that the term "knowingly" modifies the term "accessed" as well as the phrases "without authorization" or "exceeding authorization." In other words, the government must prove both that the defendant knew he or she was accessing a computer and that he or she knew that the access was without authorization or exceeding authorization. *See Flores-Figueroa v. United States*, __ U.S. __, 129 S. Ct. 1886, 1891 (2009) (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring), and noting that courts ordinarily interpret the word "knowingly" in a criminal statute as applying to all subsequently listed elements, not just the verbs). *Compare* Committee Comments to Instruction 6.18.1030B (discussing the 1986 amendments to subsection 1030(a)(2) in which Congress changed the scienter requirement from "knowingly" to "intentionally" to clarify that it intended to criminalize those who clearly intended to enter computer files without proper authorization rather than those who inadvertently stumbled upon those files).

4. If desired, the court may instruct the jury that the phrase "obtained information" includes the mere observation of the data and does not require the government to prove the data was removed from its original location or transcribed. *See* S. Rep. 99-432 at 6-7 (1986), *reprinted in* U.S.C.C.A.N. 2479, 2484 and *available at* 1986 WL 31918. In later amendments to other subsections of section 1030, Congress further clarified that the phrase "'obtaining information' includes merely reading the information. There is no requirement that the information be copied or transported." S. Rep. 104-357, 2d Sess. 8 (1996), *available at* 1996 WL 492169. The term "information" includes information stored in intangible form. *See* S. Rep. No. 357, 104th Cong., 2d Sess. 8 (1996).

5. The phrase "restricted data" means all data concerning the: (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, not declassified or removed pursuant to federal law. 18 U.S.C. § 1030(a)(1) (adopting the definition of restricted data set forth in the Atomic Energy Act, 42 U.S.C. § 2014(y)).

6. The phrase, "to the injury of the United States or to the advantage of any foreign nation," is not defined in section 1030. A similar phrase is used in espionage statutes. *See, e.g.*, 18 U.S.C. §§ 793, 794, 798. With regard to a predecessor espionage statute containing a similar phrase, the Espionage Act of 1917, the Supreme Court clarified that the meaning of this phrase turns on the defendant's intent and whether information at issue was in fact protected by the government: "This [language] requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established. Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government." *Gorin v. United States*, 312 U.S. 19, 28 (1941).

7. If a definition of "person" is desired, *see* 18 U.S.C. § 1030(e)(12).

8. The statute uses the term "willfully," but consistent with Committee Comments to Instruction 7.02, that term has been replaced with the words "voluntarily and intentionally."

9. The supplemental definitions contained in Instruction 6.18.1030I, *infra*, should be given in most cases where applicable.

Committee Comments

In 1996, Congress changed the scienter element of section 1030(a)(1) to track the scienter requirement of 18 U.S.C. § 793(e), a statute which prohibits gathering, transmitting or losing defense information. The Senate Committee stated,

> Although there is considerable overlap between 18 U.S.C. § 793(e) and section 1030(a)(1) . . . the two statutes would not reach exactly the same conduct. Section 1030(a)(1) would target those persons who deliberately break into a computer to obtain properly classified Government secrets and then try to peddle those secrets to others, including foreign governments. In other words, unlike existing espionage laws prohibiting the theft and peddling of Government secrets to foreign agents, section 1030(a)(1) would require proof that the individual knowingly used a computer without authority, for the purpose of obtaining classified information. In this sense then, it is the use of the computer which is being proscribed, not the unauthorized possession of, access to, or control over the classified information itself.

S. Rep. No. 357, 104th Cong., 2d Sess. 7, *available at* 1996 WL 492169 at * 16 (1996). Note, however, that section 1030(a)(1) can be violated even if the defendant has not delivered the information to a third party, such as if the defendant voluntarily and intentionally retained the information and failed to deliver it to the appropriate U.S. official.

Final Instructions: Elements of Offenses

6.18.1030B. COMPUTER FRAUD [OBTAINING CONFIDENTIAL INFORMATION] (18 U.S.C. § 1030(a)(2))

The crime of computer fraud to obtain confidential information, as charged in [Count __] of the Indictment, has two essential elements, which are:[1]

One, the defendant intentionally accessed a computer [without authorization][2] [exceeding authorized access], and

Two, the defendant obtained information[3] [contained in a financial record of [a financial institution] [an issuer of a credit card][;] [contained in a file of a consumer reporting agency[4] on a consumer][;] [from any [legislative] [judicial] [executive] [department][5] [agency] of the United States][;] [or] [from any protected computer].

[You are further instructed regarding the crime[s] charged in [Count[s] ____ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1030I, unless the Indictment charges multiple computer fraud violations and there will be no confusion in adding the definitions common to all counts after all of the substantive computer fraud instructions).][6]

If you find these two elements unanimously and beyond a reasonable doubt, then you must find the defendant guilty of this crime [under Count __].[7] Record your determination on the Verdict Form which will be submitted to you with these instructions.

[If you find these two elements unanimously beyond a reasonable doubt, you must also unanimously decide whether the defendant: [acted for purposes of commercial advantage or private financial gain][;] [or] [acted in furtherance of (describe crime or tort)][8] [or] [obtained information having a value exceeding $5,000.00].[9] Record your determination on the Verdict Form.]

(Instruction 3.09, *supra*, which describes the Government's burden of proof, has already been incorporated in this instruction and should not be repeated.)

Notes on Use

1. If an attempt to commit an offense under this subsection has been charged, *see* 18 U.S.C. § 1030(b), the instruction should be modified accordingly.

2. "Without authorization" is not defined in section 1030 but is commonly understood to refer to persons who have no permission or authority to do a thing whatsoever. *Condux Intern., Inc. v. Haugum*, 2008 WL 5244818 at *4 (D. Minn. Dec. 15, 2008) (citations omitted).

3. If desired, the court may instruct the jury that the phrase "obtained information" "includes merely reading the information. There is no requirement that the information be copied or transported." S. Rep. 357, 104th Cong., 2d Sess. 8 (1996), *available at* 1996 WL 492169. In earlier amendments addressing other subsections of section 1030, Congress has also stated that the phrase "obtained information" includes the mere observation of the data and does not require the government to prove the data was removed from its original location or transcribed. *See* S. Rep. 99-432 at 6-7 (1986), *reprinted in* U.S.C.C.A.N. 2479, 2484 *and available at* 1986 WL 31918. The term "information" includes information stored in intangible form. *See* S. Rep. No. 357, 104th Cong., 2d Sess. 8 (1996).

4. If a definition of "consumer reporting agency"is desired, *see* 18 U.S.C. § 1030(a)(2)(A) and 15 U.S.C. § 1681 *et seq*.

5. If a definition of the "department of the United States" is desired, *see* 18 U.S.C. § 1030(e)(7). If this subsection is applicable, the instruction should set forth the particular executive department enumerated in 5 U.S.C. § 101 and charged in the indictment.

6. The supplemental definitions contained in Instruction 6.18.1030I, *infra*, should be given in most cases where applicable.

7. This instruction is styled in the form of a lesser included offense instruction, with conviction on these two elements alone constituting a misdemeanor, unless the defendant has a conviction of a prior offense under Section 1030. *See* 18 U.S.C. § 1030(c)(2)(A). The Eighth Circuit holds that a lesser included offense instruction should be given if either the defense or the government requests it and where various factors are present. *See* Instruction 3.10; *see also United States v. Pumpkin Seed*, 572 F.3d 552, 562 (8th Cir. 2009). Thus, if neither party requests this lesser included offense instruction, or if the Court concludes that it is otherwise inappropriate under its factor test, the instruction should be revised by including the pertinent aggravating facts as required elements. The special verdict form will also be unnecessary in such a case.

8. The applicable penalty provision, section 1030(c)(B)(ii), provides that if "the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State," the defendant will face imprisonment for not more than five years and/or a fine under Title 18. If this provision is applicable, the court should make a preliminary finding on the record regarding whether the alleged offense was committed in furtherance of a criminal or tortious act that violates the Constitution or any law.

9. Any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Typically, the indictment will not include these aggravating facts if the government has charged a first-time offender of section 1030 solely

with a misdemeanor, *see* 18 U.S.C. § 1030(c)(2)(A), or if it has charged a felony offense that allegedly occurred after a conviction for another offense under section 1030. *See* 18 U.S.C. § 1030(c)(2)(C). However, if any of the additional aggravating facts set forth in the statute have been charged in the indictment, these facts should be submitted to the jury either as a formal element and/or by special interrogatory. 18 U.S.C. §§ 1030(c)(2)(B); *see* 6.18.1030B(a) for a verdict form with special interrogatories. In the Committee's view, a verdict form with special interrogatories is the preferred method for presenting these aggravating factors to the jury because it is less likely to result in confusion and because it creates a clear record of the basis for the jury's verdict.

Committee Comments

In 1986, Congress amended subsection 1030(a)(2) to change the scienter requirement from "knowingly" to "intentionally." In so doing, it made clear that element one requires the government to prove not only that the defendant intentionally accessed a computer, but also that he or she knew that the access was without authorization or exceeding authorized access. Specifically, Congress expressed concern that the "knowingly" standard "might not be sufficient to preclude liability on the part of those who inadvertently 'stumble into' someone else's computer file or computer data. This is particularly true in those cases where an individual is authorized to sign onto and use a particular computer, but subsequently exceeds his authorized access by mistakenly entering another computer file or data that happens to be accessible from the same terminal. Because the user had 'knowingly' signed onto that terminal in the first place, the danger exists that he might incur liability for his mistaken access to another file. This is so because, while he may not have desired that result, i.e., the access of another file, it is possible that a trier of fact will infer that the user was 'practically certain' such mistaken access could result from his initial decision to access the computer. The substitution of an 'intentional' standard is designed to focus federal criminal prosecutions on those whose conduct evinces a clear intent to enter, without proper authorization, computer files or data belonging to another. Again, this will comport with the Senate Report on the Criminal Code, which states that "intentional' means more than that one voluntarily engaged in conduct or caused a result. Such conduct or the causing of the result must have been the person's conscious objective.'" S. Rep. No. 99-432, at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2479, 2484 (quoting another Senate report).

Because subsection 1030(a)(2) focuses on privacy protection, the statute may be violated by the mere viewing of information online even without any downloading or copying. *See* S. Rep. No. 99-432, at § I, *available at* 1986 W.L. 31918, 1986 U.S.C.C.A.N. 2484.

Violations of this subsection may be either a felony or a misdemeanor. "The crux of the offense under subsection 1030(a)(2)(C) . . . is the abuse of a computer to obtain the information. The seriousness of a breach in confidentiality depends, in considerable part, on the value of the information taken, or on what is planned for the information after it is obtained. Thus, the statutory penalties are structured to provide that obtaining information of minimal value is only a

misdemeanor, but obtaining valuable information, or misusing information in other more serious ways, is a felony." S. Rep. No. 104-357, § IV(1)(E), *available at* 1996 W.L. 492169 at *7.

6.18.1030B(a). SPECIAL VERDICT FORM (INTERROGATORIES TO FOLLOW FINDING OF GUILT) (18 U.S.C. § 1030(a)(2))

We, the jury, find Defendant (name) _____

(guilty/not guilty)

of computer fraud to obtain confidential information [as charged in Count _____ of the Indictment] [under Instruction No. _____].

If you find the defendant "guilty," you must answer the following question[s] and you must unanimously agree on the answer[s]:

[a. Did the defendant act for purposes of commercial advantage or private financial gain?

Yes ____ No ____]

[b. Did the defendant act in furtherance of (describe crime or tort)?

Yes ____ No ____]

[c. Did the defendant obtain information that had a value exceeding $5,000.00?

Yes ____ No ____]

_____

Foreperson

_____

Date

Final Instructions: Elements of Offenses

6.18.1030C. COMPUTER FRAUD [ACCESSING A NONPUBLIC COMPUTER] (18 U.S.C. § 1030(a)(3))

The crime of accessing a nonpublic computer, as charged in [Count __] of the Indictment, has three essential elements, which are:[1]

One, the defendant intentionally accessed a nonpublic computer of a[n] [department][2] [agency] of the United States;[3]

Two, the defendant was without authorization[4] to access not just the nonpublic computer [he] [she] accessed but was without authorization to access any nonpublic computer of that [department] [agency]; and

Three, the defendant accessed a nonpublic computer that was [exclusively for the use of the United States Government] [used [by] [for] the United States Government, and the defendant's conduct affected that use [by] [for] the United States Government].[5]

[You are further instructed regarding the crime[s] charged in [Count[s] ____ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1030I, unless the Indictment charges multiple computer fraud violations and there will be no confusion in adding the definitions common to all counts after all of the substantive computer fraud instructions).][6]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. If an attempt to commit an offense under this subsection has been charged, *see* 18 U.S.C. § 1030(b), the instruction should be modified accordingly.

2. If a definition of the "department of the United States" is desired, *see* 18 U.S.C. § 1030(e)(7).

3. The Committee is of the opinion that the term "intentionally" modifies both "accessed" as well as the phrase that follows, "a nonpublic computer of a[n] [department] [agency] of the United States." *See* S. Rep. No. 99-432, at 6 (1986), reprinted in 1986 U.S.C.C.A.N. 2479, 2484 (discussing the 1986 amendments to subsection 1030(a)(2) in which Congress changed the scienter requirement from "knowingly" to "intentionally" to clarify that subsection 1030(a)(2) was designed to criminalize those who clearly intended to enter computer files without proper authorization rather than those who inadvertently stumbled upon those files, and observing that "'intentional' means more than that one voluntarily engaged in conduct or

caused a result. Such conduct or the causing of the result must have been the person's conscious objective").

4. "Without authorization" is not defined in section 1030 but is commonly understood to refer to persons who have no permission or authority to do a thing whatsoever. *Condux Intern., Inc. v. Haugum*, 2008 WL 5244818 at *4 (D. Minn. Dec. 15, 2008) (citations omitted).

5. The phrase, "affected that use [by] [for] the United States Government]" means the defendant's conduct affected the use of the government's operation of the computer in question. There is no requirement that the defendant's conduct harmed the overall operation of the government. S. Rep. No. 99-432, at *8-9, 1986 U.S.C.C.A.N. at 2485.

6. The supplemental definitions contained in Instruction 6.18.1030I, *infra*, should be given in most cases where applicable.

Committee Comments

While federal employees may not be subject to prosecution under section 1030(a)(3) as insiders as to their own agency's computers, they may be eligible for prosecution as outsiders where they engage in intrusions into other agencies' computers. S. Rep. No. 99-432, at 7, 1986 U.S.C.C.A.N. at 2485. Thus, Congress specifically provided that section 1030(a)(3) applies "where the offender's act of trespass is interdepartmental in nature." *Id.* at 8. Congress noted that "it is not difficult to envision an individual who, while authorized to use certain computers in one department, is not authorized to use them all. The danger existed that [the statute], as originally introduced, might cover every employee who happens to sit down, within his department, at a computer terminal which he is not officially authorized to use. These acts can also be best handled by administrative sanctions, rather than by criminal punishment. To that end, the Committee has constructed its amended version of (a)(3) to prevent prosecution of those who, while authorized to use some computers in their department, use others for which they lack the proper authorization."

In 1996 amendments to subsection 1030(a)(3), Congress replaced the phrase "computer of a department or agency of the United States" with the term "nonpublic" to "make clear that unauthorized access is barred to any 'non-public' Federal Government computer and that a person who is permitted to access publicly available Government computers, for example, via an agency's World Wide Web site, may still be convicted under (a)(3) for accessing without authority any nonpublic Federal Government computer." S. Rep. No. 104-357, at 9, *available at* 1996 WL 492169, * 21 (1996). Thus, although the phrase "nonpublic computer" is not defined by the statute, it would appear to have its ordinary meaning; that is, any government computer that is not available for access by the public. This is a much narrower definition than the statutory definition of "protected computer."

In earlier versions of 1030(a)(3), if the defendant was charged with unlawfully accessing a computer that was not exclusively for the government's use, the government was required to prove that the conduct "adversely" affected the use of that computer by or for the United States government. In 1996 amendments, Congress removed the word "adversely" in order to eliminate

any suggestion "that trespassing in a computer used by the Federal Government, even if not exclusively, may be benign." S. Rep. No 357, 104th Cong., 2d Sess. 9 (1996).

Violations of section 1030(a)(3) are typically charged as misdemeanors and are punishable by a fine and up to one year in prison, 18 U.S.C. § 1030(c)(2)(A), unless the individual has previously been convicted of a section 1030 offense, in which case the crime is a felony punishable up to a maximum of ten years in prison, 18 U.S.C. § 1030(c)(2)(c). Section 1030(a)(3) applies to many of the same cases in which section 1030(a)(2) could be charged. Because section 1030(a)(2) is a felony if certain aggravating facts are present, cases are rarely prosecuted under section 1030(a)(3).

Final Instructions: Elements of Offenses

6.18.1030D. COMPUTER FRAUD [ACCESSING A COMPUTER TO DEFRAUD] (18 U.S.C. § 1030(a)(4))

The crime of accessing a computer to defraud, as charged in [Count __] of the Indictment, has [four] [five] essential elements, which are:[1]

One, the defendant knowingly accessed a protected computer [without authorization][2] [exceeding authorized access];[3]

Two, the defendant did so with intent to defraud;[4]

Three, the defendant, by accessing the protected computer [without authorization] [exceeding authorized access], furthered the intended fraud; [and]

Four, the defendant thereby obtained any thing of value [; and][.]

[*Five*, the [object of the defendant's fraud] [thing of value the defendant obtained] consisted of more than just the use of the computer[.] [or] [the use of the computer was the only [object of the defendant's fraud] [thing of value the defendant obtained] and the total value of such use exceeded $5,000 during any one-year period].][5]

[You are further instructed regarding the crime[s] charged in [Count[s] ____ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1030I, unless the Indictment charges multiple computer fraud violations and there will be no confusion in adding the definitions common to all counts after all of the substantive computer fraud instructions).][6]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. If an attempt to commit an offense under this subsection has been charged, *see* 18 U.S.C. § 1030(b), the language of the instruction should be modified accordingly.

2. "Without authorization" is not defined in section 1030 but is commonly understood to refer to persons who have no permission or authority to do a thing whatsoever. *Condux Intern., Inc. v. Haugum*, 2008 WL 5244818 at *4 (D. Minn. Dec. 15, 2008) (citations omitted).

3. Although Congress did not squarely address the issue in the legislative history of section 1030, the Committee is of the opinion that the term "knowingly" modifies the term "accessed" as well as the phrases "without authorization" or "exceeding authorization." In other words, the government must prove both that the defendant knew he or she was accessing a computer and that he or she knew that the access was without authorization or exceeding

authorization (in addition to proving that the defendant also acted with intent to defraud). *See Flores-Figueroa v. United States*, __ U.S. __, 129 S. Ct. 1886, 1891 (2009) (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring), and noting that courts ordinarily interpret the word "knowingly" in a criminal statute as applying to all subsequently listed elements, not just the verbs). *Compare* Committee Comments to Instruction 6.18.1030B (discussing the 1986 amendments to subsection 1030(a)(2) in which Congress changed the scienter requirement from "knowingly" to "intentionally" to clarify that it intended to criminalize those who clearly intended to enter computer files without proper authorization rather than those who inadvertently stumbled upon those files).

4. "The 'intent to defraud' phrase is not defined by section 1030 or in its legislative history, and neither the Supreme Court nor the Eighth Circuit has defined the phrase in the context of section 1030. The Senate Committee did note that "[t]he scienter requirement for this subsection, 'knowingly and with intent to defraud,' is the same as the standard used for 18 U.S.C. § 1029 relating to credit card fraud." S. Rep. 99-432, S. Rep. No. 432, 99th Cong., 2nd Sess. 1986, 1986 U.S.C.C.A.N. 2479, *available at* 1986 WL 31918. In the section 1029 context, the Eighth Circuit appears to interpret "intent to defraud" very broadly. *See, e.g.,United States v. Kowal*, 527 F.3d 741, 748 (8th Cir. 2008) (stating that to "[d]efraud is to deprive of some right, interest or property by deceit"). Further, in *Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121, 1126 (W.D. Wash. 2000), the court broadly held that the term "fraud" as used in subsection 1030(a)(4) means "wrongdoing" and does not require proof of the common law elements of fraud. For the definition of Intent to Defraud used in mail fraud cases, *see* Instruction 6.18.1341, *infra*.

5. Section 1030(a)(4) contains an express "computer use" statutory exception. Thus, conduct that would otherwise violate the statute is not a crime if "the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period." 18 U.S.C. § 1030(a)(4). It is not clear whether Congress meant for the computer use exception to clarify the elements of the offense or to define an affirmative defense, and the Eighth Circuit has not addressed the issue. The Committee recommends that, if there is an issue about whether the statutory exception applies in a case, optional element five, modified to conform to the particulars of the case, should be submitted to the jury. Element five is stated in the alternative because if the government proves <u>either</u> that the object of the fraud was more than the use of the computer or that the value of such use was more than $5,000 in any 1-year period, the statutory exception will not apply.

6. The supplemental definitions contained in Instruction 6.18.1030I, *infra*, should be given in most cases where applicable.

Committee Comments

For a violation of subsection 1030(a)(4), there must be a sufficient tie in between the use of a computer and the fraud: "The Committee does not believe that a scheme or artifice to defraud should fall under the ambit of subsection (a)(4) merely because the offender signed onto a computer at some point near to the commission or execution of the fraud. While such a

tenuous link might be covered under current law where the instrumentality used is the mails or the wires, the Committee does not consider that link sufficient with respect to computers. To be prosecuted under this subsection, the use of the computer must be more directly linked to the intended fraud. That is, it must be used by an offender without authorization or in excess of his authorization to obtain property of another, which property furthers the intended fraud." S. Rep. 99-432, S. Rep. No. 432, 99th Cong., 2nd Sess. 1986, 1986 U.S.C.C.A.N. 2479, *available at* 1986 WL 31918.

For an example of conduct that a defendant agreed was in violation of subsection 1030(a)(4), *see United States v. Sykes*, 4 F.3d 697, 698 (8th Cir. 1993) (defendant pled guilty to making unauthorized use of an automatic teller machine and personal identification number).

With regard to the statutory exception set forth in section 1030(a)(4), the Senate Committee explained that, "[w]hile every trespass in a computer should not be converted into a felony scheme to defraud, a blanket exception for 'computer use' is too broad. Hackers, for example, have broken into Cray supercomputers for the purpose of running password cracking programs, sometimes amassing computer time worth far more than $5,000. In light of the large expense to the victim caused by some of these trespassing incidents, the amendment would limit the 'computer use' exception to cases where the stolen computer use involved less than $5,000 during any one-year period." S. Rep. 99-432, S. Rep. No. 432, 99th Cong., 2nd Sess. 1986, 1986 U.S.C.C.A.N. 2479, *available at* 1986 WL 31918.

6.18.1030E. COMPUTER FRAUD [TRANSMISSION OF PROGRAM TO CAUSE DAMAGE TO A COMPUTER] (18 U.S.C. § 1030(a)(5)(A))

The crime of transmission of a program to cause damage to a computer, as charged in [Count __] of the Indictment, has two essential elements, which are:[1]

One, the defendant knowingly caused the transmission of a [program] [information] [code] [command] to a protected computer,[2] and

Two, the defendant, as a result of such conduct, intentionally caused damage to a protected computer without authorization.[3]

[You are further instructed regarding the crime[s] charged in [Count[s] ____ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1030I, unless the Indictment charges multiple computer fraud violations and there will be no confusion in adding the definitions common to all counts after all of the substantive computer fraud instructions).][4]

If you find these two elements unanimously and beyond a reasonable doubt, then you must find the defendant guilty of this crime [under Count __].[5] Record your determination on the Verdict Form.

[If you find these two elements unanimously beyond a reasonable doubt, you must also unanimously decide whether as a result of such conduct, the defendant

- [caused loss to one or more persons[6] during any one-year period of an aggregate value of $5,000.00 or more][;]
- [caused loss resulting from a related course of conduct affecting one or more other protected computers of an aggregate value of $5,000.00 or more][;]
- [caused the [potential] [modification] [impairment] of the medical [examination] [diagnosis] [treatment] [care] of one or more individuals]
- [caused physical injury to any person][;]
- [caused a threat to public health or safety][;]

- [caused damage affecting a computer used [by] [for] a governmental entity (describe entity at issue),[7] in furtherance of [the administration of justice] [national defense] [national security]][;]
- [caused damage affecting ten or more protected computers during any one-year period]][;] [or]
- [[attempted to cause] [knowingly] [recklessly] [caused] [serious bodily injury] [death] from such conduct].[8] Record your determination on the Verdict Form.]

(Instruction 3.09, *supra*, which describes the Government's burden of proof, has already been incorporated in this instruction and should not be repeated.)

Notes on Use

1. If an attempt to commit an offense under this subsection has been charged, *see* 18 U.S.C. § 1030(b), the instruction should be modified accordingly.

2. Although Congress did not squarely address the issue in the legislative history of section 1030, the Committee is of the opinion that the term "knowingly" modifies the phrase "caused the transmission" as well as the phrase "protected computer." In other words, the government must prove both that the defendant knew he or she was causing the transmission of a program, code, command, etc., and that he or she knew the transmission was to a protected computer. *See Flores-Figueroa v. United States*, __ U.S. __, 129 S. Ct. 1886, 1891 (2009) (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring), and noting that courts ordinarily interpret the word "knowingly" in a criminal statute as applying to all subsequently listed elements, not just the verbs).

3. "Without authorization" is not defined in section 1030 but is commonly understood to refer to persons who have no permission or authority to do a thing whatsoever. *Condux Intern., Inc. v. Haugum*, 2008 WL 5244818 at *4 (D. Minn. Dec. 15, 2008) (citations omitted).

4. The supplemental definitions contained in Instruction 6.18.1030I, *infra*, should be given in most cases where applicable.

5. This instruction is styled in the form of a lesser included offense instruction, with conviction on these two elements alone constituting a misdemeanor, unless the defendant has a conviction of a prior offense under Section 1030. *See* 18 U.S.C. § 1030(c)(2)(A). The Eighth Circuit holds that a lesser included offense instruction should be given if either the defense or the government requests it and where various factors are present. *See* Instruction 3.10; *see also United States v. Pumpkin Seed*, 572 F.3d 552, 562 (8th Cir. 2009). Thus, if neither party requests this lesser included offense instruction, or if the Court concludes that it is otherwise inappropriate under its factor test, the instruction should be revised by including the pertinent

aggravating facts as required elements. The special verdict form will also be unnecessary in such a case.

6. If a definition of "person" is desired, *see* 18 U.S.C. § 1030(e)(12).

7. If a definition of "governmental entity" is desired, *see* 18 U.S.C. § 1030(e)(9).

8. Any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Typically, the indictment will not include these aggravating facts if the government has charged a first-time offender of section 1030 solely with a misdemeanor, *see* 18 U.S.C. § 1030(c)(4)(G), or if it has charged a felony offense that allegedly occurred after a conviction for another offense under Section 1030. *See* 18 U.S.C. § 1030(c)(4)(C). However, if any of the additional aggravating facts set forth in the statute have been charged in the indictment, these facts should be submitted to the jury either as a formal element and/ or by special interrogatory. 18 U.S.C. §§ 1030(c)(4)(B), (E), and (F); *see* 6.18.1030C(a) for a verdict form with special interrogatories. In the Committee's view, a verdict form with special interrogatories is the preferred method for presenting these aggravating factors to the jury because it is less likely to result in confusion and because it creates a clear record of the basis for the jury's verdict.

Committee Comments

Subsection 1030(a)(5)(A) does not require the government to prove the defendant accessed the protected computer. Some examples of conduct that would violate this subsection include the intentional release of certain viruses, worms and "trojan horses," as well as other forms of attacks on computer data. *See United States v. Trotter*, 478 F.3d 918, 919 (8th Cir. 2007); *see also International Airport Centers, L.L.C. v. Citrin*, 440 F.3d 418, 420 (7th Cir. 2006).

For a discussion on the kind of proof deemed sufficient to establish the $5,000 aggregate loss amount, *see United States v. Millot*, 433 F.3d 1057, 1061 (8th Cir. 2006).

6.18.1030E(a). SPECIAL VERDICT FORM (INTERROGATORIES TO FOLLOW FINDING OF GUILT) (18 U.S.C. § 1030(a)(5)(A))

We, the jury, find Defendant (name) _____

(guilty/not guilty)

of computer fraud by transmission of a [program] [information][code] [command] to a protected computer [as charged in Count _____ of the Indictment] [under Instruction No. _____].

If you find the defendant "guilty," you must answer the following question[s] and you must unanimously agree on the answer[s]:

As a result of such conduct,

[a._____ Did the defendant cause loss to one or more persons during any one-year period of an aggregate value of $5,000.00 or more?

Yes ____ No ____]

[b. _____Did the defendant cause loss resulting from a related course of conduct affecting one or more other protected computers of an aggregate value of $5,000.00 or more?

Yes ____ No ____]

[c. _____Did the defendant cause the [potential] [modification][impairment] of the medical [examination][diagnosis][treatment][care] of one or more individuals?

Yes ____ No ____]

[d. _____Did the defendant cause physical injury to any person?

Yes ____ No ____]

[e. _____Did the defendant cause a threat to public health or safety?

Yes ____ No ____]

[f. _____ Did the defendant cause damage affecting a computer used [by][for] a governmental entity (describe entity at issue), in furtherance of [the administration of justice][national defense][national security]?

Yes ____ No ____]

[g. _____ Did the defendant cause damage affecting ten or more protected computers during any one-year period?

Yes ____ No ____]

[h. _____ Did the defendant [attempt to cause] [knowingly][recklessly] [cause] [serious bodily injury] [death] from such conduct?

Yes ____ No ____]

_____
Foreperson

_____
(Date)

Final Instructions: Elements of Offenses

6.18.1030F. COMPUTER FRAUD [CAUSING DAMAGE TO A COMPUTER] (18 U.S.C. § 1030(a)(5)(B) and (C))

The crime of causing damage to a computer or information, as charged in [Count __] of the Indictment, has two essential elements, which are:[1]

One, the defendant intentionally accessed a protected computer without authorization, and[2, 3]

Two, the defendant, as a result of such conduct, [recklessly caused damage] [caused damage and loss].[4]

[You are further instructed regarding the crime[s] charged in [Count[s] ____ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1030I, unless the Indictment charges multiple computer fraud violations and there will be no confusion in adding the definitions common to all counts after all of the substantive computer fraud instructions).][5]

If you find these two elements unanimously and beyond a reasonable doubt, then you must find the defendant guilty of this crime [under Count __].[6] Record your determination on the Verdict Form which will be submitted to you with these instructions.

[If you find these two elements unanimously beyond a reasonable doubt, you must also unanimously decide whether the defendant, as a result of such conduct, caused

- [loss to one or more persons [7] during any one-year period of an aggregate value of $5,000.00 or more][;]
- [loss resulting from a related course of conduct affecting one or more other protected computers of an aggregate value of $5,000.00 or more][;]
- [the [potential] [modification] [impairment] of the medical [examination] [diagnosis] [treatment] [care] of one or more individuals]
- [physical injury to any person][;]
- [a threat to public health or safety][;]

Final Instructions: Elements of Offenses

- [damage affecting a computer used [by] [for] a governmental entity (describe entity at issue),[8] in furtherance of [the administration of justice] [national defense] [national security]][;] [or]
- [damage affecting ten or more protected computers during any one-year period].[9] Record your determination on the Verdict Form.]

(Instruction 3.09, *supra*, which describes the Government's burden of proof, has already been incorporated in this instruction and should not be repeated.)

Notes on Use

1. If an attempt to commit an offense under this subsection has been charged, *see* 18 U.S.C. § 1030(b), the instruction should be modified accordingly.

2. "Without authorization" is not defined in section 1030 but is commonly understood to refer to persons who have no permission or authority to do a thing whatsoever. *Condux Intern., Inc. v. Haugum*, 2008 WL 5244818 at *4 (D. Minn. Dec. 15, 2008) (citations omitted).

3. The Committee is of the opinion that the term "intentionally" modifies both "accessed" and "without authorization." *See* S. Rep. No. 99-432, at 6 (1986), reprinted in 1986 U.S.C.C.A.N. 2479, 2484 (discussing the 1986 amendments to subsection 1030(a)(2) in which Congress changed the scienter requirement from "knowingly" to "intentionally" to clarify that subsection 1030(a)(2) was designed to criminalize those who clearly intended to enter computer files without proper authorization rather than those who inadvertently stumbled upon those files, and observing that "'intentional' means more than that one voluntarily engaged in conduct or caused a result. Such conduct or the causing of the result must have been the person's conscious objective").

4. Element two should be modified in accordance with whether the government has charged a violation of 18 U.S.C. § 1030(a)(5)(B) (recklessly causing damage) or 18 U.S.C. § 1030(a)(5)(C) (negligently or accidentally causing damage and loss).

5. The supplemental definitions contained in Instruction 6.18.1030I, *infra*, should be given in most cases where applicable.

6. This instruction is styled in the form of a lesser included offense instruction, with conviction on these two elements alone constituting a misdemeanor, unless the defendant has a conviction of a prior offense under Section 1030. *See* 18 U.S.C. § 1030(c)(2)(A). The Eighth Circuit holds that a lesser included offense instruction should be given if either the defense or the government requests it and where various factors are present. *See* Instruction 3.10; *see also United States v. Pumpkin Seed*, 572 F.3d 552, 562 (8th Cir. 2009). Thus, if neither party requests this lesser included offense instruction, or if the Court concludes that it is otherwise inappropriate under its factor test, the instruction should be revised by including the pertinent

aggravating facts as required elements. The special verdict form will also be unnecessary in such a case.

7. If a definition of "person" is desired, *see* 18 U.S.C. § 1030(e)(12).

8. If a definition of "governmental entity" is desired, *see* 18 U.S.C. § 1030(e)(9).

9. Any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Typically, the indictment will not include these aggravating facts if the government has charged a first-time offender of section 1030 solely with a misdemeanor, *see* 18 U.S.C. § 1030(c)(4)(G), or if it has charged a felony offense that allegedly occurred after a conviction for another offense under section 1030. *See* 18 U.S.C. § 1030(c)(4)(C). If any of the additional aggravating facts set forth in element three have been charged in the indictment, these facts should be submitted to the jury either as a formal element and/or by special interrogatory. 18 U.S.C. §§ 1030(c)(4)(A); *see* 6.18.1030F(a) for a verdict form with special interrogatories. In the Committee's view, a verdict form with special interrogatories is the preferred method for presenting these aggravating factors to the jury because it is less likely to result in confusion and because it creates a clear record of the basis for the jury's verdict.

Committee Comments

For a discussion on the kind of proof deemed sufficient to establish the $5,000 aggregate loss amount, *see United States v. Millot*, 433 F.3d 1057, 1061 (8th Cir. 2006).

6.18.1030F(a). SPECIAL VERDICT FORM (INTERROGATORIES TO FOLLOW FINDING OF GUILT) (18 U.S.C. § 1030(a)(5)(B) and (C)

We, the jury, find Defendant (name) _____

(guilty/not guilty)

of computer fraud by causing damage to a computer [as charged in Count _____ of the Indictment] [under Instruction No. _____].

If you find the defendant "guilty," you must answer the following question[s] and you must unanimously agree on the answer[s]:

As a result of such conduct,

[a. _____ Did the defendant cause loss to one or more persons during any one-year period of an aggregate value of $5,000.00 or more?

Yes ____ No ____]

[b. _____ Did the defendant cause loss resulting from a related course of conduct affecting one or more other protected computers of an aggregate value of $5,000.00 or more?

Yes ____ No ____]

[c. _____ Did the defendant cause the [potential] [modification] [impairment] of the medical [examination] [diagnosis] [treatment] [care] of one or more individuals?

Yes ____ No ____]

[d. _____ Did the defendant cause physical injury to any person?

Yes ____ No ____]

[e. _____ Did the defendant cause a threat to public health or safety?

Yes ____ No ____]

[f. _____ Did the defendant cause damage affecting a computer used [by] [for] a governmental entity (describe entity at issue), in furtherance of [the administration of justice] [national defense] [national security]?

Yes ____ No ____]

[g. _____ Did the defendant cause damage affecting ten or more protected computers during any one-year period?

Yes ____ No ____]

_____
Foreperson

_____
(Date)

Final Instructions: Elements of Offenses

6.18.1030G. COMPUTER FRAUD [TRAFFICKING IN PASSWORDS] (18 U.S.C. § 1030(a)(6))

The crime of trafficking in passwords, as charged in [Count __] of the Indictment, has three essential elements, which are:[1]

One, the defendant knowingly

- [transferred to another person any password or similar information through which a computer may be accessed without authorization[2]]
- [obtained control of any password or similar information through which a computer may be accessed without authorization, with the intent to transfer it to another person][3];

Two, the defendant acted with the intent to defraud[4]; and

Three, [the defendant's act[s] affected [interstate] [foreign] commerce][or] [the computer was used [by] [for] the United States Government].

[You are further instructed regarding the crime[s] charged in [Count[s] ____ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1030I, unless the Indictment charges multiple computer fraud violations and there will be no confusion in adding the definitions common to all counts after all of the substantive computer fraud instructions).][5]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. If an attempt to commit an offense under this subsection has been charged, *see* 18 U.S.C. § 1030(b), the instruction should be modified accordingly.

2. "Without authorization" is not defined in section 1030 but is commonly understood to refer to persons who have no permission or authority to do a thing whatsoever. *Condux Intern., Inc. v. Haugum*, 2008 WL 5244818 at *4 (D. Minn. Dec. 15, 2008) (citations omitted).

3. Element one incorporates the definition of "traffic" found in 18 U.S.C. § 1030(a)(6) through its cross reference to 18 U.S.C. § 1029(e)(5). In addition to using the term "transfer," the definition of traffic from section 1029(e)(5) includes the phrase "dispose of." To avoid potential confusion, the Committee has eliminated the "dispose of" phrase in element one.

4. "The "intent to defraud" phrase is not defined by section 1030 or in its legislative history, and neither the Supreme Court nor the Eighth Circuit has defined the phrase in the

context of section 1030. The Senate Committee has noted with respect to a similar phrase in subsection 1030(a)(4) that "[t]he scienter requirement for this subsection, 'knowingly and with intent to defraud,' is the same as the standard used for 18 U.S.C. § 1029 relating to credit card fraud." S. Rep. 99-432, S. Rep. No. 432, 99th Cong., 2nd Sess. 1986, 1986 U.S.C.C.A.N. 2479, *available at* 1986 WL 31918. In the section 1029 context, the Eighth Circuit appears to interpret "intent to defraud" very broadly. *See, e.g.,United States v. Kowal*, 527 F.3d 741, 748 (8th Cir. 2008) (stating that to "[d]efraud is to deprive of some right, interest or property by deceit"). Further, in *Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc*., 119 F. Supp. 2d 1121, 1126 (W.D. Wash. 2000), the court broadly held that the term "fraud" as used in subsection 1030(a)(4) means "wrongdoing" and does not require proof of the common law elements of fraud. For the definition of Intent to Defraud used in mail fraud cases, *see* Instruction 6.18.1341, *infra*.

5. The supplemental definitions contained in Instruction 6.18.1030I, *infra*, should be given in most cases where applicable.

Committee Comments

The Senate Committee stated that the term "password" "does not mean a single word that enables one to access a computer. The Committee recognizes that a 'password' may actually be comprised of a set of instructions or directions for gaining access to a computer and intends that the word 'password' be construed broadly enough to encompass both single words and longer more detailed explanations on how to access others' computers." S. Rep. No. 99-432 at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2479, 2491.

6.18.1030H. COMPUTER FRAUD [THREATENING TO DAMAGE A PROTECTED COMPUTER OR INFORMATION] (18 U.S.C. § 1030(a)(7))

The crime of threatening to damage a protected computer, as charged in [Count __] of the Indictment, has three essential elements, which are:[1]

One, the defendant transmitted any communication in [interstate] [foreign] commerce;

Two, the defendant transmitted the communication with the intent to extort any [money] [thing of value] from any person;[2] and

Three, the communication contained any

- [threat to cause damage to a protected computer][;]
- [threat to obtain information from a protected computer [without authorization][3] [exceeding authorized access]][;]
- [threat to impair the confidentiality of information obtained from a protected computer [without authorization] [exceeding authorized access]][;] [or]
- [[demand] [request] for [money] [thing of value] in relation to damage to a protected computer, and the defendant caused the damage to facilitate the extortion of the [money] [thing of value]].

[The phrase "intent to extort" means an intent to obtain the property of another with his or her consent by the wrongful use of actual or threatened force, violence or fear or under color of official right.][4]

[You are further instructed regarding the crime[s] charged in [Count[s] ____ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1030I, unless the Indictment charges multiple computer fraud violations and there will be no confusion in adding the definitions common to all counts after all of the substantive computer fraud instructions).][5]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. If an attempt to commit an offense under this subsection has been charged, *see* 18 U.S.C. § 1030(b), the instruction should be modified accordingly.

2. If a definition of "person" is desired, *see* 18 U.S.C. § 1030(e)(12).

3. "Without authorization" is not defined in section 1030 but is commonly understood to refer to persons who have no permission or authority to do a thing whatsoever. *Condux Intern., Inc. v. Haugum*, 2008 WL 5244818 at *4 (D. Minn. Dec. 15, 2008) (citations omitted).

4. The Eighth Circuit has not defined "intent to extort" within the context of section 1030, but its use seems similar to that of 18 U.S.C. § 875(d) (interstate transmission of extortionate communication). Courts in the section 875(d) context have relied on the definition of "extortion" found in the Hobbs Act at 18 U.S.C. § 1951(b)(2). *See United States v. Cohen*, 738 F.2d 287, 289 (8th Cir. 1984) (in case charged under 18 U.S.C. § 875(d), court borrowed the definition of "extortion" found in the Hobbs Act, defining "intent to extort" as meaning "an intent to get the property of another with his consent, induced by wrongful use of actual or threatened force, violence or fear"). Thus, the definition of "intent to extort" adopted here for section 1030(a)(7) is based largely on the definition of extortion that is found in Instruction 6.18.1951, *infra*.

5. The supplemental definitions contained in Instruction 6.18.1030I, *infra*, should be given in most cases where applicable.

Committee Comments

Title 18 U.S.C. § 1030(a)(7) is intended to cover "computer-age blackmail" involving any "interstate or international transmissions of threats against computers, computer networks, and their data and programs whether the threat is received by mail, a telephone call, electronic mail, or through a computerized messaging service." S. Rep. No. 104-357, at 12, 1996 WL 492169, at *29 (1996).

6.18.1030I. COMPUTER FRAUD - SUPPLEMENTAL INSTRUCTIONS[1]

(1) Computer

[The term "computer," as used in [this] [Instruction[s] _____ , means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand-held calculator, or other similar device.][2]

(2) Protected Computer

[The phrase "protected computer," as used in [this] [Instruction[s] _____ , means: [a computer exclusively for the use of [a financial institution] [the United States Government]]; [a computer used [by] [for] a financial institution] [the United States Government] and the conduct constituting the offense affects that use [by] [for] [the financial institution] [the United States Government]]; or [a computer which is [used in] [affecting] [interstate] [foreign] [commerce][3] [communication], including a computer located outside the United States that is used in a manner that affects [interstate] [foreign] [commerce] [communication] of the United States].][4]

(3) Exceeding Authorized Access

[The phrase "exceeding authorized access," as used in [this] [Instruction[s] _____ , means to access a computer with authorization and to use such access to obtain or alter information in the computer that the person accessing the information is not entitled to obtain or alter.][5]

(4) Financial Institution

[The phrase "financial institution," as used in [this] [Instruction[s] _____ , means: [an institution with deposits insured by Federal Deposit Insurance Corporation]; [the Federal Reserve or a member of the Federal Reserve, including any Federal Reserve Bank]; or [a credit union with accounts insured by the National Credit Union Administration].][6]

Final Instructions: Elements of Offenses

(5) Financial Record

[The phrase "financial record," as used in [this] [Instruction[s] _____ , means information derived from any record held by [a financial institution] [an issuer of a credit card] [a consumer reporting agency] pertaining to a customer's relationship with that entity.][7]

(6) Damage

[The term "damage," as used in [this] [Instruction[s] _____ , means any impairment to the integrity or availability of data, a program, a system, or information.][8]

(7) Loss

[The term "loss," as used in [this] [Instruction[s] _____ , means any reasonable cost of responding to an offense, conducting a damage assessment, and restoring of data, a program, system, or information to its condition prior to the offense and any revenue lost, cost incurred, or other damages incurred because of interruption of service.][9]

Notes on Use

1. The Committee recommends the court explain the terms and phrases set forth in this instruction which are applicable to the section 1030 count[s] in the indictment. They should, of course, be tailored to the facts of the particular case.

2. 18 U.S.C. § 1030(e)(1).

3. Although Congress has not defined interstate or foreign commerce in section 1030 or in its legislative history, the Eighth Circuit has held, within the context of section 1030, that computers connected to the Internet are instrumentalities and channels of interstate commerce, and "[n]o additional interstate nexus is required when instrumentalities or channels of interstate commerce are regulated." *See United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (internal citations omitted). If a definition of Interstate and Foreign Commerce is desired, *see* Instruction 6.18.1956J(2), *infra*.

4. 18 U.S.C. § 1030(e)(2).

5. 18 U.S.C. § 1030(e)(6). The Eighth Circuit "has not addressed the issue of whether one who accesses a computer with apparent authorization, and then arguably uses the information for an improper purpose, has violated" section 1030 by "exceeding authorized access." *American Family Mut. Ins. Co. v. Hollander*, 2009 WL 535990 at * 10-11 (N.D. Iowa Mar. 3, 2009). Courts have come down on both sides of this issue. *See LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009) (court adopted a plain language approach to section 1030 and held that the defendant, who accessed his employer's computers while still employed and emailed documents to himself and his wife for their own competing consulting business, had not accessed a computer without authorization nor had he exceeded authorized access because he

was entitled to access such documents); *Condux Intern., Inc. v. Haugum*, 2008 WL 5244818 at *4-6 (D. Minn. 2008) (after discussing the split among authorities, court held that "[t]he legislative history of [section 1030] supports" the narrower "interpretation, which focuses on the propriety of the access of information rather than on the propriety of the use of information"); *but see International Airport Centers, LLC v. Citrin*, 440 F.3d 418, 419-20 (7th Cir. 2006) (court held employee lost his authorization to access employer's computer when he violated his duty of loyalty by starting up a competing business and deleting his employer's valuable data from his work laptop before quitting his employment)*; EF Cultural Travel BV v. Explorica, Inc*., 274 F.3d 577, 583-84 (1st Cir. 2001) (court held a former employee had likely violated section 1030 by exceeding authorized access when he used confidential information he had lawfully obtained as an employee to prepare a program that allowed him to compete against his former employer).

6. The statute provides several additional definitions of financial institution which may apply in a particular case. *See* 18 U.S.C. § 1030(e)(4).

7. 18 U.S.C. § 1030(e)(5).

8. 18 U.S.C. § 1030(e)(8). "Damage" can include deletion of data. *See Lasco Foods, Inc. v. Hall and Shaw Sales, Marketing & Consulting, LLC*, 600 F. Supp. 2d 1045, 1052 (E.D. Mo. 2009).

9. 18 U.S.C. § 1030(e)(11). The cost of the forensic analysis and other remedial measures associated with retrieving and analyzing a defendant's computers can constitute "loss" under section 1030. *See Lasco Foods, Inc. v. Hall and Shaw Sales, Marketing & Consulting, LLC*, 600 F. Supp. 2d 1045, 1052 (E.D. Mo. 2009). Although it is a question of fact for the jury whether an alleged loss is reasonable, loss can include not just the cost of outside experts, but also an estimate of the cost of salaried employees, calculated by adding up the total number of hours spent by salaried employees responding to the intrusion and fixing the problem and multiplying those hours by the imputed hourly rates for those employees. *United States v. Millot*, 433 F.3d 1057, 1061 (8th Cir. 2006). Moreover, section 1030 "does not restrict consideration of losses to only the person who owns the computer system." *Id.*

Final Instructions: Elements of Offenses

6.18.1071. CONCEALING A PERSON FROM ARREST (18 U.S.C. § 1071)

The crime of concealing a person from arrest as charged in [Count ___ of] the Indictment, has four essential elements, which are:

One, a federal warrant had been issued for the arrest of (name of the person named in the arrest warrant) [for the crime of (specify offense)] [after conviction of (specify offense)];

Two, the defendant knew the warrant had been issued;

Three, with that knowledge, the defendant harbored or concealed (name of the person named in the arrest warrant); and

Four, the defendant intended to prevent the discovery or arrest of (name of the person named in the arrest warrant).

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Committee Comments

A similar instruction was cited with approval by the Eighth Circuit in *United States v. Hayes*, 518 F.3d 989 (8th Cir. 2008). It remains an open question whether merely lying about a fugitive's whereabouts is sufficient to support a conviction for this offense. *Id.*

6.18.1111. INTRODUCTORY COMMENTS TO HOMICIDE INSTRUCTIONS

Committee Comments

Federal Jurisdiction under 18 U.S.C. § 7

Federal jurisdiction may be exclusive or concurrent. Certain statutes, such as 18 U.S.C. § 1114, base federal jurisdiction on the identity of the victim. Other statutes, such as 18 U.S.C. § 1111, base federal jurisdiction on where the crime occurs. These latter statutes, the federal enclave laws, permit federal courts to serve as a forum for the prosecution of certain crimes when they occur within the "special maritime and territorial jurisdiction of the United States," 18 U.S.C. § 7.

The phrase "within the exclusive jurisdiction of the United States" applies to crimes committed within the premises, grounds, forts, arsenals, navy-yards, and other places within the boundaries of a state or within a territory over which the federal government has jurisdiction. *In re Gon-shay-ee*, 130 U.S. 343, 351 (1889). Currently, 18 U.S.C. § 7 describes those same places more expansively and affixes to them the phrase "special maritime and territorial jurisdiction of the United States." The statute defines this as including, among other things, the high seas, any other waters within the admiralty and maritime jurisdiction of the United States and without jurisdiction of any particular state, any American vessel on the waters of any of the Great Lakes or on any of the waters connecting the Great Lakes, and any American aircraft while in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States. Although not enumerated in section 7, federal jurisdiction extends to crimes committed in Indian country under 18 U.S.C. § 1152, and exclusive federal jurisdiction is granted over certain enumerated offenses, including murder and manslaughter, committed by an Indian within Indian country (18 U.S.C. § 1153).

Federal jurisdiction under 18 U.S.C. §§ 1111 and 1112 ultimately depends on the location of the offense. The location is determined by where the injury was inflicted or other means employed which caused the death, without regard to where the death actually occurred. 18 U.S.C. § 3236; *United States v. Parker*, 622 F.2d 298, 302 (8th Cir. 1980). If injuries are inflicted both outside and inside the federal boundary, the Eighth Circuit adopts a proximate cause analysis and requires the government to prove beyond a reasonable doubt that the victim died as a proximate result of the injuries inflicted within the federal boundary. *Id.*

It is unclear in light of *United States v. Gaudin*, 515 U.S. 506 (1995), whether the element of federal jurisdiction is a question of law to be determined by the court or a question of fact to be determined by the jury. However, the Eighth Circuit in *United States v. Stands*, 105 F.3d 1565, 1575 (8th Cir. 1997), held that the location of the crime is a factual issue for the jury, but it is for the court, not the jury, to determine whether that land is in Indian country and thus within federal jurisdiction.

Injection of Defenses

See Instruction 9.05.

In the Eighth Circuit, it is well established that a defendant is entitled to an instruction on his theory of the case if there is evidence to support it and a proper request has been made. *United States v. Long Crow*, 37 F.3d 1319, 1323 (8th Cir. 1994) (quoting *United States v. Brown*, 540 F.2d 364, 380 (8th Cir. 1976)). The evidence need not be overwhelming, and a defendant is entitled to an instruction on a theory of defense even though the evidentiary basis for that theory is "weak, inconsistent, or of doubtful credibility." *United States v. Scout*, 112 F.3d 955, 960 (8th Cir. 1997) (citing *Closs v. Leapley*, 18 F.3d 574, 580 (8th Cir. 1994)); *but see Long Crow*, 37 F.3d at 1323 (the defendant must establish the insanity defense "by clear and convincing evidence"). Nonetheless, a defendant still has the burden of producing some evidence to support his theory. *See Hall v. United States*, 46 F.3d 855 (8th Cir. 1995) (there must be evidence upon which a jury could rationally sustain the defense).

Self-Defense

See Instructions 3.09, *supra*, and 9.04, *infra*.

When evidence is introduced which supports a claim of self-defense, the government must prove the absence of self-defense beyond a reasonable doubt. *See United States v. Scout*, 112 F.3d at 960 (citing *United States v. Alvarez*, 755 F.2d 830, 842 n.12 (11th Cir. 1985)). In other words, the absence of self-defense is not an element of the crime; rather, it is an affirmative defense on which the defendant bears the burden of production. Once the defendant has met this burden, the government must satisfy the burden of persuasion and negate self-defense. *Id*.

When self-defense is raised, instructions should be modified to include an additional element, that "the defendant did not kill (name of victim) in self-defense." An explanation of self-defense should also be included.

Heat of Passion

See Instruction 9.05, *infra*.

The prosecution must prove beyond a reasonable doubt the absence of heat of passion when the issue is properly raised in a homicide case. *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975).

Lesser-Included Offense

"The defendant may be found guilty of an offense necessarily included in the offense charged . . . ." Fed. R. Crim. P. 31(c). *See* Instruction 3.10, *supra*.

The Eighth Circuit has formulated a five-point test to determine when a lesser-included offense instruction should be given. *United States v. Parker*, 32 F.3d 395, 400-01 (8th Cir. 1994) (citing *United States v. Thompson*, 492 F.2d 359, 362 (8th Cir. 1974)):

> A defendant is entitled to an instruction on a lesser-included offense if: (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) there is some evidence which would justify conviction of the lesser offense; (4) the proof on the element or elements differentiating the two crimes is sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser-included offense; and (5) there is mutuality, *i.e.*, a charge may be demanded by either the prosecution or the defense.

See also United States v. Eagle Hawk, 815 F.2d 1213, 1215 (8th Cir. 1987), and *United States v. Neiss*, 684 F.2d 570, 571 (8th Cir. 1982).

6.18.1111A. MURDER, FIRST DEGREE, WITHIN SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES (18 U.S.C. § 1111) [1]

The crime of murder in the first degree [, as charged in [Count __] of the Indictment,] has four elements, which are:

One, the defendant unlawfully killed[2] [3] (name of victim);

Two, the defendant did so with malice aforethought as defined in instruction _____;[4]

Three, the killing was premeditated[5] as defined in instruction _____;[6] and

Four, the killing occurred at (describe location where killing is alleged to have occurred upon which jurisdiction is based).[7]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. Numerous statutes refer to section 1111. This instruction may be modified for these situations.

2. The statute states that the defendant must "unlawfully" kill. The issue of whether the defendant unlawfully killed is injected in a number of ways, as for instance when the defendant raises the defense of self-defense or defense of others. Those defenses are addressed by adding the appropriate language based on instruction 3.09 to this instruction, rather than by adding another element to this instruction. The burden of proof remains on the government to disprove self-defense once the defense is raised.

3. "Caused the death of" may be used instead of "killed."

4. If the defense of heat of passion is raised, the instruction should be modified to add "and not in the heat of passion as submitted in instruction ___." The Supreme Court has held that the prosecution must "prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Mullaney v. Wilbur*, 421 U.S. 684, 697-98, 704 (1975).

5. This element may be modified to state "the defendant premeditated upon the death of (name of victim)."

6. When any other form of first degree murder is at issue (*i.e.*, a murder "perpetrated by poison, lying in wait . . . or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery..."), the instruction relative to premeditation should be appropriately modified. (For example, in a case where the killing occurred during a robbery, the third element should be stricken, and a new element should be added requiring "the killing of [victim] was committed during the perpetration of a robbery." This element should be followed by language

which defines accurately the necessary elements of the offense in question, in this example, robbery.)

7. It is the Committee's opinion that the issue of where the killing occurred is a question of fact to be determined by the jury but the issue of federal jurisdiction is a question of law to be determined by the court. *See United States v. Gaudin*, 515 U.S. 506 (1995). *See also United States v. Stands*, 105 F.3d 1565, 1575 (8th Cir. 1997) (the location of the crime is a factual issue for the jury, but it is for the court, not the jury, to determine whether that land is in Indian country and thus within federal jurisdiction). If, however, the court should desire to submit the issue of federal jurisdiction to the jury, a fifth element may be added, as follows:

> [*Five*, (describe alleged location) is within the (describe basis under which the location is within the special maritime or territorial jurisdiction of the United States, e.g., the boundaries of the Sioux Indian reservation).]

If this is done, the first sentence should be modified to state that the crime has five elements.

See 18 U.S.C. § 7 for the definition of "special maritime and territorial jurisdiction of the United States," and 18 U.S.C. §§ 1152 and 1153 for federal jurisdiction over Indian country and Indians. The Committee recommends adding the appropriate definition with the statutory phrase.

Committee Comments

See 18 U.S.C. § 1111 and Introductory Comments. *See generally, Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967). Aside from the forms of first degree murder which are "perpetrated by poison, lying in wait," etc., the necessary feature of first degree murder which distinguishes it from second degree murder is the element of "premeditation." *Beardslee v. United States*. This factor is covered by the third element above. In *United States v. Downs*, 56 F.3d 973 (8th Cir. 1995), the Eighth Circuit describes the three nonexclusive categories of evidence which are reviewed in determining sufficiency of evidence of premeditation:

> (1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, *planning activity*; (2) facts about the defendant's prior relationship and conduct with the victim from which *motive* may be inferred; and (3) facts about the *nature of the killing* from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

Downs, 56 F.3d at 975. Intention and premeditation may be established by circumstantial evidence. *United States v. Blue Thunder*, 604 F.2d 550 (8th Cir. 1979); *United States v. Black Elk*, 579 F.2d 49, 51 (8th Cir. 1978); *cf., United States v. Thompson*, 492 F.2d 359, 362 (8th Cir. 1974) (insufficient circumstantial evidence of intent).

In *Ball v. United States*, 140 U.S. 118, 133 (1891), the Supreme Court recognized the applicability of the common law's year-and-a-day rule to federal prosecutions for murder. The

Eighth Circuit, in *dicta*, has recognized that the government must allege and prove that death occurred within a year and a day of the infliction of injury, *Merrill v. United States*, 599 F.2d 240, 241-42 (8th Cir. 1979). Unless there is an issue in the case as to whether death occurred more than a year and a day beyond infliction of the fatal injury, the Committee does not believe it is necessary to instruct on the issue.

Second degree murder can be a lesser-included offense under a charge of first degree murder. *See* Introductory Comments, *supra*.

Final Instructions: Elements of Offenses

6.18.1111A-1. "MALICE AFORETHOUGHT" DEFINED

As used in these instructions, "malice aforethought" means an intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life; but "malice aforethought" does not necessarily imply any ill will, spite or hatred towards the individual killed.[1] [2]

In determining whether [the victim] was unlawfully killed with malice aforethought, you should consider all the evidence concerning the facts and circumstances preceding, surrounding and following the killing which tend to shed light upon the question of intent.

Notes on Use

1. This instruction should be modified in the case of felony murder or murder for hire. As here stated, the instruction is designed for situations where a defendant is accused as the principal.

2. If the court wishes to further define malice and "callous and wanton disregard," the Eighth Circuit has stated: "Malice may be established by evidence of conduct which is reckless and wanton, and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that the defendant was aware of a serious risk of death or serious bodily harm." *United States v. Johnson*, 879 F.2d 331, 334 (8th Cir. 1989) (quoting *United States v. Black Elk*, 579 F.2d 49, 51 (8th Cir. 1978)).

6.18.1111A-2. "PREMEDITATION" DEFINED

A killing is premeditated when it is intentional and the result of planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough for the defendant, after forming the intent to kill, to be fully conscious of his intent, and to have thought about the killing.

[For there to be premeditation the defendant must think about the taking of a human life before acting. The amount of time required for premeditation cannot be arbitrarily fixed. The time required varies as the minds and temperaments of people differ and according to the surrounding circumstances in which they may be placed. Any interval of time between forming the intent to kill, and acting on that intent, which is long enough for the defendant to be fully conscious and mindful of what [he] [she] intended and willfully set about to do, is sufficient to justify the finding of premeditation.][1]

Notes on Use

1. The instruction may be submitted with the bracketed paragraph included if the court wishes to provide further description to the jury of premeditation.

6.18.1111A-3. HEAT OF PASSION OR SUDDEN QUARREL CAUSED BY ADEQUATE PROVOCATION, DEFINED

The defendant acted upon heat of passion [or sudden quarrel][1] caused by adequate provocation, if:

One, the defendant was provoked in a way that would cause a reasonable person to lose [his] [her] self-control;[2]

Two, a reasonable person subject to the same provocation would not have regained self-control in the time between the provocation and the killing; and

Three, the defendant did not regain [his] [her] self-control in the time between the provocation and the killing.

Heat of passion [or sudden quarrel] may result from anger, rage, resentment, terror or fear. The question is whether the defendant, while in such an emotional state, lost self-control and acted on impulse and without reflection.

Provocation, in order to be adequate under the law, must be such as would naturally induce a reasonable person in the passion of the moment to temporarily lose self-control and kill on impulse and without reflection. [A blow or other personal violence may constitute adequate provocation, but trivial or slight provocation, entirely disproportionate to the violence of the retaliation, is not adequate provocation.][3]

It must be such provocation as would arouse a reasonable person. [If the provocation aroused the defendant because he was voluntarily intoxicated, and would not have aroused a sober person, it does not reduce the offense to manslaughter.][4]

Notes on Use

1. The Committee recommends that “sudden quarrel” not be included in the verdict director, as heat of passion now appears to subsume “sudden quarrel.” *See* Notes on Use to Instruction 6.18.1112A, *infra*. *See United States v. Martinez*, 988 F.2d 685, 690-96 (7th Cir. 1993), for an extensive description of the history of the defense of "sudden quarrel" or “mutual combat,” in which the Court concludes that the term may be "an anachronism with no meaning not adequately served by a proper definition of heat of passion." *See also United States v. McRae*, 593 F.2d 700, 705 (5th Cir. 1979) ("it is surely not the quarrel that signifies but the heat of passion that it occasions"). Cases in the Eighth Circuit, however, typically state that voluntary

manslaughter requires evidence of a killing upon sudden quarrel or heat of passion. *See, e.g., United States v. Eagle Elk*, 658 F.2d 644, 648 (8th Cir. 1981).

If "sudden quarrel" is included, the Committee recommends it be defined. *See United States v. Martinez*, 988 F.2d at 696, quoting 2 LaFave and Scott, *Substantive Criminal Law* § 7.10(b)(2) at 256 (1986), in which "mutual combat" is defined as meaning that the parties "willingly engage in mutual combat, and during the fight one kills the other as the result of an intention to do so formed during the struggle."

2. There is case law holding the provocation must be sudden. *See United States v. Bordeaux*, 980 F.2d 534, 537 (8th Cir. 1992) ("A defendant's anger with the victim, however, is not sufficient to establish heat of passion without an element of *sudden* provocation. Evidence of 'a string of prior arguments and a continuing dispute,' without any indication of some sort of instant incitement . . . ," is not sufficient.)

3. Courts typically add, "Mere words alone, no matter how abusive or insulting, are not adequate provocation." This is the common law rule. However, there is a trend in the case law that words alone will sometimes suffice if the words are informational (conveying information of a fact which constitutes reasonable provocation when that fact is observed) rather than merely insulting or abusive words. LaFave & Scott, *Substantive Criminal Law* (1986), § 7.10(6). *But see* Robinson, *Criminal Law Defenses* (1984), Vol. I, § 102(b) (the one exception to the common law rule appears to be the confession of adultery).

4. While the issue is not clearly resolved in the Eighth Circuit, the Committee recommends this language be used only if there is evidence the defendant was voluntarily intoxicated. *See United States v. F.D.L.*, 836 F.2d 1113, 1116-18 (8th Cir. 1988). Where adequate provocation or heat of passion is raised as a defense and the defendant wishes to offer evidence of his intoxication, the trend seems to be that the provocation must be that which will arouse a reasonable *sober* person. *See* LaFave & Scott, *Substantive Criminal Law*, § 4.10.

When voluntary intoxication is raised as an insanity defense, it will be disallowed by statute and case law. 18 U.S.C. § 17 and the legislative history (S. Rep. 225, 98th Cong., 1st Sess. 222 at 229 (1983) ("the voluntary use of alcohol or drugs, even if they render the defendant unable to appreciate the nature and quality of his acts, does not constitute insanity . . . ."); *United States v. F.D.L.*, 836 F.2d at 1116. It is the general rule, however, that voluntary intoxication may negate specific intent but not general intent. *United States v. Johnston*, 543 F.2d 55 (8th Cir. 1976). *See Montana v. Egelhoff*, 518 U.S. 37 (1996); *United States v. Johnson*, 879 F.2d 331, n.1 (8th Cir. 1989).

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6.18.1111B. MURDER, SECOND DEGREE, WITHIN SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES (18 U.S.C. § 1111) [1]

The crime of murder in the second degree [, as charged in [Count ___ of] the Indictment,] has [three] [four] elements, which are:

One, the defendant unlawfully killed[2, 3] (name of victim);

Two, the defendant did so with malice aforethought as defined in instruction _____;[4] [and]

Three, the killing occurred within (describe location where killing is alleged to have occurred upon which jurisdiction is based) [.; and

Four, (describe alleged location) is within the (describe basis under which the location is within the special maritime or territorial jurisdiction of the United States, *e.g.*, the boundaries of the Sioux Indian reservation.][5, 6]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*. *See also* Instruction 3.10, *supra*.)

Notes on Use

1. Numerous statutes incorporate section 1111 as an element. This instruction may be modified to apply to these offenses.

2. The statute states that the defendant must "unlawfully" kill. The issue of whether the defendant unlawfully killed is injected when the defendant raises the defense of self-defense or defense of others. Those defenses are addressed by adding the appropriate language based on Instruction 3.09 to this instruction, rather than by adding another element to this instruction.

The burden of proof remains on the government to disprove self-defense once the defense is raised.

3. "Caused the death of" may be used instead of "killed."

4. If the defense of heat of passion is raised, the instruction should be modified to add "and not in the heat of passion as submitted in instruction ___." The Supreme Court has held that the prosecution must "prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Mullaney v. Wilbur*, 421 U.S. 684, 697-98, 704 (1975).

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5. *See* Introductory Comments and 18 U.S.C. § 7 for the definition of "special maritime and territorial jurisdiction of the United States," and 18 U.S.C. §§ 1152 and 1153 for federal jurisdiction over Indian country and Indians.

6. It is unclear whether the element of federal jurisdiction is a question of law to be determined by the court or a question of fact to be determined by the jury. *See United States v. Gaudin*, 515 U.S. 506 (1995). *But see United States v. Stands*, 105 F.3d 1565, 1575 (8th Cir. 1997) (the location of the crime is a factual issue for the jury, but it is for the court, not the jury, to determine whether that land is in Indian country and thus within federal jurisdiction).

Committee Comments

See Committee Comments, Instruction 6.18.1111A, and Introductory Comments, *supra.*

Section 1111(a), Title 18, United States Code, provides that premeditated, unlawful killing is murder in the first degree, and further provides that killing a human being in the perpetration of specified felonies is murder in the first degree. "Any other murder is murder in the second degree." *Id.* "To convict of second degree murder, the jury must find that the defendant killed the victim with 'malice aforethought.'" *United States v. Bordeaux*, 980 F.2d 534, 536 (8th Cir. 1992). Second degree murder can be a lesser-included offense under a charge of first degree murder. *See* Introductory Comments, *supra*.

Final Instructions: Elements of Offenses

6.18.1112A. VOLUNTARY MANSLAUGHTER, WITHIN SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES (18 U.S.C. § 1112)

The crime of voluntary manslaughter [, as charged in [Count ___ of] the Indictment,] has three elements, which are:

One, the defendant voluntarily, intentionally, and unlawfully killed (name of victim);[1, 2]

Two, the defendant acted [in the heat of passion] [upon sudden quarrel][3] caused by adequate provocation, as defined in instruction _____; [and]

Three, the killing occurred within (describe location where killing is alleged to have occurred upon which jurisdiction is based) [.; and

Four, (describe alleged location) is within the (describe basis under which the location is within the special maritime or territorial jurisdiction of the United States, *e.g.*, the boundaries of the Sioux Indian reservation).][4]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. If there is evidence of justification or excuse, the following language should be included after the final element:

"A killing is 'unlawful' within the meaning of this instruction if it was [neither] [not] [justifiable] [nor] [excusable]."

2. "Caused the death of" may be used instead of "killed."

3. The Committee recommends that "sudden quarrel" not be included, as heat of passion now appears to include "sudden quarrel." *See United States v. Martinez*, 988 F.2d 685, 690-96 (7th Cir. 1993), for an extensive description of the history of the defense of "sudden quarrel," in which the court concludes that the term "sudden quarrel" may be "an anachronism with no meaning not adequately served by a proper definition of heat of passion." *See also United States v. McRae*, 593 F.2d 700, 705 (5th Cir. 1979) ("it is surely not the quarrel that signifies but the heat of passion that it occasions"). Cases in the Eighth Circuit, however, typically state that voluntary manslaughter requires evidence of a killing upon sudden quarrel or heat of passion. *See, e.g., United States v. Eagle Elk*, 658 F.2d 644, 648 (8th Cir. 1981).

4. It is unclear whether the element of federal jurisdiction is a question of law to be determined by the court or fact to be determined by the jury. After *United States v. Gaudin*, 515 U.S. 506 (1995), the Committee believes courts will hold that federal jurisdiction is an element of section 1112 and will require that the issue be submitted to the jury. *But see United States v.*

Stands, 105 F.3d 1565, 1575 (8th Cir. 1997) (the location of the crime is a factual issue for the jury, but it is for the court, not the jury, to determine whether that land is in Indian country and, thus, within federal jurisdiction). If, however, the court should desire to submit the element of federal jurisdiction to the jury, the following could be added as element five:

> *[Five*, (describe alleged location) is within the [describe basis under which the location is within the special maritime or territorial jurisdiction of the United States, *e.g.*, the boundaries of the Sioux Indian reservation.]

See 18 U.S.C. § 7 for the definition of "special maritime and territorial jurisdiction of the United States," and 18 U.S.C. §§ 1152 and 1153 for federal jurisdiction over Indian country and Indians. The Committee recommends adding the appropriate definition with the statutory phrase.

Committee Comments

See Committee Comments, Instruction 6.18.1111A, *supra*, and Introductory Comments.

Voluntary manslaughter is the unlawful killing without malice, upon a sudden quarrel or heat of passion. 18 U.S.C. § 1112. The element of malice aforethought distinguishes between murder and manslaughter. *United States v. Weise*, 89 F.3d 502, 505 (8th Cir. 1996); *United States v. Bordeaux*, 980 F.2d 534, 536 (8th Cir. 1992). The offense of voluntary manslaughter requires evidence of a killing upon sudden quarrel or heat of passion, which eliminates the mental element of malice required for murder, *United States v. Bordeaux*, 980 F.2d at 537 (citing *United States v. Elk*, 658 F.2d 644, 648 (8th Cir. 1981)).

Voluntary manslaughter can be a lesser-included offense under a charge of first degree or second degree murder, and involuntary manslaughter can be a lesser-included offense under a charge of voluntary manslaughter. *See* Introductory Comments, *supra*.

JUSTIFICATION OR EXCUSE

If there is evidence of justification or excuse, the jury should be instructed that an "unlawful killing" is one that is not justifiable or excusable. Justification or excuse may include self-defense, defense of others, the right to prevent at least certain felonies, coercion or necessity, mental disorder, and other factual situations sufficient to remove the matter from the criminal arena.

The elements of a necessity/justification defense generally are discussed in *United States v. Andrade-Rodriguez*, 531 F.3d 721, 723 (8th Cir. 2008) (quoting *United States v. Luker*, 395 F.3d 830, 832-33 (8th Cir. 2005)):

> (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, and (4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.

Where the justification or excuse is not "perfect," *i.e.*, it does not meet all the elements for the defense, some cases and state criminal codes have concluded that the "imperfect" defense may warrant the killing being manslaughter rather than murder. Other cases decline to accept this approach and instead treat the issue as part of adequate provocation.

SELF-DEFENSE

See Instruction 9.04, *infra*.

When a defendant presents evidence in support of a claim of self-defense, the government must prove the absence of self-defense beyond a reasonable doubt. *See United States v. Scout*, 112 F.3d 955, 960 (8th Cir. 1997) (citing *United States v. Alvarez*, 755 F.2d 830, 842 n.12 (11th Cir. 1985)). In other words, the absence of self-defense is not an element of the crime; rather, it is an affirmative defense on which the defendant bears the burden of production. *Alvarez*, 755 F.2d at 714 n.1. Once the defendant has met this burden, the government must satisfy the burden of persuasion and negate self-defense. *Id.*

Failure to provide a separate instruction explaining that the government bears the burden of proof on self-defense can constitute reversible error. *See, e.g., United States v. Corrigan*, 548 F.2d 879, 883-84 (10th Cir. 1977).

The Committee recommends adding a fifth element to this instruction when self-defense is an issue. *See* Note 2, *supra*.

6.18.1112B. INVOLUNTARY MANSLAUGHTER, WITHIN SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES (18 U.S.C. § 1112)

The crime of involuntary manslaughter[, as charged in [Count ___ of] the Indictment,] has [four] [five] elements, which are:

One, _____ (name of victim) is dead;

Two,t, he defendant caused the death of the victim, as charged;

[Three, the death of the victim occurred as a result of an act done by the defendant during the commission of [an unlawful act[1] not amounting to a felony] [a lawful act, done either in an unlawful manner or with wanton or reckless disregard for human life, which might produce death] (describe act, e.g., was driving in excess of the speed limit);] or

[Three, [the defendant knew that his conduct was a threat to the lives of others][it was reasonably foreseeable that the defendant's conduct might be a threat to the lives of others];] [and]

Four, the killing occurred within (describe location where killing is alleged to have occurred upon which jurisdiction is based).[2]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. If there is evidence of justification or excuse, the following language should be included after the final element:

> "A killing is 'unlawful' within the meaning of this instruction if it was [neither] [not] [justifiable] [nor] [excusable]."

See Committee Comments to Instruction 6.18.1112A regarding justification and excuse.

2. It is unclear whether the element of federal jurisdiction is a question of law to be determined by the court or fact to be determined by the jury. After *United States v. Gaudin*, 515 U.S. 506 (1995), the Committee believes courts will hold that federal jurisdiction is an element of § 1112 and will require that the issue be submitted to the jury. *But see United States v. Stands*, 105 F.3d 1565, 1575 (8th Cir. 1997) (the location of the crime is a factual issue for the jury, but it is for the court, not the jury, to determine whether that land is in Indian country and thus within federal jurisdiction). If, however, the court should desire to submit the element of federal jurisdiction to the jury, the following could be added as element five:

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[Five, (describe alleged location) is within the (describe basis under which the location is within the special maritime or territorial jurisdiction of the United States, *e.g.*, the boundaries of the Sioux Indian reservation).]

See 18 U.S.C. § 7 for the definition of "special maritime and territorial jurisdiction of the United States," and 18 U.S.C. §§ 1152 and 1153 for federal jurisdiction over Indian country and Indians. The Committee recommends adding the appropriate definition with the statutory phrase.

Committee Comments

See Committee Comments, Instruction 6.18.1112A, and Introductory Comments.

Involuntary manslaughter can be a lesser-included offense of voluntary manslaughter under 18 U.S.C. § 1112. *See* Introductory Comments, *supra*. *United States v. One Star*, 979 F.2d 1319 (8th Cir. 1992).

Under 18 U.S.C. § 1112, there are two types of involuntary manslaughter. Involuntary manslaughter can either occur in the commission of (1) an unlawful act or (2) a lawful act in an unlawful manner or without due caution. *United States v. McMillan*, 820 F.2d 251, 257 (8th Cir. 1987).

In determining what constitutes an "unlawful act" under 18 U.S.C. § 1112, the Assimilative Crimes Act, 18 U.S.C. § 13, permits resort to state law when the acts of the defendant are not punishable under any enactment of Congress. *See United States v. Butler*, 541 F.2d 730, 735-36 (8th Cir. 1976); *see also United States v. Bald Eagle*, 849 F.2d 361 n.2 (8th Cir. 1988).

"The requisite mental state for involuntary manslaughter is 'gross' or 'criminal' negligence, a far more serious level of culpability than that of ordinary tort negligence, but still short of the extreme recklessness, or malice required for murder." *United States v. One Star*, 979 F.2d 1319, 1321 (8th Cir. 1992). "It is well settled that involuntary manslaughter is a lesser-included offense of murder." *Ibid.*

Actual knowledge of a threat to the lives of others, or knowledge of circumstances that would allow the defendant to foresee the life-threatening nature of his conduct, is a separate element of the crime which must be established in addition to gross negligence. *United States v. Opsta*, 659 F.2d 848, 849 (8th Cir. 1981) (citing *United States v. Schmidt*, 626 F.2d 616, 617 (8th Cir. 1980)).

There is authority for the proposition that self-defense is inconsistent with a charge of involuntary manslaughter, so that it would be error to submit on the lesser-included offense of involuntary manslaughter when the defendant asserts self-defense. Such an instruction would abrogate the complete nature of self-defense as a defense. *United States v. Iron Shield*, 697 F.2d 845 (8th Cir. 1983) (citing *United States v. Smith*, 521 F.2d 374, 377 (10th Cir. 1975)).

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6.18.1114A. MURDER, FIRST DEGREE, FEDERAL VICTIM (18 U.S.C. § 1114)

The crime of murder in the first degree [, as charged in [Count ___ of] the Indictment,] has four elements, which are:

One, the defendant unlawfully killed[1] [2] (name of victim);

Two, the defendant did so with malice aforethought and not in the heat of passion;[3]

Three, the killing was premeditated[4] as defined in instruction _____;[5] and

Four, (name of victim) was killed [while engaged in his/her official duties] [on account of the performance of his/her official duties] as an [officer] [employee] of the United States.

The defendant does not have to know that (the victim) was a federal officer.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statute states that the defendant must "unlawfully" kill. The issue of whether the defendant unlawfully killed is injected in a number of ways, as for instance when the defendant raises the defense of self-defense or defense of others. Those defenses are addressed by adding the appropriate language based on Instruction 3.09 to this instruction, rather than by adding another element to this instruction. The burden of proof remains on the government to disprove self-defense once the defense is raised.

2. "Caused the death of" may be used instead of "killed."

3. If the defense of heat of passion is raised, the instruction should be modified to add "and not in the heat of passion as submitted in instruction ___." The Supreme Court has held that the prosecution must "prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Mullaney v. Wilbur*, 421 U.S. 684, 697-98, 704 (1975).

4. This element may be modified to state "the defendant premeditated upon the death of (name of victim)."

5. When any other form of first degree murder is at issue (*i.e.*, a murder "perpetrated by poison, lying in wait . . . or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnaping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery. . . ."), the instruction relative to premeditation should be appropriately modified. (For example, in a case where the killing occurred during a robbery, the third element should be stricken, and a new element should be added requiring "the killing of [victim] was committed during the perpetration of a robbery." This element should be followed

by language which defines accurately the necessary elements of the offense in question, in this example, robbery.)

Committee Comments

See 18 U.S.C. §§ 1111, 1114; Introductory Comments; and Instructions 6.18.1111A, 6.18.1112A, *supra*.

See Committee Comments, Instructions 6.18.1111A and 6.18.1112A, *supra*.

OFFICIAL DUTY

The test for determining whether a federal officer or employee is engaged in the performance of an official duty is whether the officer or employee was acting within the scope of employment or engaging in a "personal frolic." *United States v. Street*, 66 F.3d 969, 978 (8th Cir. 1995). The scope of what the agent is employed to do is not defined by whether the officer or employee was abiding by the controlling laws and regulations at the time of the incident. *Id.* Moreover, the scope of employment is not defined by the job description. *Id.* Instead, in the Eighth Circuit, the scope of employment is interpreted broadly by looking to whether the officer or employee's actions fall within the agency's overall mission. *Id.* The statute was intended by Congress to protect federal officers and facilitating the accomplishment of federal law enforcement functions. *Id.* at 974.

FEDERAL OFFICER

A defendant need not be aware that the victim is a federal officer. *United States v. Feola*, 420 U.S. 671, 684 (1975).

A state, local or tribal officer may also be a federal officer due to cross-deputization by a federal agency. If deputized officers are pursuing duties in furtherance of their federal deputization, they are federal officers for purposes of 18 U.S.C. §§ 111 and 1114. *United States v. Schrader*, 10 F.3d 1345, 1350-51 (8th Cir. 1993). (For example, section 1114 provides that any officer or employee of the Indian field service of the United States is protected under the statute. The Bureau of Indian Affairs is part of the Indian field service of the United States. Tribal police officers who are employed by a tribe under a contract with the Bureau of Indian Affairs to provide aid in the enforcement or carrying out in Indian country of a law of either the United States or an Indian tribe are federal officers for the purpose of 18 U.S.C. § 111. *United States v. Young*, 85 F.3d 334 (8th Cir. 1996).) Whether an officer is a federal officer is a issue of law for the court; whether the person is in fact an officer and whether he was performing federal law enforcement functions are questions for the jury. *United States v. Oakie*, 12 F.3d 1436, 1439-40 (8th Cir. 1993).

6.18.1114B. MURDER, SECOND DEGREE, FEDERAL VICTIM (18 U.S.C. § 1114)

The crime of murder in the second degree [, as charged in [Count ___ of] the Indictment,] has three elements, which are:

One, the defendant unlawfully killed[1] [2] (name of victim);

Two, the defendant did so with malice aforethought as defined in instruction ____;[3] and

Three, (name of victim) was killed [while engaged in his/her official duties] [on account of the performance of his/her official duties] as an [officer] [employee] of the United States.

The defendant does not have to know that (the victim) was a federal officer.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statute states that the defendant must "unlawfully" kill. The issue of whether the defendant unlawfully killed is injected in a number of ways, as, for instance, when the defendant raises the defense of self-defense or defense of others. Those defenses are addressed by adding the appropriate language based on instruction 3.09 to this instruction, rather than by adding another element to this instruction. The burden of proof remains on the government to disprove self-defense once the defense is raised.

2. "Caused the death of" may be used instead of "killed."

3. If the defense of heat of passion is raised, the instruction should be modified to add "and not in the heat of passion as submitted in instruction ___." The Supreme Court has held that the prosecution must "prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Mullaney v. Wilbur*, 421 U.S. 684, 697-98, 704 (1975).

Committee Comments

See 18 U.S.C. §§ 1111, 1114; Introductory Comments; and Instructions 6.18.1111A, 6.18.1112A, *supra*.

See Committee Comments, Instructions 6.18.1111A, 6.18.1112A, and 6.18.1114A, *supra*.

6.18.1114C. VOLUNTARY MANSLAUGHTER, FEDERAL VICTIM (18 U.S.C. § 1114)

The crime of voluntary manslaughter [, as charged in [Count ___ of] the Indictment,] has three elements, which are:

One, the defendant voluntarily, intentionally, and unlawfully killed (name of victim);[2 3]

Two, the defendant acted upon [in the heat of passion] [sudden quarrel][4] caused by adequate provocation, as defined in instruction ____; and

Three, (name of victim) was killed [while engaged in his/her official duties] [on account of the performance of his/her official duties] as an [officer] [employee] of the United States.

The defendant does not have to know that (name of victim) was a federal officer.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. If there is evidence of justification or excuse, the following language should be included after the final element:

"A killing is 'unlawful' within the meaning of this instruction if it was [neither] [not] [justifiable] [nor] [excusable]."

2. "Caused the death of" may be used instead of "killed."

3. The Committee recommends that "sudden quarrel" not be included, as heat of passion now appears to include "sudden quarrel." *See United States v. Martinez*, 988 F.2d 685, 690-96 (7th Cir. 1993), for an extensive description of the history of the defense of "sudden quarrel," in which the Court concludes that the term "sudden quarrel" may be "an anachronism with no meaning not adequately served by a proper definition of heat of passion." *See also United States v. McRae*, 593 F.2d 700, 705 (5th Cir. 1979) ("it is surely not the quarrel that signifies but the heat of passion that it occasions"). Cases in the Eighth Circuit, however, typically state that voluntary manslaughter requires evidence of a killing upon sudden quarrel or heat of passion. *See, e.g., United States v. Eagle Elk*, 658 F.2d 644, 648 (8th Cir. 1981).

Committee Comments

See 18 U.S.C. §§ 1111, 1114; Introductory Comments; and Instructions 6.18.1111A, 6.18.1112A, *supra*.

See Committee Comments, Instructions 6.18.1111A, 6.18.1112A, and 6.18.1114A, *supra*.

6.18.1114D. INVOLUNTARY MANSLAUGHTER, FEDERAL VICTIM (18 U.S.C. § 1114)

The crime of involuntary manslaughter [, as charged in [Count ___ of] the Indictment,] has four elements, which are:

One, _____ (name of victim) is dead;

Two, the defendant caused the death of the victim, as charged;

[Three, the death of the victim occurred as a result of an act done by the defendant during the commission of [an unlawful act[1] not amounting to a felony] [a lawful act, done either in an unlawful manner or with wanton or reckless disregard for human life, which might produce death] (describe act, e.g., was driving in excess of the speed limit); or]

[Three, [the defendant knew that his conduct was a threat to the lives of others][it was reasonably foreseeable that the defendant's conduct might be a threat to the lives of others];] and

Four, (name of victim) [was killed] [died] [while engaged in his/her official duties] [on account of the performance of his/her official duties] as an [officer] [employee] of the United States.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. If there is evidence of justification or excuse, the following language should be included after the final element:

> "A killing is 'unlawful' within the meaning of this instruction if it was [neither] [not] [justifiable] [nor] [excusable]."

See Committee Comments to Instruction 6.18.1112A regarding justification and excuse.

Committee Comments

See 18 U.S.C. §§ 1111, 1114; Introductory Comments; and Instructions 6.18.1111A, 6.18.1112A, *supra*.

See Committee Comments, Instructions 6.18.1111A, 6.18.1112A, and 6.18.1114A, *supra*.

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6.18.1201. KIDNAPPING (18 U.S.C. § 1201(a)(1))

The crime of kidnapping, as charged in [Count____of] the Indictment, has four elements, which are:

One, the defendant, (insert name), unlawfully[1] [seized] [confined] [kept] [detained][2] (insert name of person described in the Indictment) without [his] [her] consent;

Two, the defendant held (insert name of person described in the Indictment) for [specify the defendant's intent, such as: ransom, reward, revenge, sexual gratification, or other reason];[3]

Three, the defendant voluntarily and intentionally transported[4, 5] (insert name of person described in the Indictment) while [he] [she] was [seized] [confined] [kept] [detained]; [and]

Four, the transportation was in [interstate] [foreign] commerce[.][6] [; and]

[*Five*, death resulted from the kidnapping.][7]

"Interstate commerce" means commerce or travel between one state and another state. The Government must prove that the defendant crossed a state line while intentionally transporting (insert name of person described in the Indictment).[8]

The Government does not have to prove that the defendant knew [he] [she] was crossing a state line.[9,10]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*).

Notes on Use

1. If requested, the term "unlawfully" should be explained to the jury. *See, e.g.*, Instruction 6.18.1111A, *supra*, n.2, and Instructions 6.18.1112A and 6.18.1112B, *supra*, n.1.

2. If the allegation is that the defendant inveigled, decoyed, abducted, or carried away the person named in the indictment, this language should be modified. *See* 18 U.S.C. § 1201(a).

3. This is not an exhaustive list, since the kidnapping statute includes the language "or otherwise," and that language has been broadly interpreted. *See, e.g.*, *United States v. Stands*, 105 F.3d 1565, 1576 (8th Cir. 1997); *United States v. Bordeaux*, 84 F.3d 1544, 1548 (8th Cir. 1996); and *United States v. Eagle Thunder*, 893 F.2d 950, 953 (8th Cir. 1990).

4. The kidnapping statute requires that the victim be "willfully" transported. The Committee recommends that the word "willfully" not be used in jury instructions in most cases, however, because it can be replaced with the words "voluntarily and intentionally" in the instruction with no further definition needed. *See* Instruction 7.02, *infra*, and applicable Committee Comments.

Final Instructions: Elements of Offenses

5. If the defendant does not transport the victim but causes him or her to be transported, element three should be modified. *See* 18 U.S.C. § 2.

6. If foreign commerce is alleged in the indictment, that phrase should be defined. *See, e.g.*, Instruction 6.18.1956J, *infra*. If jurisdiction is based upon use of the mail or some other basis, then element four should be modified to reflect the specific situation.

7. Under *Apprendi v. United States*, 530 U.S. 466 (2000), this additional element is required whenever the indictment alleges that the kidnapping resulted in the death of a person. If it is disputed whether a death resulted from the kidnapping, the court may consider giving a lesser-included offense instruction.

8. Subsection (a)(1) of the kidnapping statute bases federal jurisdiction on any use of, or transportation in, interstate or foreign commerce. The statute also applies where an offender "uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense." 18 U.S.C. § 1201(a)(1). It is not clear how broadly the courts will interpret this jurisdictional language, since the limits are not yet defined by case law.

9. To establish federal jurisdiction, the government must show that the victim was willfully transported in interstate or foreign commerce. However, the government is not required to prove that the defendant knew he traversed a state or national boundary. Knowledge of crossing state lines is not an essential element of kidnapping - - which occurs when the kidnapper "willfully transports his victim and in doing so travels in interstate commerce." *United States v. Welch*, 10 F.3d 573, 574 (8th Cir. 1993).

10. If the facts referenced in 18 U.S.C. § 1201(g) are alleged in the indictment (i.e., the victim is under eighteen and the offender is over eighteen but not a close relative), then the elements section of this instruction should be modified accordingly.

Committee Comments

Title 18 U.S.C. § 1201 does not cover kidnapping by a parent of his or her own minor child. The term "parent" in this statutory exemption potentially includes "anyone who stands in a position equivalent of that of a parent." *Miller v. United States*, 123 F.2d 715, 717 (8th Cir. 1941), *rev'd on other grounds*, 317 U.S. 192 (1942); *United States v. Brown*, 330 F.3d 1073, 1079 (8th Cir. 2003).

The victim's lack of consent is necessary to establish the crime of kidnapping because it is the "involuntariness of seizure and detention which is the very essence" of the offense. *Chatwin v. United States*, 326 U.S. 455, 464 (1946); *United States v. McCabe*, 812 F.2d 1060, 1061 (8th Cir. 1986). "If the victim is of such an age or mental state as to be incapable of having a recognizable will, the confinement then must be against the will of the parents or legal guardian of the victim." *Id.* (quoting *Chatwin* at 460). With regard to the question of when a child can be deemed to have a legally recognizable will, the Eighth Circuit stated in *McCabe* at 1062: "We think that for a child to show a will regarding an alleged kidnapping, the child must

at least understand the concept of kidnapping and its potential relevance to his or her situation." Alcohol or drug intoxication of the victim may be relevant to the issue of consent and may - - if the issue arises - - require additional instructions.

To establish the crime of kidnapping, the government must show that the victim was held for ransom or reward or otherwise. 18 U.S.C. § 1201(a). Nonphysical restraint, such as by fear or deception, is sufficient under the federal kidnapping statute. *See, e.g.*, *United States v. Hoog*, 504 F.2d 45, 50-51 (8th Cir. 1975).

Section 1201(b) provides that failure to release the victim within twenty-four hours after the kidnapping creates a rebuttable presumption of transportation in interstate or foreign commerce. However, one circuit has held this presumption unconstitutional. *United States v. Moore*, 571 F.2d 76, 86 (2d Cir. 1978).

Final Instructions: Elements of Offenses

6.18.1341. MAIL FRAUD (18 U.S.C. § 1341)

The crime of [mail] fraud, as charged in [Count _____ of] the Indictment, has [three] [four] elements, which are:

One, the defendant voluntarily and intentionally [devised or made up a scheme to defraud another out of [money, property or property rights] [the intangible right to honest services][1]] [participated in a scheme to defraud with knowledge of its fraudulent nature] [devised or participated in a scheme to obtain [money, property or property rights] [the intangible right to honest services] by means of material false representations or promises][2] [which scheme is described as follows: (describe scheme in summary form or in manner charged in the Indictment)];[3]

Two, the defendant did so with the intent to defraud; [and]

Three, the defendant used, or caused to be used, [the mail] [a private interstate carrier] [a commercial interstate carrier][4] in furtherance of, or in an attempt to carry out, some essential step in the scheme; [and]

[Four, the scheme was in connection with the conduct of telemarketing.]

or

[*Four*, the scheme was in connection with the conduct of telemarketing and

(a) victimized ten or more persons over the age of 55, or

(b) targeted persons over the age of 55.]

or

[*Four*, that the scheme affected a financial institution.][5]

The phrase "scheme to defraud" includes any plan or course of action intended to deceive or cheat another out of [money, property or property rights] [the intangible right to honest services] by [employing material falsehoods] [concealing material facts] [omitting material facts]. It also means the obtaining of [money or property] [the intangible right to honest services] from another by means of material false representations or promises. A scheme to defraud need not be fraudulent on its face but must include some sort of fraudulent misrepresentation or promise reasonably calculated to deceive a reasonable person.[6]

A statement or representation is "false" when it is untrue when made or effectively conceals or omits a material fact.[7]

A [fact] [falsehood] [representation] [promise] is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of a reasonable person in deciding whether to engage or not to engage in a particular transaction.[8] [However, whether a [fact] [falsehood] [representation] [promise] is "material" does not depend on whether the person was actually deceived.][9]

To act with "intent to defraud" means to act knowingly and with the intent to deceive someone for the purpose of causing some [financial loss] or [loss of property or property rights] [loss of an intangible right to honest services] to another or bringing about some financial gain to oneself or another to the detriment of a third party.[10] [With respect to false statements, the defendant must have known the statement was untrue when made or have made the statement with reckless indifference to its truth or falsity.][11]

[The term property rights, as used in the mail fraud statute, includes intangible as well as tangible property rights. It includes any property right which has a value – not necessarily a monetary value – to the owner of the property right. For example, a scheme to deprive a company of the exclusive use of confidential business information obtained by the employees would be a scheme to deprive the company of intangible property rights.][12]

It is not necessary that the use of [the mail] [an interstate carrier] by the participants themselves be contemplated or that the defendant do any actual [mailing] [sending of material by an interstate carrier] or specifically intend that [the mail] [an interstate carrier] be used. It is sufficient if [the mail] [an interstate carrier] was in fact used to carry out the scheme and the use of [the mail] [an interstate carrier] by someone was reasonably foreseeable.[13]

[Mailings] [Deliveries by an interstate carrier] which are designed to lull victims into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect are [mailings] [deliveries] in furtherance of the scheme.][14]

[Each separate use of [the mail] [an interstate carrier] in furtherance of the scheme to defraud constitutes a separate offense.][15]

Final Instructions: Elements of Offenses

[The [mail] fraud counts of the Indictment charge that each defendant, along with the other defendants, devised or participated in a scheme. The Government need not prove, however, that the defendants met together to formulate the scheme charged, or that there was a formal agreement among them, in order for them to be held jointly responsible for the operation of the scheme and the use of [the mail] [an interstate carrier] for the purpose of accomplishing the scheme. It is sufficient if only one person conceives the scheme and the others knowingly, voluntarily and intentionally join in and participate in some way in the operation of the scheme in order for such others to be held jointly responsible.][16]

[It is not necessary that the Government prove [all of the details alleged in the Indictment concerning the precise nature and purpose of the scheme] [that the material [mailed] [sent by an interstate carrier] was itself false or fraudulent] [that the alleged scheme actually succeeded in defrauding anyone] [that the use of [the mail] [an interstate carrier] was intended as the specific or exclusive means of accomplishing the alleged fraud].][17]

[If you find proof beyond a reasonable doubt of a business custom (describe custom, e.g., to date stamp only items received through the mail), that is evidence from which you may, but are not required to, find or infer that [the mail] [an interstate carrier] was used to deliver those items.][18]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. Depriving another of the intangible right of honest services is covered by the mail fraud statute. 18 U.S.C. § 1346. Section 1346 criminalizes only bribery and kickback schemes. *Skilling v. United States*, ___ U.S. ___, ___, 130 S. Ct. 2896, 2931 (2010). In private sector (as opposed to public corruption) honest services mail fraud, the government must show an intent to harm the victim before mail fraud is proven. *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996).

2. The proper mail fraud theory charged in the indictment should be selected and included in the body of the instruction. If more than one theory is part of the evidence in the case, and the theories constitute a separate offense or an element of the offense, such alternatives can be submitted in the disjunctive and the jury instructed that all jurors must agree as to the particular theory. *United States v. Blumeyer*, 114 F.3d 758 (8th Cir. 1997). In such a case, the jury may be instructed as follows:

> You need not find that all of the theories charged in Count ___ of the Indictment are proven; instead, you must find unanimously and beyond a reasonable doubt that at least one of the theories set out in Count ___ of the Indictment is proven.

If more than one false promise or statement is part of the evidence in the case, and the promises or statements set out different ways of committing the offense but do not constitute a separate offense or an element of the offense, then the jury may be instructed that all the jurors need not agree as to the particular theory, or the particular false promise or statement, that was made. In such a case, the jury may be instructed as follows:

> 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 ___. 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.

See Schad v. Arizona, 501 U.S. 624 (1991) (plurality opinion), in which 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. *See also Richardson v. United States*, 526 U.S. 813, 817 (1999) (plurality opinion), in which the Court again distinguished the elements of a crime from the means used to commit the elements of the crime. 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.* 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*, 501 U.S. 624 (1991)).

3. In a simple case a brief description of the fraud should be given in the first element. An example would be:

> *One*, that the defendant devised a scheme to defraud the brokerage firm of Smith & Jones by pledging counterfeit stock certificates as collateral on margin loans given to the defendant, thus causing a loss to Smith & Jones of 5 million dollars.

Some schemes will be too complicated to lend themselves to short descriptions. In those schemes the court may more fully summarize the scheme or refer to the description of the scheme contained in the indictment.

In submitting a summary of the scheme to the jury, the court should be aware that on occasion some allegations and misrepresentations charged in the indictment are not proven. These may be deleted from the summary; however, the court should be aware that if many

allegations are not proven, there may be a material and prejudicial variance between what is alleged in the indictment and what is proven at trial.

4. 18 U.S.C. § 1341 covers schemes carried out by depositing matter to be sent or delivered by any private or commercial interstate carrier.

5. A fourth element is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. §§ 1341, 2326. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). Consideration should also be given to the use of a special verdict form (interrogatories to follow finding of guilt).

6. "Intent to defraud" and "scheme to defraud" should be defined in the instruction. "A scheme to defraud need not be fraudulent on its face, but 'must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.'" *United States v. Goodman*, 984 F.2d 235, 237 (8th Cir. 1993).

7. *Preston v. United States*, 312 F.3d 959 (8th Cir. 2002).

8. *Preston v. United States*, 312 F.3d 959 (8th Cir. 2002).

9. *See United States v. Henderson*, 416 F.3d 686 (8th Cir. 2005) (material under 42 U.S.C. § 408(a)(3, 4); *United States v. Mitchell*, 388 F.3d 1139 (8th Cir. 2004) (18 U.S.C. § 1001 (materiality)).

10. *United States v. Ervasti*, 201 F.3d 1029 (8th Cir. 2000). False statements have been defined as those which were known to be untrue at the time they were made, or made with reckless indifference as to their truth or falsity, and made with the intent to deceive. *United States v. Marley*, 549 F.2d 561 (8th Cir. 1977). Reckless indifference is sufficient in these cases, and a deliberate ignorance instruction, Model Instruction 7.04, should not be necessary. *Mattingly v. United States*, 924 F.2d 785 (8th Cir. 1991), is not applicable to these cases.

11. *United States v. Casperson*, 773 F.2d 216 (8th Cir. 1985).

12. 18 U.S.C. § 1346. In *Carpenter v. United States*, 484 U.S. 19 (1987), the Supreme Court adopted a very broad definition of property rights under the mail and wire fraud statutes. The Court stated that the statute covered intangible as well as tangible property rights and included the *Wall Street Journal*'s right to control the use of information obtained by its reporters in the course of their duties. The Court held that the right of the *Journal* to decide how and when to use its confidential business information obtained by its reporters was a property right and that a scheme to deprive the *Journal* of this confidential business information was a scheme within the scope of the mail fraud statutes, even if no monetary loss to the *Journal* was caused by the scheme.

In *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir. 1990), the court held that the right to exercise control over spending is a property right protected by the mail fraud statute and approved the following instruction:

> The term "property rights" as used in the mail fraud statute includes intangible as well as tangible property. Intangible property rights include any valuable right considered as a source of wealth, and include the right to exercise control over how one's money is spent.

See also United States v. Granberry, 908 F.2d 278 (8th Cir. 1990).

However, the Supreme Court held in *Cleveland v. United States*, 532 U.S. 12 (2000), that state and municipal licenses are not property under the mail fraud statute.

13. *See Pereira v. United States*, 347 U.S. 1, 8-9 (1954), which holds as follows:

> The elements of the offense of mail fraud under 18 U.S.C. (Supp. V) § 1341 are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme. It is not necessary that the scheme contemplate the use of the mails as an essential element. *United States v. Young*, 232 U.S. 155 (1914). Here, the scheme to defraud is established, and the mailing of the check by the bank, incident to an essential part of the scheme, is established. There remains only the question whether Pereira "caused" the mailing. That question is easily answered. Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used. *United States v. Kenofskey*, 243 U.S. 440 (1917).

This Circuit has defined "reasonably foreseeable" in a variety of contexts. In a mail fraud scheme in which an insurance company was a victim, the court stated as follows:

> One who engages in carrying out a scheme to defraud is therefore responsible . . . for a use made of the mail to effect a necessary or facilitating incident thereof where such use is from the nature of the business and the incident one of such ordinary course as to constitute a matter of natural expectability. A use of the mail which is of such a general expectable occurrence is entitled to be found to be reasonably foreseeable. Thus, we observed generally . . . as to the ordinary course of such an insurance business as is here involved:
>
>> Certainly in dealing with insurance agents it will be contemplated that the mails will have to be employed in carrying on business with the different companies for whom the agent does business.

United States v. Minkin, 504 F.2d 350, 353-54 (8th Cir. 1974) (citation omitted).

In *United States v. Boyd*, 606 F.2d 792, 794 (8th Cir. 1979), the court held:

> Conduct is within the mail fraud statute when, as in this case, the use of the mails for the purpose of executing the flow of payoff funds is a reasonably foreseeable possibility in furthering the transaction.

See also United States v. Rabbitt, 583 F.2d 1014, 1022-23 (8th Cir. 1978).

In *United States v. Brown*, 540 F.2d 364, 376 (8th Cir. 1976), the court stated:

> [T]hus . . . Brown was on notice that transfer of funds from Reliance to Mansion House by mail rather than by hand delivery was a reasonable possibility. This was sufficient evidence from which the jury could find that Brown caused the use of the mails to accomplish the ultimate objective of the scheme.

14. *United States v. Sampson*, 371 U.S. 75 (1962); *United States v. Brown*, 540 F.2d 364, 376 (8th Cir. 1976); *United States v. Tackett*, 646 F.2d 1240, 1243 (8th Cir. 1981).

In *Schmuck v. United States*, 489 U.S. 705, 713 (1989), the Court held that all mailings that are in any way part of the execution of the scheme will supply the mailing element of the offense even if the mailing later may turn out to be counterproductive and allow the discovery of the scheme.

15. *Atkinson v. United States*, 344 F.2d 97 (8th Cir. 1965); *United States v. Calvert*, 523 F.2d 895, 903 n.6, 914 (8th Cir. 1975).

16. *Reistroffer v. United States*, 258 F.2d 379, 395 (8th Cir. 1958); *United States v. Porter*, 441 F.2d 1204, 1211 (8th Cir. 1971).

17. *See United States v. West*, 549 F.2d 545, 552 (8th Cir. 1977); *United States v. Gross*, 416 F.2d 1205, 1210 (8th Cir. 1969); *Atkinson v. United States*, 344 F.2d 97, 98 (8th Cir. 1965); *United States v. Calvert*, 523 F.2d 895, 912 (8th Cir. 1975) (use of mail need not be specifically nor exclusively intended).

18. *United States v. Shyres*, 898 F.2d 647, 658 (8th Cir. 1990); *United States v. Cady*, 567 F.2d 771, 775 (8th Cir. 1977); *United States v. Minkin*, 504 F.2d 350, 352-53 (8th Cir. 1974); *United States v. Joyce*, 499 F.2d 9, 17 (7th Cir. 1974); *Bolen v. United States*, 303 F.2d 870, 875 (9th Cir. 1962). Likewise mailing can be inferred from the presence of a regular postmark. *United States v. Noelke*, 1 Fed. 426 (C.C.N.Y. 1880). *See also* Instruction 4.13, *supra*, on specific inferences.

Committee Comments

The crime of mail fraud is very broad in scope. As the Eighth Circuit restated in *United States v. Bishop*, 825 F.2d 1278, 1280 (8th Cir. 1987):

> The crime of mail fraud is broad in scope; . . . the fraudulent aspect of the scheme to "defraud" is measured by a nontechnical standard . . . . Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general business life of the members of society." This is indeed broad. For as Judge Holmes once observed, "The law does not define fraud; it needs no definition. It is as old as falsehood and as versatile as human ingenuity."

The definition of "scheme" as used in these instructions is very old and is similar to one of the first definitions used in this circuit in *United States v. Dexter*, 154 Fed. 890, 896 (N.D. Ia. 1907). The court there stated:

> A scheme may be said to be a design or plan formed to accomplish some purpose. An artifice may be said to be an ingenious contrivance or device of some kind and when use in a bad sense of the word corresponds with trick or fraud. Hence, a scheme or artifice to defraud within the meaning of this statute would be to form some plan or devise some trick to perpetrate a fraud upon another.

The scheme must be one "reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Goodman*, 984 F.2d 235, 237 (8th Cir. 1993), and must employ material falsehoods. *Neder v. United States*, 527 U.S. 1 (1999). A scheme under the statute encompasses false representations as to future intentions as well as existing facts. *Durland v. United States*, 161 U.S. 306 (1896). Indeed, as stated above, a scheme to defraud may be actionable even though no actual misrepresentations are made. *See United States v. Clausen*, 792 F.2d 102, 104-05 (8th Cir. 1986). A scheme to defraud may also involve the concealment of material facts. *United States v. Bessesen*, 433 F.2d 861, 863, 864 (8th Cir. 1970).

Because of the diverse types of mail fraud schemes prosecuted, it is difficult to tailor a "model" instruction that does not refer to the indictment in the case. Because of the broad application of the mail fraud statute, it will be necessary to define certain terms in the instructions to the jury.

In *Clausen*, the court stated that the mail fraud statute prohibited both schemes to defraud *and* the obtaining of money and property by means of false pretenses. The court held that false pretenses were not essential in order to prove a scheme to defraud. Thus, it is proper to instruct the jury that the mail fraud statute may be violated either by devising a scheme to defraud or by obtaining money or property by means of false or fraudulent pretenses, representations or promises.

One who participates in an ongoing mail fraud devised by others is guilty of the crime of mail fraud. *United States v. Wilson*, 506 F.2d 1252, 1258 (7th Cir. 1974).

Intent to defraud is an element of mail fraud. *DeMier v. United States*, 616 F.2d 366, 369 (8th Cir. 1980). Thus, good faith can be a theory of defense. *United States v. Arnold*, 543 F.2d 1224 (8th Cir. 1976). A defendant is entitled to an instruction on a good faith theory of defense and one should be given if there is evidence to support the theory, *United States v. Casperson*, 773 F.2d 216, 222-24 (8th Cir. 1985); *United States v. Sherer*, 653 F.2d 334, 337 (8th Cir. 1981), but not where the defendant denies the conduct which is charged and the issue is one of credibility. *United States v. Kimmel*, 777 F.2d 290, 292-93 (5th Cir. 1985). *See* Instruction 9.08, *infra*, for good faith instructions.

The elements of wire fraud in violation of 18 U.S.C. § 1343 are identical to the elements of mail fraud with one exception; the defendant must cause interstate wire facilities to be used

instead of the mail. *See generally*, *United States v. Tackett*, 646 F.2d 1240, 1242-43 (8th Cir. 1981); *United States v. Mendenhall*, 597 F.2d 639, 641 (8th Cir. 1979); *United States v. West*, 549 F.2d 545, 549-53 (8th Cir. 1977); *United States v. Gross*, 416 F.2d 1205, 1209-10 (8th Cir. 1969). *But see United States v. Bryant*, 766 F.2d 370 (8th Cir. 1985).

Each use of the mail or the wires is a separate offense notwithstanding the fact that the defendant devised only one scheme to defraud. *See*, *e.g.*, *United States v. Massa*, 740 F.2d 629, 645-46 (8th Cir. 1984); *United States v. Calvert*, 523 F.2d 895, 914 (8th Cir. 1975).

If a conspiracy to commit mail fraud is charged, one should be aware that the Eighth Circuit at the present time requires proof that the conspiracy "contemplated the use of the mails." *United States v. Donahue*, 539 F.2d 1131, 1135, 1136 (8th Cir. 1976). That decision relied heavily on the case of *Blue v. United States*, 138 F.2d 351 (6th Cir. 1943). In *United States v. Reed*, 721 F.2d 1059 (6th Cir. 1983), the Sixth Circuit rejected *Blue* in its entirety and held that only a reasonably foreseeable use of the mail need be proven in a conspiracy case. Of the circuits which have decided this issue, it appears that only the Eighth Circuit requires that a mail fraud conspiracy "contemplate the use of the mails." *United States v. Craig*, 573 F.2d 455 (7th Cir. 1977).

Final Instructions: Elements of Offenses

6.18.1344. BANK FRAUD (18 U.S.C. § 1344)

The crime of bank fraud, as charged in [Count __ of] the Indictment, has three elements, which are:

One, the defendant knowingly [executed] [attempted to execute] [participated in] a scheme [to defraud a financial institution] [to obtain any of the [moneys] [funds] [credits][1] [owned by] [under the custody and control of] a financial institution by means of material [falsehoods] [fraudulent pretenses] [false or fraudulent representations] [false or fraudulent promises]];

Two, the defendant did so with intent to defraud; and

Three, the financial institution was insured by the United States Government Federal Deposit Insurance Corporation[2].

The phrase "scheme to defraud" includes any plan or course of action intended to deceive or cheat another out of [money, property or property rights] by [employing material falsehoods] [concealing material facts] [omitting material facts]. It also means the obtaining of [money or property] from a financial institution by means of material false representations or promises.[3]

A [fact] [falsehood] [representation] [pretense] [promise] is "false" when it is untrue when made or effectively conceals or omits a material fact. A [fact] [falsehood] [representation] [pretense] [promise] is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the institution in deciding whether to engage or not to engage in a particular transaction. [However, whether a [fact] [falsehood] [representation] [promise] is "material" does not depend on whether the institution was actually deceived.][3]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statute also covers "assets, securities, or other property." 18 U.S.C. § 1344(2). In addition, 18 U.S.C. § 1346 provides: "For the purposes of this Chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

2. “Financial institution” is defined in 18 U.S.C. § 20 and includes businesses other than banks. If the fraud was against a financial institution other than a bank, this element should be modified accordingly.

Final Instructions: Elements of Offenses

Committee Comments

The bank fraud statute was modeled after the mail and wire fraud statues; the same broad application should be applied to it as to the mail fraud statute. *United States v. Rimell*, 21 F.3d 281, 287 (8th Cir. 1994). *See* Committee Comments to Instruction 6.18.1341, *supra*. Cases interpreting the mail and wire fraud statutes have been applied to the bank fraud statute. *See, e.g., United States v. Solomonson*, 908 F.2d 358, 364 (8th Cir. 1990).

In *United States v. Stone*, 890 F.2d 418 (8th Cir. 1989), this Circuit held that the element of "knowingly" supplied the required mens rea for a violation of 18 U.S.C. § 1344.

Materiality of the falsehood is an element of the crime. *United States v. Pizano*, 421 F.3d 707, 722 (8th Cir. 2005), relying on *Neder v. United States*, 527 U.S. 1 (1999). The financial institution need not rely on the misrepresentation, however; the inquiry is whether the false statement had a natural tendency to influence or was capable of influencing the financial institution. *Pizano* at 722.

As in the mail fraud cases, it is not necessary for the government to show that the financial institution suffered a loss or was actually defrauded or that the defendant personally benefitted from the scheme. *United States v. Ponec*, 163 F.3d 486, 488 (8th Cir. 1998).

The term "scheme and artifice to defraud" includes any plan or pattern of conduct using false or fraudulent pretenses or representations. *United States v. Swearingen*, 858 F.2d 1555, 1557 (11th Cir. 1988). *See also United States v. Whitty*, 688 F. Supp. 48, 54-55 (D. Me. 1988).

Each execution of the scheme is a separate offense. *United States v. Rimell*, 21 F.3d at 287.

Although the statute is to be afforded broad application, it does not cover a traditional "pigeon-drop" scheme where the funds that were at one time under the control of the bank were legitimately withdrawn and then given to the defendants. *United States v. Blackmon*, 839 F.2d 900, 904-07 (2d Cir. 1988). Each check presented to a covered financial institution in a check-kiting scheme can be a separate violation of section 1344. *United States v. Poliak*, 823 F.2d 371, 372 (9th Cir. 1987).

6.18.1346. DEPRIVATION OF THE INTANGIBLE RIGHT OF HONEST SERVICES (18 U.S.C. § 1346)

It is a crime to use bribery or kickbacks in a fraud scheme that deprives [the public] [an employer] of its right to the honest services of [a public official] [an employee], as charged in [Count _____] of the Indictment.[1] This crime has four elements, which are:

One, the defendant voluntarily and intentionally [devised] [made up] [participated in] a scheme to defraud [the public] [an employer] of its right to the honest services of [a public official] [an employee] through [bribery] [kickbacks], which scheme to defraud is described as follows: (summarize the fraud scheme and how the defendant solicited, paid or received bribes and/or kickbacks, consistent with the charging language in the Indictment);

Two, the defendant did so with the intent to defraud;

Three, the scheme to defraud involved a [fraudulent] [false] material [promise] [pretense] [statement] [representation] [concealment of fact]; and

Four, the defendant used, or caused to be used, [the mail] [a private interstate carrier] [a commercial interstate carrier] [an interstate wire facility (identify the specific wire facility, i.e., telephone, e-mail, etc.)] in furtherance of, or in an attempt to carry out, some essential step in the scheme.

The phrase "scheme to defraud" as used in this instruction means any plan or course of action intended to deceive or cheat another out of the right to honest services where a [bribe] [kickback] is [solicited] [paid] [received] in exchange for official action or an official act.

To act with intent to defraud means to act knowingly and with the intent to deceive someone for the purpose of causing some loss of the right to honest services.

[With respect to false statements, the defendant must have known the statement was untrue when made or have made the statement with reckless indifference to its truth or falsity.]

A [promise] [pretense] [statement] [representation] [concealment of fact] is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of a reasonable person in deciding whether to engage or not to engage in a particular transaction. [However,

whether a [fact] [falsehood] [representation] [promise] is "material" does not depend on whether the person was actually deceived.][2]

Each separate use of [the mail] [a private interstate carrier] [a commercial interstate carrier] [an interstate wire facility] in furtherance of the scheme to defraud constitutes a separate offense.[3]

It is not necessary that the use of [the mail] [a private interstate carrier] [a commercial interstate carrier] [an interstate wire facility] by the participants themselves be contemplated or that the defendant do any actual [mailing] [sending of material by an interstate carrier] [use of an interstate wire facility] or specifically intend that [the mail] [a private interstate carrier] [a commercial interstate carrier] [an interstate wire facility] be used. It is sufficient if [the mail] [a private interstate carrier] [a commercial interstate carrier] [an interstate wire facility] was in fact used to carry out the scheme and the use of [the mail] [a private interstate carrier] [a commercial interstate carrier] [an interstate wire facility] by someone was reasonably foreseeable.

[The [mail] [wire] fraud counts of the Indictment charge that each defendant, along with the other defendants, devised or participated in a scheme. The Government need not prove, however, that the defendants met together to formulate the scheme charged, or that there was a formal agreement among them, in order for them to be held jointly responsible for the operation of the scheme and the use of [the mail] [a private interstate carrier] [a commercial interstate carrier] [an interstate wire facility] for the purpose of accomplishing the scheme. It is sufficient if only one person conceives the scheme and the others knowingly, voluntarily and intentionally join in and participate in some way in the operation of the scheme in order for such others to be held jointly responsible.][4]

[If you find proof beyond a reasonable doubt of a business custom (describe custom, e.g., to date-stamp only items received through the mail), that is evidence from which you may, but are not required to, find or infer that [the mail] [a private interstate carrier] [a commercial interstate carrier] [an interstate wire facility] was used to deliver those items.]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Final Instructions: Elements of Offenses

Notes on Use

1. Deprivation of honest services schemes may be prosecuted as mail or wire fraud schemes under 18 U.S.C. § 1346, but only when the scheme involves the payment of bribes or kickbacks. *Skilling v. United States*, 130 S. Ct. 2896 (2010). Post-*Skilling*, this instruction must be used where the mail/wire fraud scheme involves a deprivation of the intangible right to honest services. The mail-fraud instruction, 6.18.1341, no longer should be used for deprivation of honest services schemes, but it remains a valid instruction for all other types of mail/wire fraud schemes.

2. The definitions of "scheme to defraud," "intent to defraud," "false statements," and "material" are consistent with the definitions of those same terms in the mail-fraud instruction, 6.18.1341.

3. This paragraph and the next address the concept of mailing, and are consistent with the corresponding sections of the mail-fraud instruction, 6.18.1341, that deal with the concept of mailing.

4. This paragraph is applicable when the scheme to defraud alleged in the indictment involves multiple participants or multiple defendants.

Committee Comments

The defendant must participate in a bribery or kickback scheme involving the actual, intended, or solicited exchange of a thing of value for official action. *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404 (1999) (interpreting 18 U.S.C. § 201(b) and holding that "for bribery there must be a *quid pro quo* -- a specific intent to give or receive something of value in exchange for an official act.").

An honest services fraud may include bribery or kickback schemes in which the fiduciary solicits the bribe or kickback knowing that the bribe payer intends an exchange, even if the fiduciary does not in fact intend to carry out the paid-for official action. *United States v. Hood*, 343 U.S. 148, 151 (1952) (interpreting prior 18 U.S.C. § 215, which prohibited soliciting something of value "in consideration of the promise of support or use of influence" for a federal job. "Whether the corrupt transaction would or could ever be performed is immaterial.").

The term "corruptly" should not be used to describe section 1346's prohibition against bribes or kickbacks. *Skilling* did not use the "corruptly" modifier to describe the intent required to commit a bribery or kickback crime under section 1346.

The payment of things of value to reward, rather than in exchange for or to influence official action, i.e., the payment of "gratuities," are not covered by section 1346 as interpreted by *Skilling*. Bribes and kickbacks are a distinct category of misconduct separate from gratuities, and the distinction is well established in case law, statutes, and regulations. *See Sun-Diamond*, 526 U.S. at 404, 409-10.

Although gratuities are not covered by section 1346, the statute does cover bribery schemes involving a "stream of benefits" offered, accepted, or demanded in exchange for some official action, even if no specific official action is identified at the time the bribe is paid. *United States v. Kemp*, 500 F.3d 257, 281-86 (3d Cir. 2007) (bribery theory of honest services fraud satisfied by "stream of benefits" in exchange for some official action, without need to show specific benefit for specific action).

There is no requirement to prove willfulness, i.e., proof that the defendant knew he was violating a known legal duty. *Skilling* did not change the substantial body of case law that rejects willfulness as the required mental state for mail and wire fraud prosecutions.

Final Instructions: Elements of Offenses

6.18.1347. HEALTH CARE FRAUD (18 U.S.C. § 1347)

The crime of health care fraud, as charged in [Count ___ of] the Indictment, has four elements, which are:

One,[1] the defendant knowingly [executed] [attempted to execute] a scheme to defraud (identify the affected health care benefit program, e.g., Medicare, Medicaid, etc.), which scheme is described as follows: (describe scheme in summary form consistent with the manner it is charged in the Indictment);

or

One, the defendant knowingly [executed] [attempted to execute] a scheme to obtain [money] [property] [owned by] [under the custody and control of] (identify the affected health care benefit program, e.g., Medicare, Medicaid, etc.) by means of material[2] [false or fraudulent pretenses] [false or fraudulent representations] [false or fraudulent promises],[3] which are described as follows: (set forth alleged false or fraudulent statements in summary form consistent with the manner they are charged in the Indictment);

Two, the defendant did so with intent to defraud;[4]

Three, the defendant did so in connection with [the delivery of] [payment for] [health care benefits] [health care items] [health care services]; and

Four, (identify the health care benefit program, e.g., Medicare, Medicaid, etc.) was a [public or private] [plan or contract], affecting commerce in some way or degree, under which [specify the medical benefit, item, or service] was provided to any individual;[5]

or

Four, (identify individual or entity) was providing (specify the medical benefit, item, or service), affecting commerce in some way or degree, for which payment was made under a [public or private] [plan or contract].[6]

The phrase "scheme to defraud" includes any plan or course of action intended to deceive or cheat a health care benefit program out of [money or property] by [employing material falsehoods] [concealing material facts] [omitting material facts]. [A scheme to defraud also can include the obtaining of [money] [property] from a health care benefit program by means of

material false [pretenses] [representations] [promises]]. A scheme to defraud need not be fraudulent on its face but must include some sort of fraudulent misrepresentation or promise reasonably calculated to deceive a reasonable person.[7]

A [pretense] [representation] [promise] is "false" when it is untrue when made or effectively conceals or omits a material fact. A [pretense] [representation] [promise] is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of a reasonable person in deciding whether to [deliver] [pay for] [health care benefits] [health care items] [health care services]. [However, whether a [pretense] [representation] [promise] is "material" does not depend on whether the person was actually deceived.][8]

To act with "intent to defraud" means to act knowingly and with the intent to deceive someone for the purpose of causing some [financial loss] or [loss of property or money] to another or bringing about some financial gain to oneself or another to the detriment of a third party. [With respect to false pretenses, representations or promises, the defendant must have known the pretense, representation or promise was untrue when made or have made the pretense, representation or promise with reckless indifference to its truth or falsity.][9]

Only a minimal effect is required in order to show that the health care benefit program "affected commerce." Proof that the money obtained through execution of the scheme was paid through a financial institution insured by the FDIC, for example, is sufficient to establish that the activity "affected commerce." You may, but are not required to, find an affect on commerce has been proven if you find and believe from the evidence beyond a reasonable doubt (describe affect on interstate commerce alleged in the Indictment or on which proof was offered at trial, which demonstrates an actual effect on interstate commerce, e.g., that the money obtained through execution of the scheme was paid through a financial institution insured by the FDIC).[10]

[It is not necessary that the Government prove [all of the details alleged in the Indictment concerning the precise nature and purpose of the scheme] [that the alleged scheme succeeded in defrauding (identify the affected health care benefit program, e.g., Medicare, Medicaid, etc.)] [that the defendant intended for the execution of the scheme to have an affect on interstate commerce].][11]

Final Instructions: Elements of Offenses

[The health care fraud counts of the Indictment charge that each defendant, along with the other defendants, devised or participated in the scheme to defraud. The Government need not prove, however, that the defendants met together to formulate the scheme charged, or that there was a formal agreement among them, in order for them to be held jointly responsible for the operation of the scheme and for using a health care benefit program to accomplish the scheme. It is sufficient if only one person conceives the scheme and the others knowingly, voluntarily and intentionally join in and participate in some way in the operation of the scheme in order for such others to be held jointly responsible.][12]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The crime permits enhanced punishment where the violation "results in serious bodily injury" or "results in death." 18 U.S.C. §1347. In such cases, therefore, the first element should be modified to require an additional jury finding that the scheme resulted in serious bodily injury or death, consistent with the allegations of the indictment. This modification is necessitated by the rule of constitutional law that any fact, other than a 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. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 n.6 (1999); *see also* Instruction 6.18.1341, *supra*, n.5. The health care fraud statute incorporates the definition of "serious bodily injury" found in 18 U.S.C. § 1365. If applicable, this definition of "serious bodily injury" should be used in the jury instruction and the jury should be required to make the requisite finding required by the statute, i.e., that the scheme to defraud resulted in either (a) a substantial risk of death, or (b) extreme physical pain, or (c) protracted and obvious disfigurement, or (d) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. *See* 18 U.S.C. § 1365(h)(3).

2. The materiality element and definition are added consistent with *Neder v. United States*, 527 U.S. 1 (1999), and *United States v. Gaudin*, 515 U.S. 506, 509 (1995); *see also* Instruction 6.18.1344, *supra*, n.3.

3. The Eighth Circuit has held that where a statute prohibits both a scheme to defraud *and* the obtaining of money and property by means of false pretenses, it is proper for an indictment to charge both in the conjunctive and proof of any one of the conjunctively charged acts is sufficient to establish guilt. *United States v. Clausen*, 792 F.2d 102, 104-05 (8th Cir. 1986); *see also* Committee Comments, Instruction 6.18.1341, *supra*. However, if more than one theory is part of the evidence in the case, and the theories constitute a separate offense or an element of the offense, then the alternatives can be submitted in the disjunctive and the jury instructed that all jurors must agree as to the particular theory. Instruction 6.18.1341, *supra*, n.2, discusses when a unanimity instruction is required and provides sample unanimity instructions.

4. Requiring proof of intent to defraud incorporates the concept of wilfulness without using that term. *United States v. Hickman*, 331 F.3d 439, 444-45 (5th Cir. 2003). There are no reported cases suggesting that Congress' use of the word "willfully" in the statute was intended to incorporate the willfulness standard applicable in criminal tax prosecutions. Thus, consistent with Instruction 7.02, *infra*, the Committee recommends that the word "willfully" not be used in a jury instruction. However, consistent with the jury instructions for mail, wire, and bank fraud (Instructions 6.18.1341 and 6.18.1344, *supra*), the Committee believes that proof of intent to defraud is an essential element of the offense. *DeMier v. United States*, 616 F.2d 366, 369 (8th Cir. 1980) (intent to defraud is element of mail fraud).

5. By statutory definition, the only type of health care benefit programs covered by the statute are those that affect commerce. 18 U.S.C. § 24(b). Congress clearly used the phrase "affecting commerce" to provide the federal jurisdictional element that connects the offense to interstate commerce. *See United States v. Mann*, 493 F.3d 484, 494 (5th Cir. 2007) (reading "affecting commerce" in 18 U.S.C. § 1951 to require proof of an effect on interstate commerce); *see also United States v. Lopez*, 514 U.S. 549, 561 (1995) (statutes containing a "jurisdictional element which would ensure, through case-by-case inquiry, that the [prohibited act] in question affects interstate commerce" pass muster under the Commerce Clause). Since the object of the fraud must be a "health care benefit program" and since health care benefit programs must, by definition, "affect commerce," it would appear that proof of an affect on interstate commerce is both a jurisdictional requirement and an essential element of the offense. *United States v. Klein*, 543 F.3d 206, 211 (5th Cir. 2008) (the "affecting commerce" language in § 1347 does create an element which the government must prove beyond a reasonable doubt); *cf.*, *United States v. Westbrook*, 119 F.3d 1176, 1191 (5th Cir. 1997) (holding in the context of a money laundering prosecution under 18 U.S.C. § 1956, that the government is required to provide proof of some effect on interstate commerce when a statute has an "affecting commerce"-like requirement); *United States v. Ripinsky* 109 F.3d 1436, 1443 (9th Cir. 1997) (construing the interstate commerce requirement under 18 U.S.C. § 1956). However, by analogy to 18 U.S.C. § 922(g) where proof that the possessed firearm previously traveled in interstate commerce is sufficient to show that the defendant's possession was one "affecting commerce," the legislative history of the health care fraud statute seems to confirm Congress' intent that the jurisdictional element of "affecting commerce" may be satisfied by a *de minimus* showing and it is not necessary to prove that the defendant knew his conduct was affecting commerce. 104 P.L. 191; 110 Stat. 1936; 1996 Enacted H.R. 3103; 104 Enacted H.R. 3103. *See also United States v. Ogba*, 526 F.3d 214 (5th Cir. 2008) (interstate commerce showing satisfied because payments received through Medicare system); *United States v. Palozie*, 166 F.3d 502, 505 (2d Cir. 1999); *Westbrook*, 119 F.3d at 1192 (same *de minimus* standard applies to § 1956 money laundering); *United States v. Peay*, 972 F.2d 71, 74-75 (4th Cir. 1992) (citing *Russell v. United States*, 471 U.S. 858, 859 (1985) (only a *de minimus* effect on interstate commerce must be shown in order for such a statute to pass constitutional muster)).

6. 18 U.S.C. § 24(b) defines "health care benefit program" to include both the plan or contract that provides the medical benefit, item, or service, and, alternatively, the person or

entity that provides the medical benefit, item, or service. Again, proof of either is sufficient to establish guilt. *See* n.3, *supra*.

7. The definitions of "scheme to defraud" and "intent to defraud" are the same as those used for mail, wire, and bank fraud. *See* Instruction 6.18.1341, *supra*, nn.6, 10, and 11.

8. The definitions of "false" and "material" are based on the parallel sections of the mail, wire, and bank fraud instructions. *See* Instructions 6.18.1341 and 6.18.1344, *supra*.

9. *See* Instruction 6.18.1341, *supra*, nn.10 and 11.

10. The FDIC insurance program "is federally administered, federal officials periodically examine the accounts, and the reports sent to the FDIC deal with money that has been deposited from many sources, including those from outside the state." *United States v. Peay*, 972 F.2d at 74-75. Thus, proof that a financial transaction involved a financial institution insured by the FDIC is sufficient to establish proof of a nexus with interstate commerce. *Id.* In short, when monies obtained through execution of the fraud scheme are paid through an FDIC insured institution, the requirement that the operation of the health care benefit program must "affect commerce" has been satisfied.

11. This paragraph is modeled after an analogous section of the mail fraud instruction. *See* Instruction 6.18.1341, *supra*, n.17.

12. This instruction parallels language in the mail fraud instruction. *See* Instruction 6.18.1341, *supra*, n.16.

Committee Comments

See United States v. Refert, 519 F.3d 752, 757-58 (8th Cir. 2008) (affirming district court's instruction on the elements of health care fraud); *United States v. Boesen*, 491 F.3d 852, 856 (8th Cir. 2007) (same).

The language and structure of the health care fraud statute indicates that Congress patterned it after the bank fraud statute. *United States v. Hickman*, 331 F.3d 439, 445-46 (5th Cir. 2003). Thus, unlike the mail and wire fraud statutes which punish each separate act in furtherance, or execution, of the scheme, the bank and health care fraud statutes punish the execution of the scheme. The Committee believes, therefore, that the health care fraud statute, by analogy to the bank fraud statute, punishes the executions or attempted executions of schemes to defraud, and not simply acts in furtherance of the scheme. *See Hickman*, 331 F.3d at 445-47 and cases cited therein. As a result, the unit of prosecution created by § 1347 is each execution or attempted execution of the scheme to defraud, not each act in furtherance of the scheme. *Id.* Although the crime of health care fraud is complete upon the execution of the scheme, any scheme can be executed multiple times, and each execution may be charged in a separate count. *Id.; see also United States v. Cooper*, 283 F. Supp. 2d 1215 (D. Kan. 2003) (it can be proper to charge separate counts of health care fraud where the separately charged in stances do not involve separate parts of a whole payment, as payment on each claim involves a separate movement of money and each movement results in a separate loss to the health care benefit

program, evidencing multiple executions of the same scheme). On the other hand, the indictment may properly charge, in a single count, a pattern of executions, or submissions of false claims, as part of a single, overarching continuing scheme. *See United States v. Mermelstein*, 487 F. Supp. 2d. 242, 254-55 (E.D.N.Y. 2007) (collecting cases). In the context of the bank fraud statute, the Eighth Circuit has held that each separate deposit and withdrawal in execution of the bank fraud scheme is a separate offense and can be separately chargeable. *United States v. Barnhart*, 979 F.2d 647, 651 (8th Cir. 1992) (each check a perpetrator writes and deposits in a check kiting or similar scheme is a different and separate execution of the scheme to defraud and may be charged in separate counts of the indictment). By analogy, it appears that multiple executions of a single health care fraud scheme can be, but need not be, charged in separate counts. The process of defining a scheme or its execution is a fact-intensive process that is inextricably intertwined with the way the indictment defines the scheme and its execution. *Hickman*, 331 F.3d at 445-47. Care should be taken to ensure that the description of the scheme in the jury instruction matches the scheme charged in the indictment.

Consistent with the approach taken in the mail, wire, and bank fraud instructions, the Committee does not believe it is necessary to define "knowingly." *See* Instruction 7.03, *supra*.

Again, consistent with the approach taken in the mail, wire, and bank fraud instructions, it is not necessary for the government to show that the health care benefit program suffered a loss or was actually defrauded or that the defendant personally benefitted from the scheme. *See* Committee Comments, Instruction 6.18.1344, *supra*.

In *United States v. Dexter*, 154 Fed. 890, 896 (N.D. Iowa 1907), a scheme was distinguished from an artifice as follows:

> A scheme may be said to be a design or plan formed to accomplish some purpose. An artifice may be said to be an ingenious contrivance or device of some kind and when used in a bad sense of the word corresponds with trick or fraud. Hence, a scheme or artifice to defraud within the meaning of this statute would be to form some plan or devise some trick to perpetrate a fraud upon another.

If the indictment only alleges an artifice to defraud, the definition of "scheme to defraud" can still be used by simply changing "scheme to defraud" to "artifice to defraud."

Since intent to defraud is an element of the offense, good faith can be a theory of defense. *United States v. Arnold*, 543 F.2d 1224 (8th Cir. 1976). A defendant is entitled to an instruction on a good faith theory of defense and one should be given if there is evidence to support the theory, *United States v. Casperson*, 773 F.2d 216, 222-24 (8th Cir. 1985); *United States v. Sherer*, 653 F.2d 334, 337 (8th Cir. 1981), but not where the defendant denies the conduct which is charged and the issue is one of credibility. *United States v. Kimmel*, 777 F.2d 290, 292-93 (5th Cir. 1985). *See* Instruction 9.08, *infra*, for good faith instructions. *See also* 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 47.16 (5th ed. 2000).

6.18.1503A. CORRUPTLY ENDEAVORING TO INFLUENCE A JUROR (18 U.S.C. § 1503)

The crime of corruptly endeavoring to influence a juror[1], as charged in [Count _____ of] the Indictment, has three elements, which are:

One, (name of juror) was a [grand] juror in (describe judicial proceeding);[2]

Two, the defendant knew that (describe judicial proceeding) was pending; [and]

Three, the defendant corruptly endeavored[3] to [influence] [intimidate] [impede] (name of juror) in the discharge of his duty as a [grand] juror[; and]

[Four, (state the sentencing fact that triggers a higher maximum sencence,[4] e.g., the crime under consideration by the juror was (name the Class A or Class B felony charged[5]).]

The phrase "corruptly endeavored" means that the defendant voluntarily and intentionally (describe obstructive act)[6] and that in doing so, acted with the intent[7] to [influence (judicial) (grand jury) proceedings so as to benefit himself or another] [subvert or undermine the due administration of justice].[8] [The endeavor need not have been successful, but it must have had at least a reasonable tendency to impede the [grand] juror in the discharge of his duties.]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. This clause of the statute also applies to officers of the court and certain officials.

2. The instruction is designed for the usual case in which the pendency of a judicial proceeding is undisputed. If this question is disputed, it should be submitted to the jury under proper definitional instructions. *See United States v. Vesich*, 724 F.2d 451, 454 (5th Cir. 1984). Section 1503 typically applies "after the commencement of formal judicial proceedings." *United States v. Werlinger*, 894 F.2d 1015, 1016 n.3 (8th Cir. 1990). A criminal action remains "pending" during the one-year period within which to file a motion to reduce sentence pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure. *United States v. Novak*, 217 F.3d 566, 572-73 (8th Cir. 2000), or until disposition of the defendant's direct appeal. *United States v. Johnson*, 605 F.2d 729 (4th Cir. 1979).

3. The jury should be instructed on the meaning of "corruptly endeavored" as used by the statute. As the discussion in the Committee Comments, *infra*, illustrates, no one definition has been agreed on and different definitions may apply to different factual situations. The court of appeals "prefer[s] instructions phrased not in abstract legalisms, but rather in concrete terms that intelligibly describe the actual evidence or contentions of the parties." *United States v. Feldhacker*, 849 F.2d 293, 297 (8th Cir. 1988).

Final Instructions: Elements of Offenses

A definition which best suits the case should be formulated and used. At a minimum, there should be an intent to act and knowledge that obstruction would or could result from such act. *United States v. Aguilar*, 515 U.S. 593, 599 (1995). For a discussion of the meaning of the phrase "knowingly . . . corruptly," as used in 18 U.S.C. § 1512(b)(2)(A), *see Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005). (The Committee notes that in Fn 9 in *Andersen*, the Court observed that § 1503 "lack[s] the modifier 'knowingly,' making any analogy [to the definition of corruptly in § 1512] inexact.") The Committee recommends that in formulating a definition, words such as "knowingly," "willfully" and "specific intent" not be used in favor of words which precisely describe the mental state involved. *See* Instructions 7.01-.03, *infra*.

4. Section 1503(b) creates enhanced penalties where a juror is killed, where an attempt on the life of a juror failed, or where the offense was committed against a petit juror, in a case in which a class A or B felony was charged. In *Jones v. United States*, 526 U.S. 227 (1999), dealing with a carjacking offense under 18 U.S.C. § 2119, the Supreme Court stated, in footnote 6, "[u]nder 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." The Supreme Court made clear in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the principle it enunciated in *Jones* was a rule of constitutional law applicable to all prosecutions.

5. If a killing or attempted killing is charged, *see* Instructions 6.18.1111, 6.18.1112, and 8.01 (attempt).

6. *See United States v. Frank*, 354 F.3d 910, 921 (8th Cir. 2004) for a discussion of whether section 1503 requires commission of an overt act.

7. The government need not prove that the defendant's only or even main purpose was to obstruct the due administration of justice. *See United States v. Machi*, 811 F.2d 991, 996-97 (7th Cir. 1987).

8. This definition is a generic one. If the circumstances of the case call for a more specific definition, the Committee Comments on the "endeavor" and "corruptly" requirements of the statute should aid in fashioning one.

Committee Comments

See 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 48.03 (5th ed. 2000).

The first two clauses of section 1503, covered by Instructions 6.18.1503A and B, relate to interference with or injury to actual grand jurors, petit jurors, or court officers in the discharge of their duties. *United States v. Aguilar*, 515 U.S. 593, 598 (1995). The third clause referred to as the "Omnibus Clause," and covered by Instruction 6.18.1503C, is a catchall provision which, *inter alia*, prohibits persons from corruptly endeavoring to influence, obstruct, or impede the due

administration of justice. *Id.* These instructions apply to counts alleging that the defendant *endeavored* to obstruct justice, not to counts alleging actual obstruction.

The following discussion relates to all three clauses of section 1503, but most particularly to the Omnibus Clause, which, because it is the most general in nature, presents the most issues.

Pendency of judicial proceedings. Except where retaliation is charged, a prerequisite to prosecution under all clauses of section 1503 is a *pending* judicial proceeding. *United States v. Risken*, 788 F.2d 1361, 1368 (8th Cir. 1986). (In *United States v. Novak*, 217 F.3d 566, 572 (8th Cir. 2000), the court questioned this prerequisite, noting that "there is nothing on the face of § 1503 requiring a pending proceeding," but assumed, arguendo, the existence of the requirement.) A grand jury proceeding is considered a pending proceeding. *Riskin*. The question of when a grand jury investigation commences for the purposes of section 1503 is addressed in *United States v. Vesich*, 724 F.2d 451, 454-55 (5th Cir. 1984). *See also United States v. Nelson*, 852 F.2d 706, 709-11 (3d Cir. 1988); *United States v. Steele*, 241 F.3d 302 (3d Cir. 2001). A term of supervised release also can constitute a pending proceeding, if the obstructive conduct occurs "'within the time after sentencing for filing a request for reduction of sentence pursuant to Rule 35(b).'" *United States v. Novak*, 217 F.3d at 572.

The defendant must know of the pendency of a judicial proceeding. *Pettibone v. United States*, 148 U.S. 197, 206-07 (1893); *United States v. Vesich*, 724 F.2d at 457. Such knowledge may be inferred from the circumstances and need not be detailed. *Id.* The defendant need not know that the proceeding is federal in nature. *United States v. Ardito*, 782 F.2d 358, 360-62 (2d Cir. 1986). In *United States v. McKnight*, 799 F.2d 443, 447 (8th Cir. 1986), the court held it was not plain error where the court had not specifically instructed the jury that the defendant must have had knowledge of the judicial proceeding. The court had instructed the jury that the defendant must have acted "knowingly." The Committee recommends that the precise knowledge be set forth in the instruction. *See* Element *Two*, *supra*.

"Corruptly endeavor" requirement. Although courts often define the words "corruptly" and "endeavor" separately, the Committee believes that to define them as a single phrase would result in less confusion and overlap. The following is a summary of case law as to the meaning of each word.

"Endeavor" requirement. As the Supreme Court stated in *United States v. Russell*, "[t]he word of the section is 'endeavor' and by using it the section got rid of the technicalities which might be urged as besetting the word 'attempt' and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent." 255 U.S. at 143; *Osborn v. United States*, 385 U.S. 323, 332-33 (1966). However, the endeavor "must have a relationship in time, causation, or logic with the judicial proceedings. . . . [It] must have the 'natural and probable effect' of interfering with the due administration of justice." (citations omitted). *United States v. Aguilar*, 515 U.S. at 599. Therefore, a judge's making of false statements to an FBI agent did not constitute obstruction in the absence of evidence the judge knew those false statements would be given to the grand jury. *Id.* at 600. On the other hand, submission to a sentencing judge of a false letter seeking leniency constituted obstruction, even though the government did

not prove that the court's sentencing decision was actually affected by the letter, because the letter was of the type normally received and relied upon by the judge. *United States v. Collis*, 128 F.3d 313 (6th Cir. 1997).

Success is not a prerequisite to conviction under any of the clauses of section 1503. All that must be proved is that the defendant "corruptly endeavored" to obstruct justice. *United States v. Aguilar*, 515 U.S. 593, 599 (1995); *United States v. Russell*, 255 U.S. 138, 143 (1921); *United States v. Jackson*, 607 F.2d 1219, 1222-23 (8th Cir. 1979); *United States v. McCarty*, 611 F.2d 220, 224 (8th Cir. 1979).

Endeavor defined.

The Seventh Circuit Model Instructions include the following definitions of endeavor:

> *Influencing - Definition of Endeavor*. The word endeavor describes any effort or act to influence [a witness, a juror, an officer in or of any court of the United States]. The endeavor need not be successful, but it must have at least a reasonable tendency to impede the [witness, juror, officer] in the discharge of his duties.
>
> *Obstruction of Justice Generally - Definition of Endeavor*. The word endeavor describes any effort or act to influence, obstruct, or impede the due administration of justice. The endeavor need not be successful, but it must have at least a reasonable tendency to influence, obstruct, or impede the due administration of justice.

Seventh Circuit Federal Jury Instructions Criminal (1999).

In *United States v. Cioffi*, 493 F.2d 1111, 1119 (2d Cir. 1974), "endeavor" was defined for the jury as "any effort or any act, however contrived, to obstruct, impede or interfere . . . ."

In *United States v. Silverman*, 745 F.2d 1386, 1396 n.12 (11th Cir. 1984), the definition of endeavor was altered to correspond to that case's definition of "corruptly." "[E]ndeavor means to undertake an act or to attempt to effectuate an arrangement or to try to do something, the natural and probable consequences of which is to influence, obstruct or impede the due administration of justice."

"Corruptly" requirement. The defendant must have acted "corruptly" in order to violate the first and last clauses of section 1503. "Corruptly" applies as an alternative to threats or force or threatening letter or communication. *See United States v. Cioffi*, 493 F.2d 1111, 1118 n.2 (2d Cir. 1974). Instruction 6.18.1503A covers corrupt endeavors to influence jurors and Instruction 6.18.1503B, *infra*, covers threats and force. Instruction 6.18.1503C, *infra*, covers conduct violating the last or "omnibus" clause of section 1503.

The "corruptly" requirement incorporates the scienter element of the statute. That said, courts have defined the mental state required by the word "corruptly" within at least four different, but often overlapping, categories: a. intent to influence or obstruct justice; b. intent to do the act which results in obstruction; c. wicked or evil purpose; and d. "per se" corruption. As

the court noted in *United States v. Brady*, 168 F.3d 574, 578 (1st Cir. 1999), a case involving a refusal to testify,:

> The scienter element in the obstruction statute is the subject of more confusing case law than can be described in brief compass. In part, this results from the promiscuous use in the cases of the ambiguous word, "intent," which can mean either *knowledge* (of consequences) or *purpose* (to achieve them); in part, it results from the great range of varying motives that can underlie a refusal to testify (e.g., loyalty of various kinds, concern as to reputation, fear of reprisal, concern about self-incrimination.) Further, cases that purport to be setting legal standards are often instead concerned with the inferences to be drawn from particular facts.

The term "specific intent" is found in many definitions of "corruptly," including one approved by the Eighth Circuit: "In this case, the word 'corruptly' means willfully, knowingly and with specific intent to influence a juror to abrogate his or her legal duties as petit juror." *United States v. Jackson*, 607 F.2d at 1221-22. *See also United States v. Quinn*, 543 F.2d 640, 647 (8th Cir. 1976). *But see United States v. Gage*, 183 F.3d 711, 718-19 (7th Cir. 1999) (Chief Judge Posner, concurring) (§ 1503 does not require specific intent).

The most common formulation of a definition of "corruptly" includes language that the obstructive act must be done with the intent to influence judicial or grand jury proceedings. As stated in *United States v. Aguilar*, 515 U.S. at 616, "[corruptly] denotes '[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others. . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another.'" (J. Scalia, joined by J. Kennedy and Thomas, concurring, in part, and dissenting, in part) (internal cites omitted).

"[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Id.* Intent can be inferred where the obstruction is a natural consequence of another intended act. *Pettibone v. United States*, 148 U.S. at 207; *United States v. Jackson*, 607 F.2d at 1221.

Vol. 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 48.04 (5th ed. 2000), provides the following definition: "[t]o act 'corruptly' as that word is used in these instructions means to act voluntarily and deliberately and for the purpose of improperly influencing, or obstructing, or interfering with the administration of justice."

The Seventh Circuit has approved the following instruction:

> Corruptly means to act with the purpose of obstructing justice. The United States is not required to prove that the defendant's only or even main purpose was to obstruct the due administration of justice. The government only has to establish that the defendant should have reasonably seen that the natural and probable consequences of his acts was the

> obstruction of justice. Intent may be inferred from all of the surrounding facts and circumstances. Any act, by any party, whether lawful or unlawful on its face, may violate section 1503 if performed with a corrupt motive.

United States v. Cueto, 151 F.3d 620, 630-31 (7th Cir. 1998).

Final Instructions: Elements of Offenses

6.18.1503B. INFLUENCING A JUROR BY THREATS (18 U.S.C. § 1503)

The crime of influencing a juror[1] by threats, as charged in [Count __ of] the Indictment, has three elements, which are:

One, (name of juror) was a [grand] juror in (describe judicial proceeding);[2]

Two, the defendant knew that (describe judicial proceeding) was pending; and

Three, that the defendant endeavored[3] to [influence] [intimidate] [impede] (name of juror) in the discharge of his duty as a [grand] juror by [threats] [force] [threatening letter] [threatening communication].

[Four, (state the sentencing fact that triggers a higher maximum sencence,[4] e.g., the crime under consideration by the juror was (name the Class A or Class B felony charged[5]).]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. This clause of the statute also applies to officers of the court and certain other officials.

2. The instruction is designed for the usual case in which the pendency of a judicial proceeding is undisputed. If this question is disputed, it should be submitted to the jury under proper definitional instructions.

3. The jury should be instructed on the meaning of "endeavor." *See* Committee Comments, Instruction 6.18.1503A, *supra*, for possible definitions.

4. Section 1503(b) creates enhanced penalties where a juror is killed, where an attempt on the life of a juror failed, or where the offense was committed against a petit juror, in a case in which a class A or B felony was charged. In *Jones v. United States*, 526 U.S. 227 (1999), dealing with a carjacking offense under 18 U.S.C. § 2119, the Supreme Court stated, in footnote 6, "[u]nder 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." The Supreme Court made clear in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the principle it enunciated in *Jones* was a rule of constitutional law applicable to all prosecutions.

5. If a killing or attempted killing is charged, *see* Instructions 6.18.1111, 6.18.1112, and 8.01 (attempt).

Committee Comments

See Committee Comments, Instruction 6.18.1503A, *supra*.

Final Instructions: Elements of Offenses

6.18.1503C. OBSTRUCTION OF JUSTICE (18 U.S.C. § 1503)

The crime of obstruction of justice[1], as charged in [Count _____ of] the Indictment, has three elements, which are:

One, the defendant (describe conduct and judicial proceeding[2], e.g., destroyed documents which had been subpoenaed in an investigation by a federal grand jury);

Two, the defendant knew that (describe judicial proceeding) was pending; and

Three, by (describe conduct, e.g., destroying said documents), the defendant corruptly endeavored[3] to [influence] [obstruct] [impede] the due administration of justice.

[Four, (state the sentencing fact that triggers a higher maximum sencence,[4] e.g., the crime under consideration by the juror was (name the Class A or Class B felony charged[5]).]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. "Obstruction of justice" refers to the conduct barred by the last clause of section 1503, known as the omnibus clause.

2. This instruction is designed for the usual case in which the pendency of a judicial proceeding is undisputed. If this question is disputed, it should be submitted to the jury under proper definitional instructions.

3. The jury should be instructed on the meaning of "corruptly endeavored" in this statute. As the discussion in the Committee Comments, Instruction 6.18.1503A, *supra*, illustrates, no one definition has been agreed on and different definitions may apply to different factual situations. A definition which best suits the case should be formulated and used. It should include an intent to act and knowledge that obstruction would or could result from such act. "[T]he act must have a relationship in time, causation or logic with the judicial proceedings," and "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *United States v. Aguilar*, 515 U.S. 593, 599 (1995). The Committee recommends that in formulating a definition of "corruptly endeavored," words such as "knowingly," "willfully" and "specific intent" not be used in favor of words which precisely describe the mental state involved. *See* Instructions 7.01-.03, *infra*.

4. Section 1503(b) creates enhanced penalties where a juror is killed, where an attempt on the life of a juror failed, or where the offense was committed against a petit juror, in a case in which a class A or B felony was charged. In *Jones v. United States*, 526 U.S. 227 (1999), dealing with a carjacking offense under 18 U.S.C. § 2119, the Supreme Court stated, in footnote 6, “[u]nder 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." The Supreme Court made clear in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the principle it enunciated in *Jones* was a rule of constitutional law applicable to all prosecutions.

5. If a killing or attempted killing is charged, *see* Instructions 6.18.1111, 6.18.1112, and 8.01 (attempt).

Committee Comments

See Committee Comments, Instruction 6.18.1503A, *supra*; *United States v. Frank*, 354 F.3d 910 (8th Cir. 2004); *United States v. Russell*, 234 F.3d 404 (8th Cir. 2000); *United States v. Novak*, 217 F.3d 566 (8th Cir. 2000); *United States v. Lefkowitz*, 125 F.3d 608 (8th Cir. 1997); *United States v. McKnight*, 799 F.2d 443, 446 (8th Cir. 1986).

The omnibus clause of section 1503 applies to witnesses and prospective witnesses where there is a pending judicial proceeding. *United States v. Risken*, 788 F.2d 1361, 1367-68 (8th Cir. 1986); *United States v. Shannon*, 836 F.2d 1125, 1128 (8th Cir. 1988). The Eighth Circuit has held that the witness need not be actually scheduled to testify nor must he or she actually give testimony at a later time. *Shannon*, *id.* However, in *United States v. Aguilar*, 515 U.S. at 601 , the Supreme Court held that the giving of false testimony to "an investigating agent who ha[d] not been subpoenaed or otherwise directed to appear before the grand jury" was not a violation of this section.

6.18.1510. OBSTRUCTION OF CRIMINAL INVESTIGATIONS (18 U.S.C. § 1510(a))

The crime of obstructing a criminal investigation by bribery, as charged in [Count __ of] the Indictment, has three elements, which are:

One, the defendant [believed][1] [knew] that (name of person) had information relating to (describe violation of a federal criminal statute, e.g., theft of Government property);

Two, the defendant [believed] [knew] that (name of person) might communicate the information to [a federal criminal investigator] [an agent of the (name of federal agency, e.g., Federal Bureau of Investigation)][2]; and

Three, the defendant voluntarily and intentionally endeavored[3] to [obstruct] [delay] [prevent] the communication of the information to [a federal criminal investigator] [an agent of the (name of federal agency, e.g., Federal Bureau of Investigation)][4] by [giving] [offering] [promising] something of value[5] to (name of person).

[A "federal criminal investigator," as used in this instruction, is any individual duly authorized by a department, agency, or armed force of the United States to investigate or prosecute violations of federal criminal law.][6]

[To "endeavor" means to make any effort, regardless of success.][3]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. "[I]t is only necessary for a defendant to have believed that a witness might give information to federal officials, and to have prevented this communication, to violate 18 U.S.C. § 1510." *United States v. Leisure*, 844 F.2d 1347, 1364 (8th Cir. 1988).

2. The defendant must know or believe that the intended recipient of the information is a federal investigator. *United States v. Williams*, 470 F.2d 1339, 1342 (8th Cir. 1973).

3. The statute says, "Whoever willfully *endeavors* by means of bribery to obstruct. . . ." [Emphasis added.] The Committee recommends that the instruction include the following definition: "To ‘endeavor’ means to make any effort, regardless of success." *See United States v. Russell*, 255 U.S. 138 (1921), *quoted in Osborn v. United States*, 385 U.S. 323, 333 (1966), *and in Jackson v. United States*, 444 U.S. 1080 (1980). An "endeavor" to obstruct can be less than an "attempt." *See* discussion in *United States v. Leisure*, 844 F.2d at 1366.

4. If the evidence shows that the defendant endeavored to obstruct communication to a particular agency or investigator, such agency or investigator can be described in elements One and Two.

5. *See* Instruction 6.18.201A.

6. "Criminal investigator" should be defined if the term is used in elements One and Two. The definition paraphrases the language in 18 U.S.C. § 1510(c).

Committee Comments

See 2 J. Potuto, S. Saltzburg & H. Perlman, FEDERAL CRIMINAL JURY INSTRUCTIONS, § 51.07 (2d ed. 1993 Supp.); 1A L. Sand, et al., MODERN FEDERAL JURY INSTRUCTIONS, ¶ 46.03 (1995).

Section 1510(a) is limited to obstruction by means of bribery after amendments by the Victim and Witness Protection Act, effective October 12, 1982. *United States v. Leisure*, 844 F.2d 1347, 1364 (8th Cir. 1988). Obstruction of justice by means of threats or intimidation is covered by 18 U.S.C. § 1512. *Id.*

The instruction does not require proof that the defendant had knowledge of an actual criminal investigation. *See United States v. Leisure* and Note 1, *supra*. The Seventh Circuit has remarked, in *dicta*, that, "It is unclear, however, whether the statute is applicable if there is no criminal investigation known to be in progress." *United States v. Van Engel*, 15 F.3d 623, 627 (7th Cir. 1993) (citing *United States v. Daly*, 842 F.2d 1380, 1390-91 (2d Cir. 1988), *Leisure* and *United States v. Carzoli*, 447 F.2d 774, 779 (7th Cir. 1971) ("An element of [a § 1510 offense] is an actual, existing investigation of possible violation of a criminal statute.")). *Cf. United States v. Aguilar*, 515 U.S. 593, 599 (1995) (not a violation of 18 U.S.C. § 1503 to give false information to an FBI agent without proof that the defendant knew his actions were likely to affect a grand jury proceeding).

Final Instructions: Elements of Offenses

6.18.1512. TAMPERING WITH A WITNESS (18 U.S.C. § 1512(b)(1))

The crime of tampering with a witness,[1] as charged in [Count __ of] the Indictment, has two elements, which are:

One, the defendant knowingly used [intimidation][2] [threats] [corrupt persuasion][3] against (name of witness); and

Two, the defendant did so with intent to [influence] [delay] [prevent] the testimony of (name of witness) in (insert title of official proceeding).[4, 5, 6]

[To "intimidate" someone means intentionally to say or do something that would cause a person of ordinary sensibilities to be fearful of harm to himself or another. It is not necessary for the Government to prove that (name of witness) was actually frightened.]

[To corruptly persuade someone means to persuade with consciousness of wrongdoing.]

[To act with "intent to influence" the testimony of a person means to act for the purpose of getting the person to change or color or shade his or her testimony in some way. It is not necessary for the Government to prove that the person's testimony was, in fact, changed in any way.]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. This model instruction addresses only certain violations of 18 U.S.C. § 1512, the witness tampering statute. Specifically, this instruction addresses one aspect of the conduct prohibited by 18 U.S.C. § 1512(b)(1). Other subsections of section 1512 prohibit different tampering conduct including killing or attempting to kill a witness (§ 1512(a)(1)), using physical force against a witness or threatening to do so (§ 1512(a)(2)); destroying documents and evidence (§ 1512(c)); and other forms of witness tampering. Where other types of violations are alleged, it will be necessary to alter or add to the elements set forth above.

Allegations that a defendant killed a witness (or otherwise harmed or threatened a witness) in order to prevent that person from communicating with federal law enforcement or a judge in violation of § 1512(a)(1)(c), § 1512(a)(2)(c), § 1512(b)(3), or § 1512(d)(2), will require a carefully tailored jury instruction in light of the Supreme Court's decision in *Fowler v. United States*, 131 S. Ct. 2045 (2011). In *Fowler*, the Court held that the government must prove a "reasonable likelihood" that, had the victim communicated with law enforcement officers, at least part of that communication would have been with a federal law enforcement officer.

Final Instructions: Elements of Offenses

2. Title 18 U.S.C. § 1512(b)(1) specifically prohibits attempts to violate the statute. If an attempt offense is submitted, this instruction must be appropriately modified. *See* Instruction 8.01 of these Model Jury Instructions.

3. Under 18 U.S.C. § 1515(a)(6), the term "'corrupt persuasion' does not include conduct which would be misleading conduct but for a lack of a state of mind." There must be consciousness of wrongdoing. *See Arthur Anderson v. United States*, 544 U.S. 696 (2005).

4. "Official proceeding" is defined in 18 U.S.C. § 1515(a)(1). The defendant need not know that the proceeding was a federal proceeding. Further, it is not necessary that a proceeding actually be pending or about to be instituted. *See* 18 U.S.C. § 1512(n)(1) and (g)(1). Additional definitions are contained in 18 U.S.C. § 1515. The defendant must, however, contemplate some particular official proceeding in which the testimony might be material. *See Arthur Anderson v. United States*, 544 U.S. 696 (2005), and *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

5. This crime allows for an enhancement of punishment where the violation "occurs in connection with a trial of a criminal case." 18 U.S.C. § 1512(j). In such cases, therefore, the second element of the offense should specify that the official proceeding was a trial of a criminal case.

6. Title 18 U.S.C. § 1512(e) provides: "In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully." Section 1515(c) states: "This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or in anticipation of an official proceeding." These affirmative defenses should be submitted under appropriate instructions to the jury if there are facts to support these defenses at trial. *See* Section 9.00 of these Pattern Instructions (affirmative defenses).

Committee Comments

See 18 U.S.C. §§ 1512(f)(g) and (i) and 18 U.S.C. § 1515 for provisions which define or modify this statute.

Before 1982, tampering with and retaliation against federal witnesses was covered exclusively by 18 U.S.C. § 1503. *See* Instructions 6.18.1503A and 6.18.1503B, *supra*. Now, these offenses are specifically proscribed by 18 U.S.C. §§ 1512 and 1513. Section 1512 was intended to provide greater protection for witnesses than did section 1503; however, section 1503 still applies to certain types of conduct involving witnesses. *See United States v. Risken*, 788 F.2d 1361, 1365-69 (8th Cir. 1986), for an extensive analysis and comparison of the respective scopes of sections 1503 and 1512.

It is not necessary that the victim be under subpoena or a scheduled witness in a case. The statute purposely uses the term "person" instead of "witness." *United States v. Risken*, 788 F.2d at 1368-69 (dismissed witness).

Final Instructions: Elements of Offenses

6.18.1513. RETALIATING AGAINST A WITNESS (18 U.S.C. § 1513)

The crime of retaliating against a witness, as charged in [Count __ of] the Indictment, has two elements, which are:

One, the defendant knowingly [caused] [threatened to cause] [bodily injury to] [damaged] [threatened to damage] [the tangible property of] (name of witness); and

Two, the defendant did so with intent to retaliate against (name of witness) because [he] [she] had been a [witness] [party] at (insert title of official proceeding).[1]

[(Describe tangible property) is tangible property].[2]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. "Official proceeding" is defined in 18 U.S.C. § 1515(a)(1).

2. "Tangible property" is not defined in the Act.

Committee Comments

See Committee Comments, Instruction 6.18.1512, *supra*. *See generally United States v. Maggitt*, 784 F.2d 590, 593-94 (5th Cir. 1986); *United States v. Velasquez*, 772 F.2d 1348, 1356-58 (7th Cir. 1985). Definitions are contained in 18 U.S.C. § 1515.

Final Instructions: Elements of Offenses

6.18.1621. PERJURY (18 U.S.C. § 1621)

The crime of perjury, as charged in [Count __ of] the Indictment, has five elements, which are:

One, the defendant testified under [oath] [affirmation] (describe proceeding, e.g., at the trial of *Smith v. Jones*) that (insert alleged false testimony);

Two, the testimony so given was false; [1]

Three, at the time he testified, the defendant knew such testimony was false;

Four, the defendant voluntarily and intentionally [2] gave such testimony; and

Five, the false testimony was material.[3]

False testimony is "material" if the testimony is capable of influencing (insert name of tribunal, etc.) on the issue before it.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09. *supra*.)

Notes on Use

1. In many cases, more than one specification of perjury or more than one false declaration is charged in a single count of an indictment. Typically these charges are in the disjunctive. In those cases, the jury should be instructed as follows:

> You need not find that all of the alleged false statements in each count of the Indictment are false; instead, you must find unanimously and beyond a reasonable doubt that at least one of the statements set out in a particular count of the Indictment is false.

Vitello v. United States, 425 F.2d 416 (9th Cir. 1970); *United States v. Dilworth*, 524 F.2d 470 (5th Cir. 1975); *Arena v. United States*, 226 F.2d 227, 236 (9th Cir. 1955); 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 50.03 (5th ed. 2000).

2. The Committee doubts that intent to deceive the court or jury is an element. Neither 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 50.03 (5th ed. 2000), nor S. Saltzburg & H. Perlman, FEDERAL CRIMINAL JURY INSTRUCTIONS § 50.01 (1985) includes this element, but in their notes, Saltzburg and Perlman quote *United States v. Rose*, 215 F.2d 617, 622-23 (3d Cir. 1954), in describing the requisite mental state as "[k]nowingly making a false statement with the intent to deceive." Neither of the cases cited by *Rose* supports that assertion.

Despite its unexplained assertion unsupported by the cases it cites (dealing with willfulness, not intent to deceive), *Rose* has spawned a series of cases that apply its intent-to-deceive language and merely cite back to *Rose*. *See, e.g., United States v. Goguen*, 723 F.2d 1012, 1020 (1st Cir. 1983) (citing *Beckanstin* to effect that section 1621 requires intent to

deceive); *Beckanstin v. United States*, 232 F.2d l, 4 (5th Cir. 1956) (citing *Rose* for proposition that intent to deceive is an element).

Although the Committee has found no cases saying that *Rose* is wrong, there is some support in the language of *Bronston v. United States*, 409 U.S. 352 (1973), for the position that there is no intent-to-deceive element in section 1621. The issue in *Bronston* was "whether a witness may be convicted for perjury for an answer that is literally true but not responsive to the question asked and arguably misleading by negative implication." Answering in the negative, the Court supplied the following analysis:

> It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether "he does not believe [his answer] to be true." To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know.

Id. at 359. *See also United States v. Debrow*, 346 U.S. 374, 376 (1953) (elements include "(3) a false statement wilfully made as to acts material to the hearing" but no mention of intent to deceive; issue was sufficiency of the indictment).

3. The Committee has added materiality as an element for the jury to decide in light of *United States v. Gaudin*, 515 U.S. 506 (1995). *See also United States v. Swink*, 21 F.3d 852, 857 (8th Cir. 1994).

Committee Comments

See 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 50.01-.12 (5th ed. 2000).

> A witness testifying under oath or affirmation violates this statute [18 U.S.C. § 1621] if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory.

United States v. Dunnigan, 507 U.S. 87, 94 (1993). *See also United States v. Swink*, 21 F.3d 852, 857 (8th Cir. 1994) (listing elements of a violation of section 1621).

The Committee believes that for section 1621 purposes, the issue of what is "a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered" presents a question of law and need not be submitted to the jury.

The materiality of the perjurious testimony is an element of this offense. *E.g.*, *United States v. Qaisi*, 779 F.2d 346 (6th Cir. 1985). Most courts of appeals have held that materiality is a question of law for the trial court. *See, e.g.*, *United States v. Ashby*, 748 F.2d 467, 470 (8th Cir. 1984); *United States v. Larranaga*, 787 F.2d 489, 494 (10th Cir. 1986); *United States v. Lighte*, 782 F.2d 367, 372 (2d Cir. 1986). Presumably, materiality is now a question of fact for the jury to decide under *United States v. Gaudin*, 515 U.S. 506 (1995).

A statement which is literally true cannot support a conviction even if it was intended to be misleading. *Bronston v. United States*, 409 U.S. 352 (1973); *United States v. Lighte*, 782 F.2d at 374.

However, each question and answer must be considered in its own context and in relation to the questions and answers given before and after the alleged perjurious testimony. In *United States v. Williams*, 552 F.2d 226, 229 (8th Cir. 1977), the court stated:

> In *Bronston*, however, the Court dealt only with a literally true declarative statement and not with the situation presented by Williams' "No" answers, the truth or falsity of which can only be ascertained in the context of the question asked. *See United States v. Williams*, 536 F.2d 1202, 1205 (7th Cir. 1976); *United States v. Chapin*, 515 F.2d 1274, 1280 (8th Cir. 1975). If the response given was false as the defendant understood the question, his conviction is not invalidated by the fact that his answer to the question might generate a number of different interpretations. *United States v. Chapin*; *United States v. Parr*, 516 F.2d 458, 470 (5th Cir. 1975).

In a case where a defendant sufficiently raises the defense of literal truthfulness, the jury should be instructed on this issue. Likewise, if the context of the alleged false testimony is important in determining the truth or falsity of the testimony, e.g., where the ambiguity of the question or answer is raised, this principle should also be instructed upon. *See United States v. Bonacorsa*, 528 F.2d 1218 (2d Cir. 1976).

In a section 1621 prosecution, the defendant must have acted knowingly and willfully. *United States v. Edwards*, 443 F.2d 1286, 1294 (8th Cir. 1971); *Spaeth v. United States*, 218 F.2d 361, 363 (6th Cir. 1955). These mental states are expressed in the third and fourth elements of this instruction.

In order to fall within section 1621, the false testimony must have been given under oath or affirmed. *United States v. Plascencia-Orozco*, 768 F.2d 1074, 1076 (9th Cir. 1985). When requested, the defendant is entitled to an instruction on the two-witness rule, which requires in perjury prosecutions that the falsity of the defendant's statement must be proved by the testimony of two witnesses or the testimony of one witness plus corroborating evidence. *See Weiler v. United States*, 323 U.S. 606, 607 (1945); *LaRocca v. United States*, 337 F.2d 39, 44 (8th Cir. 1964). The following language may be used to express the two-witness rule:

> You are instructed that the testimony of one witness is not enough to support a finding that the defendant's testimony was false. There must be additional evidence -- either the testimony of another person, or documentary evidence, or other evidence -- which tends to support the testimony's falsity. The other evidence, standing alone, need not convince you beyond a reasonable doubt that the testimony was false. But, after considering all of the evidence on the subject, you must be convinced beyond a reasonable doubt that the testimony was false.

2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 50.05 (5th ed. 2000).

Where the defendant's allegedly false statement is "I don't know" or "I don't remember," the two-witness rule rarely can be applied. In such cases, circumstantial evidence standing alone can be used to prove the defendant knowingly lied. *Gebhard v. United States*, 422 F.2d 281, 288 (9th Cir. 1970); *United States v. Nicoletti*, 310 F.2d 359, 361-63 (7th Cir. 1962).

Final Instructions: Elements of Offenses

6.18.1622. SUBORNATION OF PERJURY (18 U.S.C. § 1622)

The crime of suborning perjury, as charged in [Count _____ of] the Indictment, has three elements, which are:

One, the defendant voluntarily and intentionally persuaded (name of witness) to commit perjury;

Two, the defendant did so with the intent that (name of witness) would deceive the [court] [jury]; and

Three, (name of witness) committed a perjury in that:

(a) He testified under oath or affirmation at (describe proceeding, e.g., the trial of *United States v. Doe*) that [insert alleged false testimony];

(b) the testimony given was false;

(c) at the time he testified, the witness knew his testimony was false;

[(d) the witness gave such testimony voluntarily and intentionally;][1]

[(d)] [(e)] the false testimony was material.[2]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09. *supra*.)

Notes on Use

1. Sub-element (d) of Element *Three* must be included where the underlying perjury is in violation of section 1621, but may be omitted where the predicate perjury is based on section 1623. *See United States v. Watson*, 623 F.2d 1198, 1207 (7th Cir. 1980).

2. As in Instructions 6.18.1621 and 6.18.1623, materiality is an element for the jury to decide in light of *United States v. Gaudin*, 515 U.S. 506 (1995). A definition of “material” from either Instruction 6.18.1621 or Instruction 6.18.1623 should be inserted after this sub-element.

Committee Comments

See Committee Comments, Instruction 6.18.1621, *supra*.

A perjury is an element of this offense. *Segal v. United States*, 246 F.2d 814, 816 (8th Cir. 1957). The use of "any perjury" in section 1622 evidences a congressional intent that subornation of perjury is committed not only by one who procures another to commit perjury in violation of 18 U.S.C. § 1621, but also by one who procures another to make a false statement in violation of 18 U.S.C. § 1623. *United States v. Gross*, 511 F.2d 910 (3d Cir. 1975).

If the suborned testimony is in violation of section 1621, the "two-witness" or "corroboration" rule applies. *Segal v. United States*, 246 F.2d at 216. However, the

"two-witness" rule does not apply if the suborned testimony is in violation of section 1623. *United States v. Gross*, 511 F.2d at 915-16.

The "two-witness" rule never applies to the crime of subornation. *Segal v. United States*, 246 F.2d at 817. Nevertheless, the suborner must have acted knowingly and willfully in persuading the witness to commit perjury.

6.18.1623. FALSE DECLARATION BEFORE COURT OR GRAND JURY (18 U.S.C. § 1623)

The crime of making a false declaration, as charged in [Count _____ of] the Indictment, has four elements, which are:

One, the defendant testified under oath or affirmation [before a grand jury] [before a court] that (insert alleged false testimony);

Two, such testimony was false in whole or in part[1];

Three, at the time he so testified, the defendant knew his testimony was false; and

Four, the false testimony was material.[2]

False testimony is "material" if the testimony was capable of influencing [the grand jury] [the court]. It is not necessary to find that the false testimony actually affected [the grand jury] [the court].

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. In many cases, more than one specification of perjury or more than one false declaration is charged in a single count of an indictment. In those cases, the jury should be instructed as follows:

> You need not find that all of the alleged false statements in each count of the Indictment are false; instead, you must find unanimously and beyond a reasonable doubt that at least one of the statements set out in a particular count of the Indictment is false.

United States v. Holley, 942 F.2d 916, 925-29 (5th Cir. 1991), *distinguished in United States v. Bellrichard*, 62 F.3d 1046 (8th Cir. 1995). *Vitello v. United States*, 425 F.2d 416 (9th Cir. 1970); *United States v. Dilworth*, 524 F.2d 470 (5th Cir. 1975); *Arena v. United States*, 226 F.2d 227, 236 (9th Cir. 1955); 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 50.08 (5th ed. 2000).

2. The Committee has added materiality as an element for the jury to decide in light of *United States v. Gaudin*, 515 U.S. 506 (1995).

The test for materiality of false testimony in a trial is whether the false testimony was capable of influencing the tribunal on the issue before it. *United States v. Sablosky*, 810 F.2d 167, 169 (8th Cir. 1987) (citing *United States v. Jackson*, 640 F.2d 614, 616 (8th Cir. 1981)).

Materiality of false testimony before a grand jury is determined under a similar test. However, the broader range of a grand jury investigation, as compared to a trial focused on

specific issues, is taken into account in assessing the materiality of false testimony before a grand jury. *United States v. Phillips*, 540 F.2d 319, 328 (8th Cir. 1976).

> The test of materiality is "whether or not the statements alleged to be perjurious tend to impede or hamper the course of the investigation of the grand jury." [Citations omitted.] The statements need not be material to any particular issue, but may be material to any proper matter of inquiry.

United States v. Ostertag, 671 F.2d at 264. The "capability" and "potential" of the false testimony to influence the grand jury are alternative descriptions of the test of materiality. "Materiality only calls for the lie to be a potential impediment, not an actual impediment, of the grand jury's inquiry." *United States v. Waldemer*, 50 F.3d 1379, 1382 (7th Cir. 1995). "The inquiry into materiality assesses potential. It considers whether the false statement was 'capable of influencing the grand jury on the issue before it.'" *United States v. Friedhaber*, 856 F.2d 640, 642 (4th Cir. 1988). The false testimony need not actually have influenced, misled or hampered the grand jury; it is sufficient if it was capable of influencing the grand jury on the issue before it. *United States v. Brown*, 666 F.2d 1196, 1200 (8th Cir. 1981). A false declaration can also satisfy the materiality requirement if a truthful statement might have assisted or influenced the grand jury in its investigation. *United States v. Richardson*, 596 F.2d 157, 165 (6th Cir. 1979). *United States v. Swift*, 809 F.2d 320, 324 (6th Cir. 1987). *Cf. United States v. Lasater*, 535 F.2d 1041 (8th Cir. 1976) (alleged false statement held not to have impeded grand jury investigation when other parts of grand jury testimony addressed the same issue); *accord United States v. Ball*, 738 F. Supp. 1073 (E.D. Mich. 1990).

> Materiality is thus demonstrated if the question posed is such that a truthful answer could help the inquiry, or a false response hinder it, and these effects are weighed in terms of potentiality rather than probability. Thus, in applying this gauge to specific situations, it is only the question, at the time of its asking, which is considered. It is of no consequence that the information sought would be merely cumulative, *United States v. Richardson*, 596 F.2d 157 (6th Cir. 1979), that the response was believed by the grand jury to be perjurious at the time it was uttered, *United States v. Lee*, 509 F.2d 645 (2d Cir. 1975), or that the matters inquired into were collateral to the principal objective of the grand jury. *United States v. Stone*, 429 F.2d 138, 140-41 (2d Cir. 1970).

United States v. Berardi, 629 F.2d 723 (2d Cir. 1980).

Committee Comments

See Committee Comments, Instructions 6.18.1621 and 6.18.1622, *supra*.

Section 1623 applies only to "any proceeding before or ancillary to any court or grand jury of the United States." An "ancillary proceeding" is "an action conducted pursuant to explicit statutory or judicial procedures." *United States v. Tibbs*, 600 F.2d 19, 21 (6th Cir. 1979); *see, e.g.*, *United States v. Krogh*, 366 F. Supp. 1255, 1256 (D.D.C. 1973) (sworn deposition an ancillary proceeding); *cf. Dunn v. United States*, 442 U.S. 100 (1979) (sworn statement given during interview with private attorney was not a formal deposition and thus was

not an ancillary proceeding). Section 1621 is broader; it proscribes false testimony in proceedings which are not strictly judicial in nature. *See, e.g.*, *Woolley v. United States*, 97 F.2d 258 (9th Cir. 1938) (Securities and Exchange Commission investigation); *United States v. Seymour*, 50 F.2d 930 (D. Neb. 1931) (senatorial hearing).

Determination of the nature of the proceeding is a matter of law for the court. *See Tasby v. United States*, 504 F.2d 332, 337 (8th Cir. 1974).

In the Eighth Circuit the criterion for determining materiality in a section 1623 case is whether or not the statements alleged to be perjurious tend to impede or hamper the course of the investigation by the grand jury. *United States v. Drape*, 753 F.2d 660, 663 (8th Cir. 1985); *United States v. Williams*, 552 F.2d 226, 230 (8th Cir. 1977); *United States v. Phillips*, 540 F.2d 319, 328 (8th Cir. 1976). The latitude of materiality with respect to questions asked of a witness during a grand jury investigation is broader than the same questions asked at trial since the purpose of the investigation is to obtain facts and leads rather than prove matters directly at issue. *Phillips*, 540 F.2d at 328-29. The statements need not be material to any particular issue, but may be material to any proper area of inquiry. *United States v. Ostertag*, 671 F.2d 262, 264 (8th Cir. 1982).

There are three other important differences between sections 1623 and 1621:

a. Section 1623(c) authorizes a person to be accused of having made "two or more declarations, which are inconsistent to the degree that one of them is necessarily false." The government is not required to specify which declaration is false.

b. The requisite mental states are different. Section 1621 requires that the defendant act willfully. Section 1623 requires only that the defendant know that his testimony was false. *See United States v. Watson*, 623 F.2d 1198, 1207 (7th Cir. 1980); *United States v. Lardieri*, 497 F.2d 317 (3d Cir. 1974).

c. The "two-witness" or "corroboration" rule, which requires that oral testimony of the falsity of a statement be corroborated in a section 1621 prosecution, is inapplicable to section 1623. *Dunn v. United States*, 442 U.S. at 108. Thus, a corroboration instruction is not required where the defendant is charged under section 1623.

Because of the willfulness element and the two-witness rule of 18 U.S.C. § 1621, most "perjury" prosecutions are brought under 18 U.S.C. § 1623.

Final Instructions: Elements of Offenses

6.18.1708A. MAIL THEFT (18 U.S.C. § 1708) (First Paragraph)

The crime of mail theft, as charged in [Count __ of] the Indictment, has three elements, which are:

One, the defendant voluntarily [stole] [took][1] a [letter][postal card] [package] [bag];

Two, the [letter] [postal card] [package] [bag] [mail] was in [the United States mail] [(describe authorized depository for U.S. mail matter)];[2] and

Three, in so doing the defendant intended to deprive the addressee temporarily or permanently of the [letter, etc.]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statute also includes obtaining or attempting to obtain mail by fraud. In such a case, that language should be used.

2. The statute lists specific depositories for mail. Other authorized depositories are established by regulations of the Postmaster General. *See* 39 C.F.R. § 111.1, incorporating the Domestic Mail Manual D041.1.1. If one of these is involved, it should be named in the elements.

Committee Comments

Cf. 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 52.01-.05 (5th ed. 2000). *See generally United States v. Hopping*, 668 F.2d 398, 399-400 (8th Cir. 1982).

Theft of mail includes the element of intent to steal at the time the mail is taken. *United States v. Hopping*, 668 F.2d at 399-400. Element *Three*, which requires a finding of intent, is also a definition of "steal." *See United States v. Turley*, 352 U.S. 407, 417 (1957). Accordingly, the Committee believes no further definition of "steal" is necessary.

The protection of 18 U.S.C. § 1708 is limited to mail matter which is still in the possession or control of the Postal Service or which has been placed in an authorized receptacle for mail matter, such as a private letter box, and has not been lawfully removed therefrom. *Rosen v. United States*, 245 U.S. 467 (1918); *United States v. Matzker*, 473 F.2d 408 (8th Cir. 1973). On the other hand, the protection extended by § 1702 is applicable until the mailed material is physically delivered to the addressee or his agent. *United States v. Ashford*, 530 F.2d 792 (8th Cir. 1976).

Final Instructions: Elements of Offenses

6.18.1708B. POSSESSION OF STOLEN MAIL (18 U.S.C. § 1708) (Third Paragraph)

The crime of unlawful [purchase] [receipt] [concealment] [possession] of stolen mail, as charged in [Count __ of] the Indictment, has two elements, which are:

One, the defendant [bought] [received] [concealed] [unlawfully had in [his] [her] possession] (describe letter, mail, etc. or article or thing contained therein);

Two, this (describe letter, mail, etc. or article or thing contained therein) had been stolen[1] from (describe authorized depository for mail matter); and

Three, the defendant knew (describe letter, mail, etc. or article or thing contained therein) had been stolen.

Mail matter is "stolen" when it has been voluntarily taken from an authorized depository for mail matter with intent to deprive the addressee temporarily or permanently of its use and benefit.

The Government does not have to prove who stole the mail matter. Also, the Government does not have to prove that the defendant knew that the matter had been stolen from the mail, only that [he] [she] knew it had been stolen.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statute also makes illegal the receipt of mail which has been taken, embezzled or obstructed. If one of these alternatives is charged, the instruction should be so modified.

Committee Comments

See 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 52.01-.05 (5th ed. 2000). *See* Committee Comments, Instruction 6.18.1708A, *supra*; *Blue v. United States*, 528 F.2d 892, 894 (8th Cir. 1976).

The defendant must know that the letter or package was stolen, but he need not know that it was stolen from the mails. *United States v. Owens*, 472 F.2d 780-87 (8th Cir. 1973).

The government may prove by circumstantial evidence that the mail was stolen. *United States v. Reece*, 547 F.2d 432, 435 (8th Cir. 1977); *United States v. Bloom*, 482 F.2d 1162, 1164 (8th Cir. 1973).

An instruction defining actual and constructive possession in a section 1708 case was approved in *United States v. Haynes*, 653 F.2d 332, 333 (8th Cir. 1981). *See* Instruction 8.02, *infra*, for an instruction defining possession.

Where warranted by the evidence, an instruction allowing the jury to draw inferences of theft and knowledge of the theft from evidence of recent possession of stolen mail may be given. *United States v. Hayes*, 631 F.2d 593, 594-95 (8th Cir. 1980). *See also Barnes v. United States*, 412 U.S. 837, 839-40 (1973); *United States v. Bloom*, 482 F.2d at 1165-66. *See further* Instruction 4.13, *supra*, concerning instructions on inferences.

The defendant cannot be convicted for both theft and possession of a single piece of mail. *United States v. Lindsay*, 552 F.2d 263, 266 (8th Cir. 1977).

The Committee believes "unlawfully" is required by the statute which proscribes the "unlawful" possession of stolen mail. The definition of "unlawfully" as "contrary to law" has been called "circular" and "no definition at all." *United States v. Hoog*, 504 F.2d 45, 51 (8th Cir. 1974). The Committee recommends that "unlawfully" be defined in terms of the particular conduct which made the possession unlawful.

If the defendant claims innocent or authorized possession, the burden is on the defendant to produce such evidence and raise it as a defense; it is not an element of the crime to be proved by the government. *United States v. Tompkins*, 487 F.2d 146, 152 (8th Cir. 1973).

Final Instructions: Elements of Offenses

6.18.1709A. EMBEZZLEMENT OF MAIL (18 U.S.C. § 1709) (First Clause)

The crime of embezzling mail, as charged in [Count _____ of] the Indictment, has three elements, which are:

One, the defendant was an [officer] [employee] of the United States Postal Service at the time stated in the Indictment; and

Two, in [his] [her] position with the Postal Service, the defendant had possession of (describe the mail matter, e.g., a letter) that was intended to be conveyed by mail; and

Three, the defendant [took] [removed][1] the (describe the mail matter, e.g., contents of letter) with the intent to convert it to [his] [her] own use.

(Describe the mail matter, e.g., A letter) is "intended to be conveyed by mail" if a reasonable person who saw (describe the mail matter, e.g., the letter) would think it was intended to be delivered through the mail. [The intent of the person who prepared the item for mailing or who mailed it is irrelevant.]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. There are two separate methods for a postal employee to violate section 1709: by embezzling mail matter (clause 1), which includes a letter and its contents, or by stealing the contents of mail matter (clause 2). The difference between the two clauses is that one can embezzle mail matter (i.e., letter or package) and its contents, but the "stealing clause" applies only to theft of the contents of mail matter (letter or package). *United States v. Selwyn*, 998 F.2d 556, 557 (8th Cir. 1993); 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 52.06-.10 (5th ed. 2000). *See United States v. Selwyn*, 998 F.2d at 557-59, which applied a strict common-law view of embezzlement to this statute. *See* an instruction on clause 2.

Committee Comments

See 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 52.06-.10 (5th ed. 2000).

Intent to convert property to one's own use is required. *United States v. Rush*, 551 F. Supp. 148, 151 (S.D. Iowa 1982).

Embezzlement presupposes lawful possession, but theft does not. *See United States v. Selwyn*, 998 F.2d 556 (8th Cir. 1993) and Note on Use 1. A postal employee, who does not, by nature of his duties, originally have lawful possession of certain mail matter, can be charged and

convicted under the stealing provisions in the second clause of section 1709. *United States v. Selwyn*, 998 F.2d at 558.

The first clause of section 1709 requires that the mail matter was "intended to be delivered by mail." In "test letter" cases, the Eighth Circuit has required "evidence from which the jury could conclude that, judged by objective standards, the test letter appeared to be a letter that was intended to be delivered." *United States v. Costello*, 604 F.2d 589, 591 (8th Cir. 1979). *See also United States v. Hergenrader*, 529 F.2d 83, 84-86 (8th Cir. 1976), and *Scott v. United States*, 172 U.S. 343 (1899) (indicating the subjective intent of the person “mailing” the letter was not at issue; rather, the issue is whether a reasonable person would believe that the particular mail matter was intended to be conveyed by mail).

6.18.1709B. THEFT OF MAIL BY POSTAL SERVICE EMPLOYEE (18 U.S.C. § 1709) (Second Clause)

The crime of theft of mail by a Postal Service employee, as charged in [Count _____ of] the Indictment, has three elements, which are:

One, the defendant was an [officer] [employee] of the United States Postal Service at the time stated in the Indictment;

Two, the [letter] [package] [bag] [mail] was [in the United States mail] [intended to be conveyed by mail]; and

Three, the defendant [took] [removed][1] the (describe the contents of the mail matter, e.g., check from the letter) with the intent to convert it to [his] [her] own use.

[(Describe the mail matter, e.g., a letter) is "intended to be conveyed by mail" if a reasonable person who saw (describe the mail matter, e.g., the letter) would think it was intended to be delivered through the mail.] [The intent of the person who prepared the item for mailing or who mailed it is irrelevant.]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. There are two separate methods for a postal employee to violate section 1709: by embezzling mail matter (clause 1), which includes a letter and its contents, or by stealing the contents of mail matter (clause 2). The difference between the two clauses is that one can embezzle mail matter (i.e., letter or package) and its contents, but the "stealing clause" applies only to theft of the contents of mail matter (letter or package). *United States v. Selwyn*, 998 F.2d 556, 557 (8th Cir. 1993); 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 52.06-.10 (5th ed. 2000). *Also see United States v. Selwyn*, 998 F.2d at 557-59, which applied a strict common-law view of embezzlement to this statute.

Committee Comments

See Instruction 6.18.1709A; 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 52.06-.10 (5th ed. 2000).

Intent to convert property to one's own use is required. *United States v. First*, 600 F.2d 170, 171 (8th Cir. 1979); *United States v. Rush*, 551 F. Supp. 148, 151 (S.D. Iowa 1982).

Embezzlement presupposes lawful possession, but theft does not. *See United States v. Selwyn*, 998 F.2d 556 (8th Cir. 1993), and Note on Use 1. A postal employee, who does not, by nature of his duties, originally have lawful possession of certain mail matter, can be charged and

convicted under the stealing provisions in the second clause of section 1709. *United States v. Selwyn*, 998 F.2d at 558.

One of jurisdictional bases for a violation of section 1709 is that the mail matter was "intended to be delivered by mail." In "test letter" cases, the Eighth Circuit has required "evidence from which the jury could conclude that, judged by objective standards, the test letter appeared to be a letter that was intended to be delivered." *United States v. Costello*, 604 F.2d 589, 591 (8th Cir. 1979). *See also United States v. Hergenrader*, 529 F.2d 83, 84-86 (8th Cir. 1976), and *Scott v. United States*, 172 U.S. 343 (1899) (indicating the subjective intent of the person “mailing” the letter was not at issue; rather, the issue is whether a reasonable person would believe that the particular mail matter was intended to be conveyed by mail).

6.18.1951. INTERFERENCE WITH COMMERCE BY MEANS OF EXTORTION (18 U.S.C. § 1951) (Hobbs Act)

The crime of interference with commerce by means of extortion, as charged in [Count _____ of] the Indictment, has three elements, which are:

One, the defendant induced (describe victim[s], e.g., John Jones, President of ABC Corp.) to part with [property] (describe property, e.g., $10,000.00 cash);

Two, the defendant voluntarily and intentionally did so by extortion -- that is, [through the wrongful use of actual or threatened force or violence] [through the wrongful use of fear] [under color of official right];[1]

Three, the defendant's action [obstructed] [delayed] [affected] [interstate] [foreign] commerce in some way or degree.[2]

["Fear" means a state of anxious concern, alarm or apprehension of harm. Fear includes fear of economic loss or injury, as well as fear of physical violence. Extortion by wrongful use of fear requires that the fear be reasonable under the circumstances.][3]

[Extortion "under color of official right" is the wrongful taking by a public officer of money or property not due him or his office, whether or not the taking was accompanied by force, threats or use of fear. So if a public official voluntarily and intentionally misuses his public office and power for the wrongful purpose of inducing a victim to part with property, such activity constitutes extortion.][4]

[Extortion is committed when property is obtained with the consent of the victim by the wrongful use of actual or threatened force, violence or fear or under color of official right.][5]

[You may find an [obstruction] [delay] [effect] on [interstate] [foreign] commerce has been proven if you find and believe from the evidence beyond a reasonable doubt: (describe effects on [interstate] [foreign] commerce alleged in the Indictment on which proof was offered at trial, which demonstrate an actual effect on interstate commerce, e.g., that the John Doe Produce Distributing Co. shipped lettuce, tomatoes, string beans, and other produce from St. Louis, in the State of Missouri, to various points outside of the State of Missouri, including the states of Oregon, Wyoming and Kansas.)[6]]

Final Instructions: Elements of Offenses

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The proper theory of extortion charged in the indictment should be selected in the second element of the instruction.

2. If an attempt crime is charged, the instruction should be modified accordingly.

3. "Extortion" and "fear" must be defined. The statutory definition of "extortion" may be found at 18 U.S.C. § 1951(b)(2). The wrongful use of fear and a reasonable fear on the part of the victim is essential to a conviction of extortion by use of fear. *See United States v. Brown*, 540 F.2d 364, 373 n.6 (8th Cir. 1976); *Nick v. United States*, 122 F.2d 660 (8th Cir. 1941); *United States v. Margiotta*, 688 F.2d 108, 133-35 (2d Cir. 1982). See the discussion of extortion in *United States v. Foster*, 443 F.3d 978, 984 (8th Cir. 2006).

4. If possible, the instruction should be made to relate specifically to the charges and evidence in the case. In a case involving extortion by a police officer, an instruction similar to the following instruction was used:

> Extortion under color of official right by a law enforcement officer need not involve force or threats. If a victim reasonably feels compelled or induced to pay money to a law enforcement officer, because of that officer's wrongful use of his official position for the purpose of obtaining money, the requirement of the crime of extortion under color of official right is satisfied.

See United States v. Crowley, 504 F.2d 992, 995 (7th Cir. 1974). *See also United States v. Hathaway*, 534 F.2d 386 (1st Cir. 1976); *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976).

In "campaign contribution" cases, an instruction similar to the following language approved by the Eleventh Circuit, affirmed in *Evans v. United States*, 504 U.S. 255 (1992), may be appropriate:

> [T]he acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.
>
> However, if a public official demands or accepts money in exchange for a specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

504 U.S. at 258.

5. In a case where different theories of extortion are charged, it is appropriate to charge the jury in the disjunctive on extortion, i.e., a finding of guilt is supported by extortion under fear of economic loss or under color of official right. *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir. 1972); *United States v. Rabbitt*, 583 F.2d 1014, 1027 (8th Cir. 1978); *United States v.*

Brown, 540 F.2d 364, 377 (8th Cir. 1976). If both theories are submitted to the jury, they should be instructed that they may convict the defendant if they find unanimously and beyond a reasonable doubt that at least one of the theories was proven by the government.

6. Although some courts have held that the jury may be instructed as a matter of law that interstate commerce has been shown if various facts were proven, this appears to be the safer instruction. *See generally* the definition of interstate and foreign commerce found in 6.18.1956J(2); *Hulahan v. United States*, 214 F.2d 441, 445, 446 (8th Cir. 1954); *United States v. Rabbitt*, 583 F.2d 1014, 1023 (8th Cir. 1978); *United States v. French*, 628 F.2d 1069, 1078 (8th Cir. 1980).

Committee Comments

The Hobbs Act is a constitutional exercise of Congress' power under the Commerce Clause. *United States v. Foster*, 443 F.3d at 982, rejecting a challenge under *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Farmer*, 73 F.3d 836, 843-44 (8th Cir. 1996).

If a public official is alleged to have extorted a campaign contribution "under color of official right," the jury must be instructed that receipt of such contribution violates section 1951 "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *McCormick v. United States*, 500 U.S. 257 (1991). A subsequent case, *Evans v. United States*, 504 U.S. 255 (1992), resolved the issue as to whether an affirmative act of inducement by a public official is required to support a conviction of extortion under color of official right by affirming a conviction based on an official's passive acceptance of a payment known to have been offered in exchange for a specific requested exercise of official power. *Evans* also held that the *quid pro quo* requirement of *McCormick* is met when "the public official receives payment [a campaign contribution] in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense." 504 U.S. at 256, 268-69.

Extortion under "color of official right" does not require compulsion or duress. Wrongful use of office to induce payments to or at the direction of a public official will make out an extortion. Because threats or coercion are not required, the facts of some cases will be fairly similar to the facts of a bribery case, in that the "victim" will be buying the influence of a public official, often with very subtle inducements on the part of the public official to make payoffs to him. *See United States v. Brown*, 540 F.2d 364 (8th Cir. 1976); *United States v. French*, 628 F.2d 1069 (8th Cir. 1980).

The term "property" has been broadly defined under the Hobbs Act, and includes not only tangible property, but includes "any valuable right considered as a source of wealth." *See United States v. Provenzano*, 334 F.2d 678 (3d Cir. 1964).

Fear of economic injury has also been held to include the fear of lost business opportunities, and the fear of loss of one's ability to compete in the marketplace. *United States v. Hathaway*, 534 F.2d 386, 393-94 (1st Cir. 1976).

It is not necessary that the government prove that a defendant himself benefitted from any extortion. Extortion is proven if the payments are made to a third party, or entity, at the direction of the defendant. *United States v. Provenzano*; *United States v. Green*, 350 U.S. 415, 420 (1956).

Further, only a minimal effect on interstate commerce is required to establish jurisdiction under the Hobbs Act because Congress intended to exercise the full scope of its power under the Interstate Commerce Clause of the United States Constitution. *United States v. Dobbs*, 449 F.3d 904, 912 (8th Cir. 2006) (robbery of stand-alone, "mom and pop" convenience store was a Hobbs Act violation, even though the store had only a de minimus connection to interstate commerce); *United States v. Farmer*, 73 F.3d at 843 (robbery of a single HyVee grocery store sufficient to support conviction where store was part of a national chain which received goods shipped in interstate commerce); *United States v. Quigley*, 53 F.3d 909 (8th Cir. 1995) (robbery of two individuals of a pouch of chewing tobacco and eighty cents while on way to purchase beer from store which received goods in interstate commerce not sufficient to support conviction). However, the effect on interstate commerce must be actual and not merely probable or potential, *United States v. Williams*, 308 F.3d. 833 (8th Cir. 2002), unless the case involves prosecution of an attempt crime. In such a case, a probable or potential impact is sufficient. *United States v. Foster*, 443 F.3d at 984.

If attempted extortion is charged, the instruction should be modified accordingly. Furthermore, in attempted extortion, the focus is on the defendant's intent, rather than on the state of mind of the victim. *United States v. Smith*, 631 F.2d at 104. An attempt to arouse fear is sufficient. *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977). The actual generation of fear is unnecessary. *United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972). "'The offense of attempted extortion is complete when the defendant has attempted to induce his victim to part with property.'" *United States v. Foster*, 443 F.3d at 985 (quoting *United States v. Frazier*, 560 F.2d at 887).

There is no requirement that the public official have the actual power to perform an act which is the basis of an extortionate scheme. As long as the victim holds a reasonable belief that the defendant's office included the apparent authority to do the acts which a defendant claims he can carry out, an extortion is proven. In cases involving apparent authority, the jury should be instructed on this issue in terms of the specific case involved. An example is as follows:

> You must find that Leo Victim reasonably believed that Senator Doe's official powers included the securing of leases for the State of Missouri. You need not find, however, that Senator Doe actually held this power.

See United States v. Mazzei, 521 F.2d 639, 643 n.2 (3d Cir. 1975); *United States v. Brown*, 540 F.2d 364, 372 (8th Cir. 1976). In *United States v. Loftus*, 992 F.2d 793, 796 (8th Cir. 1993), the court of appeals stated, "[a]ctual authority over the end result - rezoning - is not controlling if Loftus, through his official position, had influence and authority over a means to that end."

6.18.1955. ILLEGAL GAMBLING BUSINESS (18 U.S.C. § 1955)

The crime of conducting an illegal gambling business, as charged in [Count _____ of] the Indictment, has three elements, which are:

One, that the defendant knowingly [conducted] [financed] [managed] [supervised] [directed] [owned][1] [all of] [part of] a gambling business in which five or more persons were involved in the operation of the business;

Two, that such gambling business was a violation of the law[s] of the state[s] of (name of state(s)).[2]

Three, that such gambling business was in substantially continuous operation for a period more than thirty days or had a gross revenue of $2,000 or more in any one day.

["Bookmaking" is a form of gambling and involves the business of establishing certain terms and conditions applicable to given bets or wagers, usually called a line or odds, and then accepting bets from members of the public on either side of the wagering proposition with a view toward making a profit from a percentage or commission collected from the bettors or customers for the privilege of placing the bets. You are instructed that "bookmaking" is a crime in the State[s] of (name of state(s)].[3]

[The word, "conduct," as it is used in connection with the gambling business, means to perform any act, function or duty which is necessary to or helpful in the ordinary operation of the business. A person may be found to conduct a gambling business even though [he] [she] is only an agent or employee having no part in the management or control of the business and no share in the profits.][4]

[A mere bettor or customer of a gambling business cannot properly be said to conduct the business.] [If, however, you find beyond a reasonable doubt that a defendant is a bookmaker and that [he] [she] regularly exchanges line information, or regularly places or accepts layoff bets with another bookmaker, you may consider that the defendant and the other bookmaker as being members of the same gambling business.][5]

[It is not necessary to prove [that anyone other than the defendant has been charged with an offense] [that the same five people, including the defendant, owned, financed or conducted

such gambling business throughout more than a thirty-day period] [that the defendant knew the names or identities of any given number of people who might have been so involved].][6] [Neither must it be proved that bets were accepted every day over a greater than thirty-day period, *nor* that such activity constituted the primary business or employment of the defendant.][7]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The word[s], "(conducted) (financed) (managed) (supervised) (directed) (owned)," are all used in their ordinary sense.

2. Fill in the name of the state(s) whose gambling laws were allegedly violated. Multiple state law violations may be subsumed under a single section 1955 violation. *See Sanabria*, 437 U.S. at 72-73.

3. In many cases, instructing the jury whether a particular form of gambling, e.g., bookmaking, violates state law will suffice. However, if the defense contends that the form of gambling shown by the evidence did not violate state law, a more detailed explanation of the elements of the state violation may be appropriate. For example:

> Bookmaking [is] a felony crime in the State of Missouri when conducted as a business rather than in a casual or personal fashion, and when a bookmaker or bookie accepts more than one bet in any day and accepts more than $100 in bets.

United States v. Sutera, 933 F.2d 641, 646 (8th Cir. 1991).

Where the defense contends a narrow or specific exemption from the state law applied to the gambling business which prevented it from being illegal, a more detailed focus may be appropriate. The state instruction should be consulted for information as to how to instruct, and what are the elements of the state offense.

It is the defendant's obligation to raise the issue that the gambling business fell within an exemption from state law. *See United States v. Cartano*, 534 F.2d 788, 791 (8th Cir. 1976). The government has the ultimate burden of showing there is no exemption.

Section 1955 is not a specific intent offense. *See United States v. Kohne*, 358 F. Supp. 1053, 1061 (W.D. Pa. 1973), *aff'd*, 487 F.2d 1395 (3d Cir. 1973); *accord United States v. Mendelsohn*, 896 F.2d 1183, 1188 (9th Cir. 1990). In fact, the government need not prove that the *defendant* himself performed any act prohibited by state law. The focus is on the illegal nature of the gambling *business* which the government must prove the defendant "conducted," "financed," etc., under section 1955(a). *Sanabria*, 437 U.S. at 70; *United States v. Murray*, 928 F.2d 1242, 1245 (1st Cir. 1991). *See also United States v. Hill*, 935 F.2d 196, 199 (11th Cir. 1991) (regulatory exception to 21 U.S.C. § 952(a) is an affirmative defense with the defendant bearing the burden of going forward).

4. The Eighth Circuit follows the majority view in holding that "all levels of personnel involved in the gambling business, not just those on the management level, are to be considered in determining whether five or more persons conduct such business within the meaning of section 1955. *United States v. Hammond*, 821 F.2d 473, 476 (8th Cir. 1987). Thus, it is enough if the person is "helpful" as opposed to "necessary." *Id.*, n.5; *Merrell v. United States*, 463 U.S. 1230, 1231 (1983) (dissent in denial of petition where the defendant's conduct was serving drinks and cleaning up); *United States v. Bennett*, 563 F.2d 879, 883-84 (8th Cir. 1977) (waitress serving drinks). *But see United States v. Boss*, 671 F.2d 396 (10th Cir. 1982). The statute is intended to apply to all who participate in the gambling operation except the bettor. *Sanabria v. United States*, 437 U.S. 54, 70-71 n.26 (1978); *United States v. Hammond*, 821 F.2d 473, 476 (8th Cir. 1987); *United States v. Smaldone*, 583 F.2d 1129, 1132 (10th Cir. 1978).

5. The bracketed sentence may be needed where a jury must decide whether a particular bookmaker was part of the single gambling business alleged in the indictment, or an independent operator who had contact with the alleged business only in placing personal bets.

6. *United States v. Segal*, 867 F.2d 1173 (8th Cir. 1989).

7. These should be included only if they are in issue in the case.

Committee Comments

See 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 55.01-.10 (5th ed. 2000).

Whether the evidence established that five or more persons were involved in conducting the gambling business is a frequent issue. The government need not prove that a particular defendant *knew* or reasonably anticipated that five or more persons were involved. *United States v. Segal*, 867 F.2d 1173, 1178 n.6 (8th Cir. 1989). Evidence of layoff betting and other relationships between bookmakers may establish that apparently separate bookmaking operations are part of a single business. *United States v. Parrino*, 816 F.2d 414, 416 (8th Cir. 1987); *United States v. Reeder*, 614 F.2d 1179, 1183 (8th Cir. 1980); *United States v. Guzek*, 527 F.2d 552 (8th Cir. 1975); *United States v. Thomas*, 508 F.2d 1200 (8th Cir. 1975).

The trial court determines as a matter of law which state gambling statute may be applicable. *See, e.g., United States v. Clements*, 588 F.2d 1030, 1037 (5th Cir. 1979) and 441 U.S. 936 (1979). Minimal or even no explanation to the jury of the state statute allegedly violated has been upheld. *United States v. Balistrieri*, 779 F.2d 1191, 1223 (7th Cir. 1985); *United States v. Quarry*, 614 F.2d 245 (10th Cir. 1980) (citing *United States v. Crockett*, 506 F.2d 759, 761 (5th Cir. 1975)). The Fifth and Eleventh Circuits' pattern instructions recommend advising the jury that the particular type of gambling alleged, e.g., bookmaking, is a violation of state law. It is the gambling business that must violate state law--not the individual acts of a particular defendant. *Sanabria v. United States*, 437 U.S. 54, 70 (1978).

"Gambling" is defined in section 1955(b)(2). Gambling terminology is explained in *United States v. Thomas*, 508 F.2d 1200, 1202 n.2 (8th Cir. 1975).

Final Instructions: Elements of Offenses

"Gross revenue" is measured by the total amount of wagers placed during a single day. *United States v. Rotchford*, 575 F.2d 166 (8th Cir. 1978).

Final Instructions: Elements of Offenses

6.18.1956A. MONEY LAUNDERING - FINANCIAL TRANSACTION TO PROMOTE SPECIFIED UNLAWFUL ACTIVITY (18 U.S.C. § 1956(a)(1)(A)(i))

The crime of [conducting] [attempting to conduct] an illegal financial transaction, as charged in [Count[s] _____ of] the Indictment has four elements, which are:

One, on or about (date),[1] [the defendant] [defendant[s] (name[s])] [conducted] [attempted to conduct][2] a financial transaction,[3] that is, (describe in simple terms, e.g., the purchase of an automobile), which in any way or degree affected interstate or foreign commerce;[4]

Two, the defendant[s] [conducted] [attempted to conduct] the financial transaction with (describe the property, e.g., money, certificates of deposit) that involved the proceeds[5] of (describe the specified unlawful activity,[6] e.g., unlawful distribution of cocaine);

Three, at the time the defendant[s] [conducted] [attempted to conduct] the financial transaction, the defendant[s] knew the (describe property) represented the proceeds of some form of unlawful activity;[7] and

Four, the defendant[s] [conducted] [attempted to conduct] the financial transaction with the intent to promote the carrying on of (describe the specified unlawful activity).[8]

[A defendant may be found to have attempted to conduct a financial transaction if [he] [she] intended to conduct a financial transaction and voluntarily and intentionally carried out some act which was a substantial step toward conducting that financial transaction, even if the transaction was never completed.][9]

[The term "conducted," as used in [this] [Instruction[s] _____] includes initiating, concluding or participating in initiating or concluding a transaction.][10]

[You are further instructed regarding the crime[s] charged in [Count[s] ___ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1956J, unless the Indictment charges multiple money laundering violations and there will be no confusion in adding the definitions common to all counts after all of the substantive money laundering instructions).][11]

[It is not necessary to show that [a] [the] defendant intended to commit (specify additional crime) [himself] [herself]; it is sufficient that in [conducting] [attempting to conduct]

the financial transaction, [a] [the] defendant [himself] [herself] intended to make the unlawful activity easier or less difficult.][12]

[The crime charged in [Count[s] ____ of] the Indictment alleges multiple purposes for the crime, that is, that [the defendant] [defendant[s] (name[s])] knew that the transaction was [conducted] [attempted] for the purposes of (list all objectives). To find [the defendant] [defendant[s] (name[s])] guilty of the offense[s], you must agree unanimously that one or more of the objectives charged were proved beyond a reasonable doubt.][13]

(Insert paragraph describing Government's burden of proof; *See* Instruction 3.09, *supra*.)

Notes on Use

1. The statutes and implementing regulations have been amended frequently. The date of the offense is critical in verifying that the criminal conduct charged was covered by the statute and regulation in effect on that date. Additionally, changes in reporting requirements under Treasury regulations (31 C.F.R.) may affect offenses charged under sections 1956(a)(1)(B)(ii) and 1956(a)(2)(B)(ii).

a. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Title I, Subtitle H (Money Laundering Control Act of 1986), § 1352(a), 100 Stat. 3207-18 to 22, added sections 1956 and 1957 to Title 18 of the United States Code. The Anti-Drug Abuse Act of 1986, including the newly added sections 1956 and 1957 of Title 18, became effective on October 27, 1986.

b. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VI, §§ 6183, 6465, 6469(a)(1) and 6471(a)-(b), and Title VII, § 7031, 102 Stat. 4354, 4375, 4377, 4378 and 4398 became effective on November 18, 1988. *Inter alia* it added a new offense, section 1956(a)(1)(A)(ii), conducting a financial transaction with intent to engage in violations of the tax code (26 U.S.C. §§ 7201 or 7206), expanded the scope of section 1956(a)(2), added a "sting" section, 1956(a)(3), and added a number of "specified unlawful activity" predicate offenses as defined in section 1956(c)(7).

c. The Crime Control Act of 1990, Pub. L. No. 101-647, Title I, §§ 105-108, Title XII, § 1205(j), Title XIV, §§ 1402 and 1404, Title XXV, § 2506 and Title XXXV, § 3557, 104 Stat. 4791-92, 4831, 4835, 4862 and 4927 became effective November 29, 1990. *Inter alia* it amended the provisions of section 1956(a)(2)(B) to permit the government to establish the defendant's knowledge of the illegality of his actions through the law enforcement officer's representations and the defendant's subsequent statements or actions indicating the defendant believed the representation, added violations of foreign law to the definition of "unlawful activity" (18 U.S.C. § 1956(c)(1)), amended the definition of "financial transaction" (section 1956(c)(4)) and "monetary instruments" (section 1956(c)(5)) to emphasize the alternative means of meeting the definitions,

revised and expanded the scope of the term "specified unlawful activity" (SUA) (sections 1956(c)(7)(A) and (D), added as predicate SUA several "environmental" offenses (section 1956(c)(7)(E)), added a new section, 1956(c)(8), defining "state," and added agencies authorized to investigate section 1956 violations. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity), *infra*.

d. Effective October 28, 1992, Pub. L. 102-550, Title XV, §§ 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534 and 1536, 106 Stat. 4055 and 4064-67 added, *inter alia*, use of a safe deposit box to the definition of "transaction" (section 1956(c)(3)), added transfer of title to real property, vehicles, vessels or aircraft to the definitions of "financial transaction" (section 1956(c)(4)), expanded the scope of the term "specified unlawful activity" regarding offenses against foreign nations (section 1956(c)(7)(B)), deleted and added several predicate SUA offenses (section 1956(c)(7)(D)), and created the offense of conspiracy to violate sections 1956 or 1957, carrying the same penalties as the object offenses. Instead of a statutory five-year maximum under 18 U.S.C. § 371, a conspiracy to violate 18 U.S.C. § 1956 now carries a 20-year statutory maximum. *See* 18 U.S.C. § 1956(g). Prior to the amendment, the five-year statutory maximum for conspiracy would have precluded imposition of a sentence corresponding to the sentencing guideline range for the defendants who conspired to launder large sums or who had significant prior criminal histories. *See* United States Sentencing Guideline § 2S1.1 and Chapter 5, Part A (Sentencing Table).

2. Both types of activity have been proscribed since original enactment of section 1956. *See* 18 U.S.C. §§ 1956(a)(1), (a)(2) and (a)(3).

3. *See* Instruction 6.18.1956J(1) (Financial Transaction), *infra*. "Financial transaction" is a term of art originally defined in 18 U.S.C. § 1956(c)(4) and subsequently expanded and clarified through amendments. It encompasses another statutorily defined term of art, "transaction," which has also been expanded since the enactment of section 1956(c)(3). The Committee recommends careful review to determine which of the provisions of sections 1956(c)(3) and 1956(c)(4) were in effect at the time of the alleged financial transaction. *See* Note 1, *supra*.

4. *See* Instruction 6.18.1956J(2) (Interstate and Foreign Commerce), *infra*. All section 1956 offenses require proof that the financial transaction itself or the financial institution, if one was involved, in some way affected interstate or foreign commerce. *See* 18 U.S.C. § 1956(c)(4); *United States v. Baker*, 985 F.2d 1248, 1252 (4th Cir. 1993) (element under section 1956(a)(1)(B)(i)); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 n.6 (8th Cir. 1992) (expert witness testified as to issue), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 924 (5th Cir. 1992) (discussing *United States v. Gallo*, 927 F.2d 815, 823 (5th Cir. 1991) and *United States v. Hamilton*, 931 F.2d 1046, 1051-52 (5th Cir. 1991)). The Eighth Circuit has not ruled whether the indictment must explicitly allege the interstate/foreign commerce nexus. *United States v. Lucas*, 932 F.2d 1210, 1219 (8th Cir. 1991) (court was not required to reach the issue because the indictment which alleged construction of a

shopping center and purchase of merchandise could be reasonably construed to allege the element). *See also United States v. Green*, 964 F.2d 365, 374 (5th Cir. 1992) (citing *Lucas*); *United States v. Lovett*, 964 F.2d 1029, 1038 (10th Cir. 1992) (under section 1957, the interstate commerce nexus is jurisdictional but not an element of the crime charged) (citing *United States v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991)). Given the lack of controlling law on this issue, the Committee recommends that the nexus be alleged in the indictment. In any case, a finding of an effect on interstate or foreign commerce of either the transaction itself or the activities of the financial institution, if one was involved, is essential. *See United States v. Ben M. Hogan Co., Inc.*, 769 F.2d 1293, 1297 (8th Cir. 1985) (reversible error for a district court to give an instruction which could have been understood to include a conclusive presumption of effect on interstate commerce, where such a finding by the jury was essential in a prosecution under the Sherman Anti-Trust Act).

5. *See* Instruction 6.18.1956J(6) (Proceeds), *infra*. The term is not defined in 18 U.S.C. § 1956(c).

6. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity). *infra*. The term should not be confused with "unlawful activity" in general and has a specific, statutory meaning, as set forth in section 1956(c)(7). Because that section has had numerous amendments, and itself incorporates activities defined in several other statutes, the Committee recommends careful review of both the provisions of section 1956(c)(7) and of the incorporated statutes which were in effect at the time of the alleged financial transaction (section 1956(a)(1)) or transportation, transmission or transfer (section 1956)(a)(2)). *See also* Note 8, *infra*.

Throughout these instructions, the plain description of the offense has been substituted for the phrase "specified unlawful activity" (SUA), which is a term of art specifically defined in 18 U.S.C. § 1956(c)(7), and which incorporates *inter alia* most of 18 U.S.C. § 1961(1). If the indictment is read to the jury and contains the phrase, any inquiry by the jury as to whether a particular offense is "specified unlawful activity" can be answered as a matter of law. Section 1956(c)(7) as originally enacted effective October 27, 1986, was amended on November 18, 1988, on November 29, 1990, and on October 28, 1992. *See* Note 1, *supra*. The provisions of section 1956(c)(7) used should correspond to the alleged date of the offense. Further, many of the most common SUAs, such as drug trafficking, are derived from the definition of "racketeering activity," contained in 18 U.S.C. § 1961(1). That statute has also been amended since October 27, 1986, on November 10, 1986, November 18, 1988, and on November 29, 1990. Therefore, when determining whether an offense qualifies as an SUA, the applicable provisions of section 1961(1) should also be reviewed.

7. *See* Instruction 6.18.1956J, *infra*. The requirement that the defendant knew the property involved in the financial transaction represented the proceeds of some form of unlawful activity is common to all section 1956(a)(1) offenses. "Unlawful activity" encompasses many more violations than "specified unlawful activity." *Compare* section 1956(c)(1) *with* section 1956(c)(7). However, between October 27, 1986, and November 29, 1990, it did not include felony violations of foreign law. *See* Note 1, *supra*.

8. The mens rea required under sections 1956(a)(1)(A), (a)(2)(A), and (a)(3) offenses is more restrictive than under sections 1956(a)(1)(B) and (a)(2)(B). The former requires proof of the defendant's intent; the latter merely requires that the defendant have knowledge of the object of the financial transaction. *See* G. Richard Strafer, *Money Laundering: The Crime of the '90's*, 27 Amer. Crim. L. Rev. 149, 162, 172 (1989).

Under sections 1956(a)(1)(A)(i), 1956(a)(2)(a) and 1956(a)(3), the defendant must have acted with the intent to promote a "specified" unlawful activity, as defined in 18 U.S.C. § 1956(c)(7), rather than the more broadly described unlawful activity defined in 18 U.S.C. § 1956(c)(1). *See* Note 12, *infra*. Although the specified unlawful activity inserted in the second element, *see* Note 6, *supra*, will frequently be the same set forth regarding the defendant's intent, the two forms of specified unlawful activity need not be the same, e.g., drug proceeds with which the defendant conducts a transaction with the intent of making a fraudulent credit application.

On November 18, 1988, section 1956(a)(1)(A)(ii) was added, creating a fourth objective constituting an offense under section 1956(a)(1): "[w]ith intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986" (i.e., attempt to evade or defeat tax or making false statements, 26 U.S.C. §§ 7201 and 7206). The Committee believes that section 1956(a)(1)(A)(ii) prosecutions will be rare; therefore, no instruction is included. If used, such an instruction should define what constitutes violations of 26 U.S.C. § 7201 or 7206, as appropriate. The jury should also be instructed that they must consider a defendant's asserted, subjective beliefs that any unreported income was not income under the law and/or that the defendant was not a taxpayer within the meaning of the Internal Revenue Code. *See Cheek v. United States*, 498 U.S. 192, 202-03 (1991) (error for trial court to instruct jury that the defendant's subjective beliefs should not be considered in determining whether he acted willfully); *United States v. Grunewald*, 987 F.2d 531, 535-36 (8th Cir. 1993). The Court would not be required to give a *Cheek* instruction if the facts demonstrated that the defendant challenged the constitutionality or validity of the tax laws, rather than held a good faith but mistaken belief or misunderstanding that the law did not apply to him. *See United States v. Dack*, 987 F.2d 1282, 1285 (7th Cir. 1993) (citing *United States v. Cheek*, 931 F.2d 1206, 1208 (7th Cir. 1991) (on remand from the Supreme Court)). *See also United States v. Dykstra*, 991 F.2d 450 (8th Cir. 1993) (construing *Cheek* and discussing when a personal belief is not relevant to the issue of willfulness).

9. *See* Instruction 8.01, *infra*.

10. *See* 18 U.S.C. § 1956(c)(2). This definition was included in the October 27, 1986, version of the statute and has not changed since.

11. The supplemental definitions and instructions contained in Instruction 6.18.1956J, *infra*, should be given in most cases. Whether they are inserted in each 6.18.1956 instruction or given after a series of 6.18.1956A through 6.18.1956I instructions is an option for the court to consider based on the number and types of money laundering counts and the ability of the jury to relate the definitions to the applicable counts.

Final Instructions: Elements of Offenses

12. *See United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991); *see also United States v. Corona*, 885 F.2d 766, 773 (11th Cir. 1989) (the defendant himself does not have to be involved in the offense being facilitated). The specified unlawful activity which a defendant intends to promote may be a continuing offense, may be still underway or may be an offense that will be committed in the future. The financial transaction need not be linked to a specific future offense; it is sufficient if a defendant intended to promote a specified unlawful activity generally. For example, issuing checks to vendors providing beeper and mobile telephone services used in a continuing criminal enterprise would qualify, but purchases of cellular phones not previously used or clearly intended for use in the enterprise would not.

13. If the indictment alleges the defendant did not personally conduct the transaction but knew the transaction was conducted for more than one purpose, use the first set of bracketed language. If the indictment alleges the defendant personally engaged in the financial transaction, use the second set of bracketed language. The multiple objective situation may apply both to multiple intent (i.e., sections 1956(a)(1)(A)(i) and (ii)) and to multiple knowledge (i.e., sections 1956(a)(1)(B)(i) and (ii)) allegations, as well as to allegations of violation of both sections 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i). *See United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991) (government should give clear notice of the provision(s) under which it is proceeding). Although there is no case law requiring unanimity on objectives, if an instruction to that effect is desired, *see* Instruction 5.06(F), *supra*.

Committee Comments

See generally United States v. Cruz, 993 F.2d 164 (8th Cir. 1993); *United States v. Peery*, 977 F.2d 1230, 1234 (8th Cir. 1992); *United States v. Turner*, 975 F.2d 490, 497 (8th Cir. 1992); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Davila*, 964 F.2d 778, 782 (8th Cir. 1992); *United States v. Sutera*, 933 F.2d 641, 644-46 (8th Cir. 1991); *United States v. Martin*, 933 F.2d 609, 610 (8th Cir. 1991); *United States v. Lucas*, 932 F.2d 1210, 1214 n.3, 1219 (8th Cir. 1991); *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990); *United States v. Lee*, 886 F.2d 998, 1002-03 (8th Cir. 1989). *See also* U.S. Dept. of Justice, *Money Laundering Federal Prosecution Manual* (Feb. 1992).

See Instruction 6.18.1956J, *infra*, for additional instructions which should be given in most cases.

6.18.1956B. MONEY LAUNDERING - FINANCIAL TRANSACTION TO CONCEAL PROCEEDS (18 U.S.C. § 1956(a)(1)(B)(i))

The crime of [conducting] [attempting to conduct] an illegal financial transaction, as charged in [Count[s] _____ of] the Indictment has four elements, which are:

One, on or about (date),[1] [the defendant] [defendant[s] (name[s])] [conducted] [attempted to conduct][2] a financial transaction,[3] that is, (describe in simple terms, e.g., the purchase of an automobile), which in any way or degree affected interstate or foreign commerce;[4]

Two, the defendant[s] [conducted] [attempted to conduct] the financial transaction with (describe the property, e.g., money, certificates of deposit) that involved the proceeds[5] of (describe the specified unlawful activity,[6] e.g., unlawful distribution of cocaine);

Three, at the time the defendant[s] [conducted] [attempted to conduct] the financial transaction, the defendant[s] knew the (describe property) represented the proceeds of some form of unlawful activity;[7] and

Four, the defendant[s] [conducted] [attempted to conduct] the financial transaction knowing that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of (describe the specified unlawful activity).[8]

[A defendant may be found to have attempted to conduct a financial transaction if [he] [she] intended to conduct a financial transaction and voluntarily and intentionally carried out some act which was a substantial step toward conducting that financial transaction, even if the transaction was never completed.][9]

[The term "conducted," as used in [this] [Instruction[s] _____] includes initiating, concluding or participating in initiating or concluding a transaction.][10]

[You are further instructed regarding the crime[s] charged in [Count[s] ___ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1956J, unless the Indictment charges multiple money laundering violations and there will be no confusion in adding the definitions common to all counts after all of the substantive money laundering instructions).][11]

Final Instructions: Elements of Offenses

[You may find that [the defendant] [defendant[s] (name[s])] knew the purpose of the financial transaction was to conceal or disguise the nature, location, source, ownership or control of the proceeds of (describe the specified unlawful activity) if you find beyond a reasonable doubt that (insert appropriate language from Instruction 7.04).][12]

[The crime charged in [Count[s] ____ of] the Indictment alleges multiple purposes for the crime, that is, that [the defendant] [defendant[s] (name[s])] knew that the transaction was [conducted] [attempted] for the purposes of (list all objectives). To find [the defendant] [defendant[s] (name[s])] guilty of the offense[s], you must agree unanimously that one or more of the objectives charged were proved beyond a reasonable doubt.][13]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statutes and implementing regulations have been amended frequently. The date of the offense is critical in verifying that the criminal conduct charged was covered by the statute and regulation in effect on that date. Additionally, changes in reporting requirements under Treasury regulations (31 C.F.R.) may affect offenses charged under sections 1956(a)(1)(B)(ii) and 1956(a)(2)(B)(ii).

a. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Title I, Subtitle H (Money Laundering Control Act of 1986), § 1352(a), 100 Stat. 3207-18 to 22, added sections 1956 and 1957 to Title 18 of the United States Code. The Anti-Drug Abuse Act of 1986, including the newly added sections 1956 and 1957 of Title 18, became effective on October 27, 1986.

b. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VI, §§ 6183, 6465, 6469(a)(1) and 6471(a)-(b), and Title VII, § 7031, 102 Stat. 4354, 4375, 4377, 4378 and 4398 became effective November 18, 1988. *Inter alia* it added a new offense, section 1956(a)(1)(A)(ii), conducting a financial transaction with intent to engage in violations of the tax code (26 U.S.C. §§ 7201 or 7206), expanded the scope of section 1956(a)(2), added a "sting" section, 1956(a)(3), and added a number of "specified unlawful activity" predicate offenses as defined in section 1956(c)(7).

c. The Crime Control Act of 1990, Pub. L. No. 101-647, Title I, §§ 105-108, Title XII, § 1205(j), Title XIV, §§ 1402 and 1404, Title XXV, § 2506 and Title XXXV, § 3557, 104 Stat. 4791-92, 4831, 4835, 4862 and 4927 became effective November 29, 1990. *Inter alia* it amended the provisions of section 1956(a)(2)(B) to permit the government to establish the defendant's knowledge of the illegality of his actions through the law enforcement officer's representations and the defendant's subsequent statements or actions indicating the defendant believed the representation, added violations of

foreign law to the definition of "unlawful activity" (18 U.S.C. § 1956(c)(1)), amended the definition of "financial transaction" (section 1956(c)(4)) and "monetary instruments" (section 1956(c)(5)) to emphasize the alternative means of meeting the definitions, revised and expanded the scope of the term "specified unlawful activity" (SUA) (sections 1956(c)(7)(A) and (D), added as predicate SUA several "environmental" offenses (section 1956(c)(7)(E)), added a new section, 1956(c)(8), defining "state," and added agencies authorized to investigate section 1956 violations. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity), *infra*.

d. Effective October 28, 1992, Pub. L. 102-550, Title XV, §§ 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534 and 1536, 106 Stat. 4055 and 4064-67 added, *inter alia*, use of a safe deposit box to the definition of "transaction" (section 1956(c)(3)), added transfer of title to real property, vehicles, vessels or aircraft to the definitions of "financial transaction" (section 1956(c)(4)), expanded the scope of the term "specified unlawful activity" regarding offenses against foreign nations (section 1956(c)(7)(B)), deleted and added several predicate SUA offenses (section 1956(c)(7)(D)) and created the offense of conspiracy to violate sections 1956 or 1957, carrying the same penalties as the object offenses. Instead of a statutory five-year maximum under 18 U.S.C. § 371, a conspiracy to violate 18 U.S.C. § 1956 now carries a 20-year statutory maximum. *See* 18 U.S.C. § 1956(g). Prior to the amendment, the five-year statutory maximum for conspiracy would have precluded imposition of a sentence corresponding to the sentencing guideline range for the defendants who conspired to launder large sums or who had significant prior criminal histories. *See* United States Sentencing Guideline § 2S1.1 and Chapter 5, Part A (Sentencing Table).

2. Both types of activity have been proscribed since original enactment of section 1956. *See* 18 U.S.C. §§ 1956(a)(1), (a)(2) and (a)(3).

3. *See* Instruction 6.18.1956J(1) (Financial Transaction), *infra*. "Financial transaction" is a term of art originally defined in 18 U.S.C. § 1956(c)(4) and subsequently expanded and clarified through amendments. It encompasses another statutorily defined term of art, "transaction," which has also been expanded since the enactment of section 1956(c)(3). The Committee recommends careful review to determine which of the provisions of sections 1956(c)(3) and 1956(c)(4) were in effect at the time of the alleged financial transaction. *See* Note 1, *supra*.

4. *See* Instruction 6.18.1956J(2) (Interstate and Foreign Commerce), *infra*. All section 1956 offenses require proof that the financial transaction itself or the financial institution, if one was involved, in some way affected interstate or foreign commerce. *See* 18 U.S.C. § 1956(c)(4); *United States v. Baker*, 985 F.2d 1248, 1252 (4th Cir. 1993) (element under 1956(a)(1)(B)(i)); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 n.6 (8th Cir. 1992) (expert witness testified as to issue), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 924 (5th Cir. 1992) (discussing *United States v. Gallo*, 927 F.2d 815, 823 (5th Cir. 1991) and *United States v. Hamilton*, 931 F.2d 1046, 1051-52 (5th Cir. 1991)).

The Eighth Circuit has not ruled whether the indictment must explicitly allege the interstate/foreign commerce nexus. *United States v. Lucas*, 932 F.2d 1210, 1219 (8th Cir. 1991) (court was not required to reach the issue because the indictment which alleged construction of a shopping center and purchase of merchandise could be reasonably construed to allege the element). *See also United States v. Green*, 964 F.2d 365, 374 (5th Cir. 1992) (citing *Lucas*); *United States v. Lovett*, 964 F.2d 1029, 1038 (10th Cir. 1992) (under section 1957, the interstate commerce nexus is jurisdictional but not an element of the crime charged) (citing *United States v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991)). Given the lack of controlling law on this issue, the Committee recommends that the nexus be alleged in the indictment. In any case, a finding of an effect on interstate or foreign commerce of either the transaction itself or the activities of the financial institution, if one was involved, is essential. *See United States v. Ben M. Hogan Co., Inc.*, 769 F.2d 1293, 1297 (8th Cir. 1985) (reversible error for a district court to give an instruction which could have been understood to include a conclusive presumption of effect on interstate commerce, where such a finding by the jury was essential in a prosecution under the Sherman Anti-Trust Act).

5. *See* Instruction 6.18.1956J(6) (Proceeds), *infra*. The term is not defined in 18 U.S.C. § 1956(c).

6. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity), *infra*. The term should not be confused with "unlawful activity" in general and has a specific, statutory meaning, as set forth in section 1956(c)(7). Because that section has had numerous amendments, and itself incorporates activities defined in several other statutes, the Committee recommends careful review of both the provisions of section 1956(c)(7) and of the incorporated statutes which were in effect at the time of the alleged financial transaction (section 1956(a)(1)) or transportation, transmission or transfer (section 1956)(a)(2)).

Throughout these instructions, the plain description of the offense has been substituted for the phrase "specified unlawful activity" (SUA), which is a term of art specifically defined in 18 U.S.C. § 1956(c)(7), and which incorporates *inter alia* most of 18 U.S.C. § 1961(1). If the indictment is read to the jury and contains the phrase, any inquiry by the jury as to whether a particular offense is "specified unlawful activity" can be answered as a matter of law. Section 1956(c)(7) as originally enacted effective October 27, 1986, was amended on November 18, 1988, on November 29, 1990, and on October 28, 1992. *See* Note 1, *supra*. The provisions of section 1956(c)(7) used should correspond to the alleged date of the offense. Further, many of the most common SUAs, such as drug trafficking, are derived from the definition of "racketeering activity," contained in 18 U.S.C. § 1961(1). That statute has also been amended since October 27, 1986, on November 10, 1986, November 18, 1988, and on November 29, 1990. Therefore, when determining whether an offense qualifies as an SUA, the applicable provisions of section 1961(1) should also be reviewed.

7. *See* Instruction 6.18.1956J, *infra*. The requirement that the defendant knew the property involved in the financial transaction represented the proceeds of some form of unlawful activity is common to all section 1956(a)(1) offenses. "Unlawful activity" encompasses many

more violations than "specified unlawful activity." *Compare* section 1956(c)(1) *with* section 1956(c)(7). However, between October 27, 1986, and November 29, 1990, it did not include felony violations of foreign law. *See* Note 1, *supra*.

8. A conviction under section 1956(a)(1)(B)(i) (concealment) requires a design to conceal or disguise the nature, location, source, ownership or control of the proceeds. A "typical" money laundering transaction involving purchases in third-party names frequently satisfies this element. Purchases in the names of close family members, however, are problematic, especially where the defendant's subsequent use of the asset is open and conspicuous. *Compare United States v. Sanders*, 929 F.2d 1466, 1472 (10th Cir. 1991) (contrasting *United States v. Lee*, 886 F.2d 998, 1002-03 (8th Cir. 1989)) *with United States v. Sutera*, 933 F.2d 641, 648 (8th Cir. 1991) (money laundering statute did not require that the defendant did a good job of laundering the proceeds; the jury simply had to find that the defendant intended to hide them) *and United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 n.7 (8th Cir. 1992) (the defendant commingled legitimate and illegitimate business receipts over a three year period; despite no attempt to disguise control of the account, one could infer from her record keeping and bank activity a design to conceal or disguise her illegal proceeds), *aff'd on other grounds*, 511 U.S. 513 (1994).

In a "mixed motive" situation, a defendant may be found guilty under both sections 1956(a)(1)(B)(i) and 1956(a)(1)(B)(ii), e.g., where a transaction is designed in whole or in part to conceal and the same transaction also is designed to evade taxes. *See United States v. Isabel*, 945 F.2d 1193, 1203 (1st Cir. 1991). Similarly, the same transaction may support separate offenses under section 1956(a)(1)(A)(i) (promoting) and 1956(a)(1)(B)(i) (concealing). The indictment and instructions should clearly place the defendant, the court and the jury on notice whether the government is proceeding under the former, the latter or both. *United States v. Jackson*, 935 F.2d at 842.

9. *See* Instruction 8.01, *infra*.

10. *See* 18 U.S.C. § 1956(c)(2). This definition was included in the October 27, 1986, version of the statute and has not changed since.

11. The supplemental definitions and instructions contained in Instruction 6.18.1956J, *infra*, should be given in most cases. Whether they are inserted in each 6.18.1956 instruction or given after a series of 6.18.1956A through 6.18.1956I instructions is an option for the Court to consider based on the number and types of money laundering counts and the ability of the jury to relate the definitions to the applicable counts.

12. *See* Instruction 7.04, *infra*. The 1956(a)(1)(B) "knowing" requirement encompasses instances of "willful blindness." S. Rep. No. 433, 99th Cong., 2d Sess. 6, 10 (1986), *construed in* 27 Amer. Crim. L. Rev. 167. *See also United States v. Kaufmann*, 985 F.2d 884, 897 n.6 (7th Cir. 1993) ("ostrich" instruction appropriate for counts requiring knowledge); *United States v. Campbell*, 977 F.2d 854, 857-58 (4th Cir. 1992) (discussing a willful blindness instruction given in a section 1956(a)(1)(B)(i) trial); *United States v. Montoya*, 945 F.2d 1068, 1076 (9th Cir.

1991) (distinguishing sections 1956(a)(1)(A) and 1956(a)(1)(B)); *United States v. Fuller*, 974 F.2d 1474, 1482 (5th Cir. 1992) (deliberate ignorance instruction regarding conspiracy to launder money). In *United States v. Barnhart*, 979 F.2d 647, 651-52 (8th Cir. 1992), the Eighth Circuit addressed a willful blindness instruction patterned on 7.04 and held that such an instruction "should not be given unless there is evidence to support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution." *Id.* (quoting *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1987)). If there is evidence a defendant actually believed that the transaction was for an innocent purpose, *see* Instruction 7.04, *infra*, nn 3,4. The deliberate ignorance instruction should not be given where the evidence points solely to either actual knowledge, or lack thereof, and where there is no evidence that the defendant had a conscious purpose to avoid learning the truth. Note 5, Instruction 7.04, *infra*; *Barnhart*, 979 F.2d at 651. The permissive rather than mandatory phrasing "you *may* find" comports with the usage suggested in *Karras v. Leapley*, 974 F.2d 71, 74 n.6 (8th Cir. 1992).

13. If the indictment alleges the defendant did not personally conduct the transaction but knew the transaction was conducted for more than one purpose, use the first set of bracketed language. If the indictment alleges the defendant personally engaged in the financial transaction, use the second set of bracketed language. The multiple objective situation may apply both to multiple intent (i.e., 1956(a)(1)(A)(i) and (ii)) and to multiple knowledge (i.e., 1956(a)(1)(B)(i) and (ii)) allegations, as well as to allegations of violation of both 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i). *See* Note 8, *supra*. *See also United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991) (government should give clear notice of the provision(s) under which it is proceeding). Although there is no case law requiring unanimity on objectives, if an instruction to that effect is desired, *see* Instruction 5.06(F), *supra*.

Committee Comments

See generally United States v. Cruz, 993 F.2d 164 (8th Cir. 1993); *United States v. Peery*, 977 F.2d 1230, 1234 (8th Cir. 1992); *United States v. Turner*, 975 F.2d 490, 497 (8th Cir. 1992); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Davila*, 964 F.2d 778, 782 (8th Cir. 1992); *United States v. Sutera*, 933 F.2d 641, 644-46 (8th Cir. 1991); *United States v. Martin*, 933 F.2d 609, 610 (8th Cir. 1991); *United States v. Lucas*, 932 F.2d 1210, 1214 n.3, 1219 (8th Cir. 1991); *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990); *United States v. Lee*, 886 F.2d 998, 1002-03 (8th Cir. 1989). *See also* U.S. Dept. of Justice, *Money Laundering Federal Prosecution Manual* (Feb. 1992).

See Instruction 6.18.1956J, *infra*, for additional instructions which should be given in most cases.

6.18.1956C. MONEY LAUNDERING - FINANCIAL TRANSACTION TO AVOID REPORTING REQUIREMENTS (18 U.S.C. § 1956(a)(1)(B)(ii))

The crime of [conducting] [attempting to conduct] an illegal financial transaction, as charged in [Count[s] _____ of] the Indictment has four elements, which are:

One, on or about (date),[1] [the defendant] [defendant[s] (name[s])] [conducted] [attempted to conduct][2] a financial transaction,[3] that is, (describe in simple terms, e.g., the purchase of an automobile), which in any way or degree affected interstate or foreign commerce;[4]

Two, the defendant[s] [conducted] [attempted to conduct] the financial transaction with (describe the property, e.g., money, certificates of deposit) that involved the proceeds[5] of (describe the specified unlawful activity,[6] e.g., unlawful distribution of cocaine);

Three, at the time the defendant[s] [conducted] [attempted to conduct] the financial transaction, the defendant[s] knew the (describe property) represented the proceeds of some form of unlawful activity;[7] and

Four, the defendant[s] [conducted] [attempted to conduct] the financial transaction knowing that the transaction was designed in whole or in part to avoid a transaction reporting requirement under state or federal law.[8]

[A defendant may be found to have attempted to conduct a financial transaction if [he] [she] intended to conduct a financial transaction and voluntarily and intentionally carried out some act which was a substantial step toward conducting that financial transaction, even if the transaction was never completed.][9]

[The term "conducted," as used in [this] [Instruction[s] _____] includes initiating, concluding or participating in initiating or concluding a transaction.][10]

[You are further instructed regarding the crime[s] charged in [Count[s] ___ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1956J, unless the Indictment charges multiple money laundering violations and there will be no confusion in adding the definitions common to all counts after all of the substantive money laundering instructions).][11]

Final Instructions: Elements of Offenses

[The Currency Transaction Reporting (CTR) requirement of federal law[12] requires financial institutions to file a report for each deposit, withdrawal, exchange of currency, or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Multiple currency transactions are treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totaling more than $10,000 during any one business day. A financial institution includes all of its domestic branch offices for purposes of this requirement. The phrase "financial institution" includes (insert appropriate institution from 31 C.F.R. § 103.11(i), such as "bank" or "savings & loan").][13]

[You may find that [the defendant] [defendant[s] (name[s])] knew that the purpose of the transaction was to avoid the CTR reporting requirement if you find beyond a reasonable doubt that (insert appropriate language from Instruction 7.04).][14]

[The crime charged in [Count[s] ____ of] the Indictment alleges multiple purposes for the crime, that is, that [the defendant] [defendant[s] (name[s])] knew that the transaction was [conducted] [attempted] for the purposes of (list all objectives). To find [the defendant] [defendant[s] (name[s])] guilty of the offense[s], you must agree unanimously that one or more of the objectives charged were proved beyond a reasonable doubt.][15]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statutes and implementing regulations have been amended frequently. The date of the offense is critical in verifying that the criminal conduct charged was covered by the statute and regulation in effect on that date. Additionally, changes in reporting requirements under Treasury regulations (31 C.F.R.) may affect offenses charged under sections 1956(a)(1)(B)(ii) and 1956(a)(2)(B)(ii).

a. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Title I, Subtitle H (Money Laundering Control Act of 1986), § 1352(a), 100 Stat. 3207-18 to 22, added sections 1956 and 1957 to Title 18 of the United States Code. The Anti-Drug Abuse Act of 1986, including the newly added sections 1956 and 1957 of Title 18, became effective on October 27, 1986.

b. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VI, §§ 6183, 6465, 6469(a)(1) and 6471(a)-(b), and Title VII, § 7031, 102 Stat. 4354, 4375, 4377, 4378 and 4398 became effective on November 18, 1988. *Inter alia* it added a new

offense, section 1956(a)(1)(A)(ii), conducting a financial transaction with intent to engage in violations of the tax code (26 U.S.C. §§ 7201 or 7206), expanded the scope of section 1956(a)(2), added a "sting" section, 1956(a)(3), and added a number of "specified unlawful activity" predicate offenses as defined in section 1956(c)(7).

c. The Crime Control Act of 1990, Pub. L. No. 101-647, Title I, §§ 105-108, Title XII, § 1205(j), Title XIV, §§ 1402 and 1404, Title XXV, § 2506 and Title XXXV, § 3557, 104 Stat. 4791-92, 4831, 4835, 4862 and 4927 became effective on November 29, 1990. *Inter alia* it amended the provisions of section 1956(a)(2)(B) to permit the government to establish the defendant's knowledge of the illegality of his actions through the law enforcement officer's representations and the defendant's subsequent statements or actions indicating the defendant believed the representation, added violations of foreign law to the definition of "unlawful activity" (18 U.S.C. § 1956(c)(1)), amended the definition of "financial transaction" (section 1956(c)(4)) and "monetary instruments" (section 1956(c)(5)) to emphasize the alternative means of meeting the definitions, revised and expanded the scope of the term "specified unlawful activity" (SUA) (sections 1956(c)(7)(A) and (D), added as predicate SUA several "environmental" offenses (section 1956(c)(7)(E)), added a new section, 1956(c)(8), defining "state," and added agencies authorized to investigate section 1956 violations. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity), *infra*.

d. Effective October 28, 1992, Pub. L. 102-550, Title XV, §§ 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534 and 1536, 106 Stat. 4055 and 4064-67 added, *inter alia*, use of a safe deposit box to the definition of "transaction" (section 1956(c)(3)), added transfer of title to real property, vehicles, vessels or aircraft to the definitions of "financial transaction" (section 1956(c)(4)), expanded the scope of the term "specified unlawful activity" regarding offenses against foreign nations (section 1956(c)(7)(B)), deleted and added several predicate SUA offenses (section 1956(c)(7)(D)) and created the offense of conspiracy to violate sections 1956 or 1957, carrying the same penalties as the object offenses. Instead of a statutory five-year maximum under 18 U.S.C. § 371, a conspiracy to violate 18 U.S.C. § 1956 now carries a 20-year statutory maximum. *See* 18 U.S.C. § 1956(g). Prior to the amendment, the five-year statutory maximum for conspiracy would have precluded imposition of a sentence corresponding to the sentencing guideline range for the defendants who conspired to launder large sums or who had significant prior criminal histories. *See* United States Sentencing Guideline § 2S1.1 and Chapter 5, Part A (Sentencing Table).

2. Both types of activity have been proscribed since original enactment of section 1956. *See* 18 U.S.C. §§ 1956(a)(1), (a)(2) and (a)(3).

3. *See* Instruction 6.18.1956J(1) (Financial Transaction), *infra*. "Financial transaction" is a term of art originally defined in 18 U.S.C. § 1956(c)(4) and subsequently expanded and clarified through amendments. It encompasses another statutorily defined term of art, "transaction," which has also been expanded since the enactment of section 1956(c)(3). The

Committee recommends careful review to determine which of the provisions of sections 1956(c)(3) and 1956(c)(4) were in effect at the time of the alleged financial transaction. *See* Note 1, *supra*.

4. *See* Instruction 6.18.1956J, *infra*. All section 1956 offenses require proof that the financial transaction itself or the financial institution, if one was involved, in some way affected interstate or foreign commerce. *See* 18 U.S.C. § 1956(c)(4); *United States v. Baker*, 985 F.2d 1248, 1252 (4th Cir. 1993) (element under 1956(a)(1)(B)(i)); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 n.6 (8th Cir. 1992) (expert witness testified as to issue), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 924 (5th Cir. 1992) (discussing *United States v. Gallo*, 927 F.2d 815, 823 (5th Cir. 1991) and *United States v. Hamilton*, 931 F.2d 1046, 1051-52 (5th Cir. 1991)). The Eighth Circuit has not ruled whether the indictment must explicitly allege the interstate/foreign commerce nexus. *United States v. Lucas*, 932 F.2d 1210, 1219 (8th Cir. 1991) (court was not required to reach the issue because the indictment which alleged construction of a shopping center and purchase of merchandise could be reasonably construed to allege the element). *See also United States v. Green*, 964 F.2d 365, 374 (5th Cir. 1992) (citing *Lucas*); *United States v. Lovett*, 964 F.2d 1029, 1038 (10th Cir. 1992) (under section 1957, the interstate commerce nexus is jurisdictional but not an element of the crime charged) (citing *United States v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991)). Given the lack of controlling law on this issue, the Committee recommends that the nexus be alleged in the indictment. In any case, a finding of an effect on interstate or foreign commerce of either the transaction itself or the activities of the financial institution, if one was involved, is essential. *See United States v. Ben M. Hogan Co., Inc.*, 809 F.2d 480 (8th Cir. 1987) (failure to instruct jury that it must find an interstate commerce connection can be harmless error).

5. *See* Instruction 6.18.1956J(6) (Proceeds), *infra*. The term is not defined in 18 U.S.C. § 1956(c).

6. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity), *infra*. The term should not be confused with "unlawful activity" in general and has a specific, statutory meaning, as set forth in section 1956(c)(7). Because that section has had numerous amendments, and itself incorporates activities defined in several other statutes, the Committee recommends careful review of both the provisions of section 1956(c)(7) and of the incorporated statutes which were in effect at the time of the alleged financial transaction (1956(a)(1)) or transportation, transmission or transfer (1956)(a)(2)).

Throughout these instructions, the plain description of the offense has been substituted for the phrase "specified unlawful activity" (SUA), which is a term of art specifically defined in 18 U.S.C. § 1956(c)(7), and which incorporates *inter alia* most of 18 U.S.C. § 1961(1). If the indictment is read to the jury and contains the phrase, any inquiry by the jury as to whether a particular offense is "specified unlawful activity" can be answered as a matter of law. Section 1956(c)(7) as originally enacted effective October 27, 1986, was amended on November 18, 1988, on November 29, 1990, and on October 28, 1992. *See* Note 1, *supra*. The provisions of section 1956(c)(7) used should correspond to the alleged date of the offense. Further, many of

the most common SUAs, such as drug trafficking, are derived from the definition of "racketeering activity," contained in 18 U.S.C. § 1961(1). That statute has also been amended since October 27, 1986, on November 10, 1986, November 18, 1988, and on November 29, 1990. Therefore, when determining whether an offense qualifies as an SUA, the applicable provisions of section 1961(1) should also be reviewed.

7. *See* Instruction 6.18.1956J, *infra*. The requirement that the defendant knew the property involved in the financial transaction represented the proceeds of some form of unlawful activity is common to all section 1956(a)(1) offenses. "Unlawful activity" encompasses many more violations than "specified unlawful activity." *Compare* section 1956(c)(1) *with* section 1956(c)(7). However, between October 27, 1986, and November 29, 1990, it did not include felony violations of foreign law. *See* Note 1, *supra*.

8. *See* Instruction 6.18.1956J(1) (Financial Transaction). Determination of the transaction reporting requirements in effect on the date of the alleged transaction requires reviewing the provisions of both 31 U.S.C. §§ 5311-5327 and 31 C.F.R. Chapter 103, in effect on that date. Further, if the alleged financial transaction involves the use of a "financial institution," both 31 U.S.C. § 5312(a)(2) and the regulations promulgated thereunder, should be reviewed to ensure that the entity was a financial institution. *See* 18 U.S.C. § 1956(c)(6) (incorporating by reference 31 U.S.C. § 5312(a)(2) and its regulations).

The decision in *Ratzlaf v. United States*, 510 U.S. 135 (1994) is not likely applicable to violations of 18 U.S.C. § 1956. *Ratzlaf* involved an interpretation of 31 U.S.C. § 5324 and the mental state required under that statute. Because the mental state requirements of 18 U.S.C. § 1956 are clearly different, the applicability of *Ratzlaf* is doubtful.

9. *See* Instruction 8.01, *infra*.

10. *See* 18 U.S.C. § 1956(c)(2). This definition was included in the October 27, 1986, version of the statute and has not changed since.

11. The supplemental definitions and instructions contained in Instruction 6.18.1956J should be given in most cases. Whether they are inserted in each 6.18.1956 instruction or given after a series of 6.18.1956A through 6.18.1956I instructions is an option for the court to consider based on the number and types of money laundering counts and the ability of the jury to relate the definitions to the applicable counts.

12. Use with 18 U.S.C. § 1956(a)(1)(B)(ii). In addition to Currency Transaction Report (CTR) requirements under 31 U.S.C. § 5313, two other common reporting requirements are Currency and Monetary Instrument Reports (CMIR) under 31 U.S.C. § 5316 and Forms 8300, under 26 U.S.C. § 6050I. Analogous instructions about those reporting requirements and their applicable provisions can be tailored for such cases.

13. *See* 31 U.S.C. § 5313; 31 C.F.R. § 103.22. Care should be taken to use the versions of the statutes and regulations in effect on the date of the transaction. For CMIRs the applicable

references are 31 U.S.C. § 5316 and 31 C.F.R. § 103.23. For Forms 8300, *see* 26 U.S.C. § 6050I.

14. *See* Instruction 7.04, *infra*. The 1956(a)(1)(B) "knowing" requirement encompasses instances of "willful blindness." S. Rep. No. 433, 99th Cong., 2d Sess. 6, 10 (1986) *construed in* 27 Amer. Crim. L. Rev. 167. *See also United States v. Kaufmann*, 985 F.2d 884, 897 n.6 (7th Cir. 1993) ("ostrich" instruction appropriate for counts requiring knowledge); *United States v. Campbell*, 977 F.2d 854, 857-58 (4th Cir. 1992) (discussing a willful blindness instruction given in a section 1956(a)(1)(B)(i) trial); *United States v. Montoya*, 945 F.2d 1068, 1076 (9th Cir. 1991) (distinguishing sections 1956(a)(1)(A) and 1956(a)(1)(B)); *United States v. Fuller*, 974 F.2d 1474, 1482 (5th Cir. 1992) (deliberate ignorance instruction regarding conspiracy to launder money). In *United States v. Barnhart*, 979 F.2d 647, 651-52 (8th Cir. 1992), the Eighth Circuit addressed a willful blindness instruction patterned on Instruction 7.04, *infra*, and held that such an instruction "should not be given unless there is evidence to support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution." *Id.* (quoting *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1987). If there is evidence a defendant actually believed that the transaction was for an innocent purpose, *see* Instruction 7.04, *infra*, nn 3,4. The deliberate ignorance instruction should not be given where the evidence points solely to either actual knowledge, or lack thereof, and where there is no evidence that the defendant had a conscious purpose to avoid learning the truth. Note 5, Instruction 7.04, *infra*; *Barnhart*, 979 F.2d at 651. The permissive rather than mandatory phrasing "you *may* find" comports with the usage suggested in *Karras v. Leapley*, 974 F.2d 71, 74 n.6 (8th Cir. 1992).

15. If the indictment alleges the defendant did not personally conduct the transaction but knew the transaction was conducted for more than one purpose, use the first set of bracketed language. If the indictment alleges the defendant personally engaged in the financial transaction, use the second set of bracketed language. The multiple objective situation may apply both to multiple intent (i.e., 1956(a)(1)(A)(i) and (ii)) and to multiple knowledge (i.e., 1956(a)(1)(B)(i) and (ii)) allegations, as well as to allegations of violation of both 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i). *See United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991) (government should give clear notice of the provision(s) under which it is proceeding). Although there is no case law requiring unanimity on objectives, if an instruction to that effect is desired, *see* Instruction 5.06(F), *supra*.

Committee Comments

See generally United States v. Cruz, 993 F.2d 164 (8th Cir. 1993); *United States v. Peery*, 977 F.2d 1230, 1234 (8th Cir. 1992); *United States v. Turner*, 975 F.2d 490, 497 (8th Cir. 1992); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Davila*, 964 F.2d 778, 782 (8th Cir. 1992); *United States v. Sutera*, 933 F.2d 641, 644-46 (8th Cir. 1991); *United States v. Martin*, 933 F.2d 609, 610 (8th Cir. 1991); *United States v. Lucas*, 932 F.2d 1210, 1214 n.3, 1219 (8th Cir. 1991);

United States v. Blackman, 904 F.2d 1250, 1257 (8th Cir. 1990); *United States v. Lee*, 886 F.2d 998, 1002-03 (8th Cir. 1989). *See also* U.S. Dept. of Justice, *Money Laundering Federal Prosecution Manual* (Feb. 1992).

See Instruction 6.18.1956J, *infra*, for additional instructions which should be given in most cases.

Final Instructions: Elements of Offenses

6.18.1956D. MONEY LAUNDERING - MOVEMENT OF MONETARY INSTRUMENTS AND FUNDS TO PROMOTE SPECIFIED UNLAWFUL ACTIVITY (18 U.S.C. § 1956(a)(2)(A))

The crime of illegally [attempting to] [transport[ing]] [transmit[ting]] [transfer[ring]] a monetary instrument, as charged in [Count[s] ____ of] the Indictment has three elements which are:

One, on or about (date),[1] [the defendant] [defendant[s] (name[s])] knowingly [attempted to][2] [transport[ed]] [transmit[ted]] [transfer[red]][3] [a] [monetary instrument[s]][4] [funds];[5]

Two, the defendant[s] did so with intent to promote the carrying on of (describe the specified unlawful activity)[6]; and

Three, the [attempted] act 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].

[A defendant may be found to have attempted to [transport] [transmit] [transfer] [a] [monetary instrument[s]] [funds] if [he] [she] intended to commit the offense and voluntarily and intentionally carried out some act which was a substantial step toward conducting that offense, even if the [transportation] [transmission] [transfer] was never completed.][7]

[You are further instructed regarding the crime[s] charged in [Count[s] ____ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1956J, unless the Indictment charges multiple money laundering violations and there will be no confusion in adding the definitions common to all counts after all of the substantive money laundering instructions).][8]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statutes and implementing regulations have been amended frequently. The date of the offense is critical in verifying that the criminal conduct charged was covered by the statute and regulation in effect on that date. Additionally, changes in reporting requirements under Treasury regulations (31 C.F.R.) may affect offenses charged under sections 1956(a)(1)(B)(ii) and 1956(a)(2)(B)(ii).

a. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Title I, Subtitle H (Money Laundering Control Act of 1986), § 1352(a), 100 Stat. 3207-18 to 22, added sections 1956 and 1957 to Title 18 of the United States Code. The Anti-Drug Abuse Act of 1986, including the newly added sections 1956 and 1957 of Title 18, became effective on October 27, 1986.

b. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VI, §§ 6183, 6465, 6469(a)(1) and 6471(a)-(b), and Title VII, § 7031, 102 Stat. 4354, 4375, 4377, 4378 and 4398 became effective on November 18, 1988. *Inter alia* it added a new offense, section 1956(a)(1)(A)(ii), conducting a financial transaction with intent to engage in violations of the tax code (26 U.S.C. §§ 7201 or 7206), expanded the scope of section 1956(a)(2), added a "sting" section, 1956(a)(3), and added a number of "specified unlawful activity" predicate offenses as defined in section 1956(c)(7).

c. The Crime Control Act of 1990, Pub. L. No. 101-647, Title I, §§ 105-108, Title XII, § 1205(j), Title XIV, §§ 1402 and 1404, Title XXV, § 2506 and Title XXXV, § 3557, 104 Stat. 4791-92, 4831, 4835, 4862 and 4927 became effective November 29, 1990. *Inter alia* it amended the provisions of section 1956(a)(2)(B) to permit the government to establish the defendant's knowledge of the illegality of his actions through the law enforcement officer's representations and the defendant's subsequent statements or actions indicating the defendant believed the representation, added violations of foreign law to the definition of "unlawful activity" (18 U.S.C. § 1956(c)(1)), amended the definition of "financial transaction" (section 1956(c)(4)) and "monetary instruments" (section 1956(c)(5)) to emphasize the alternative means of meeting the definitions, revised and expanded the scope of the term "specified unlawful activity" (SUA) (sections 1956(c)(7)(A) and (D), added as predicate SUA several "environmental" offenses (section 1956(c)(7)(E)), added a new section, 1956(c)(8), defining "state," and added agencies authorized to investigate section 1956 violations. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity), *infra*.

d. Effective October 28, 1992, Pub. L. 102-550, Title XV, §§ 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534 and 1536, 106 Stat. 4055 and 4064-67 added, *inter alia*, use of a safe deposit box to the definition of "transaction" (section 1956(c)(3)), added transfer of title to real property, vehicles, vessels or aircraft to the definitions of "financial transaction" (section 1956(c)(4)), expanded the scope of the term "specified unlawful activity" regarding offenses against foreign nations (section 1956(c)(7)(B)), deleted and added several predicate SUA offenses (section 1956(c)(7)(D)) and created the offense of conspiracy to violate sections 1956 or 1957, carrying the same penalties as the object offenses. Instead of a statutory five-year maximum under 18 U.S.C. § 371, a conspiracy to violate 18 U.S.C. § 1956 now carries a 20-year statutory maximum. *See* 18 U.S.C. § 1956(g). Prior to the amendment, the five-year statutory maximum for conspiracy would have precluded imposition of a sentence corresponding to the sentencing guideline range for the defendants who conspired to launder large sums or

who had significant prior criminal histories. *See* United States Sentencing Guideline § 2S1.1 and Chapter 5, Part A (Sentencing Table).

2. *See* Note 2, Instruction 6.18.1956A, *supra*.

3. The terms "transmit" and "transfer" were added, effective November 18, 1988. *See* Note 2, *supra*. Prior to that time at least one circuit had held that an international wire transfer constituted "transportation" of funds within the meaning of 1956(a)(2). *United States v. Monroe*, 943 F.2d 1007, 1015-16 (9th Cir. 1991).

4. *See* 18 U.S.C. § 1956(c)(5). *See also* Instruction 6.18.1956J(4) (Monetary Instrument), *infra*.. The present definition became effective November 29, 1990. Although not listed in section 1956(c)(5), cashier's checks are negotiable instruments in "such form that title thereto passes upon delivery." S. Rep. No. 433, 99th Cong., 2d Sess. 13 (1986). This definition was explicitly clarified, effective May 8, 1987, when "cashier's checks" was added to the definition of "monetary instruments" in 31 C.F.R. § 103.11(j)(iii). *See* 52 Fed. Reg. 11436 (1987) (Final Rule).

5. *See* Instruction 6.18.1956J(3) (Funds), *infra*.

6. *See* Note 6 and 12, Instruction 6.18.1956A, *supra*, and 6.18.1956J(7) (Specified Unlawful Activity), *infra*.

7. *See* Instruction 8.01, *infra*.

8. *See* Note 11, Instruction 6.18.1956A, *supra*.

Committee Comments

See generally United States v. Cruz, 993 F.2d 164 (8th Cir 1993); *United States v. Peery*, 977 F.2d 1230, 1234 (8th Cir. 1992); *United States v. Turner*, 975 F.2d 490, 497 (8th Cir. 1992); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Davila*, 964 F.2d 778, 782 (8th Cir. 1992); *United States v. Sutera*, 933 F.2d 641, 644-46 (8th Cir. 1991); *United States v. Martin*, 933 F.2d 609, 610 (8th Cir. 1991); *United States v. Lucas*, 932 F.2d 1210, 1214 n.3, 1219 (8th Cir. 1991); *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990); *United States v. Lee*, 886 F.2d 998, 1002-03 (8th Cir. 1989). *See also* U.S. Dept. of Justice, *Money Laundering Federal Prosecution Manual* (Feb. 1992).

See Instruction 6.18.1956J, *infra*, for additional instructions which should be given in most cases.

6.18.1956E. MONEY LAUNDERING - MOVEMENT OF MONETARY INSTRUMENTS AND FUNDS TO CONCEAL PROCEEDS (18 U.S.C. § 1956(a)(2)(B)(i))

The crime of illegally [attempting to] [transport[ing]] [transmit[ting]] [transfer[ring]] a monetary instrument as charged in [Count[s] ____ of] the Indictment has four elements which are:

One, on or about (date),[1] [the defendant] [defendant[s] (name[s])] knowingly [attempted to][2] [transport[ed]] [transmit[ted]] [transfer[red]][3] [a] [monetary instrument[s]][4] [funds];[5]

Two, at the time of the [attempted] act described in element one, above, the defendant[s] knew[6] the [monetary instrument[s]] [funds] represented the proceeds[7] of some form of unlawful activity[8]];

Three, at the same time, the defendant[s] knew[6] that the [attempted] act was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of (describe the specified unlawful activity);[9] and

Four, the [attempted] act 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].

[A defendant may be found to have attempted to [transport] [transmit] [transfer] [[a] [monetary instrument[s]] [funds] if [he] [she] intended to commit the offense and voluntarily and intentionally carried out some act which was a substantial step toward conducting that offense, even if the [transportation] [transmission] [transfer] was never completed.][10]

[You are further instructed regarding the crime[s] charged in [Count[s] ____ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1956J, unless the Indictment charges multiple money laundering violations and there will be no confusion in adding the definitions common to all counts after all of the substantive money laundering instructions).][11]

[You may find that [the defendant] [defendant[s] (name[s])] knew the purpose of the [attempted] act was to conceal or disguise the nature, location, source, ownership or control of

the proceeds of (describe the specified unlawful activity)[9] if you find beyond a reasonable doubt that (insert appropriate language from Instruction 7.04).][12]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statutes and implementing regulations have been amended frequently. The date of the offense is critical in verifying that the criminal conduct charged was covered by the statute and regulation in effect on that date. Additionally, changes in reporting requirements under Treasury regulations (31 C.F.R.) may affect offenses charged under sections 1956(a)(1)(B)(ii) and 1956(a)(2)(B)(ii).

a. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Title I, Subtitle H (Money Laundering Control Act of 1986), § 1352(a), 100 Stat. 3207-18 to 22, added sections 1956 and 1957 to Title 18 of the United States Code. The Anti-Drug Abuse Act of 1986, including the newly added sections 1956 and 1957 of Title 18, became effective on October 27, 1986.

b. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VI, §§ 6183, 6465, 6469(a)(1) and 6471(a)-(b), and Title VII, § 7031, 102 Stat. 4354, 4375, 4377, 4378 and 4398 became effective on November 18, 1988. *Inter alia* it added a new offense, section 1956(a)(1)(A)(ii), conducting a financial transaction with intent to engage in violations of the tax code (26 U.S.C. §§ 7201 or 7206), expanded the scope of section 1956(a)(2), added a "sting" section, 1956(a)(3), and added a number of "specified unlawful activity" predicate offenses as defined in section 1956(c)(7).

c. The Crime Control Act of 1990, Pub. L. No. 101-647, Title I, §§ 105-108, Title XII, § 1205(j), Title XIV, §§ 1402 and 1404, Title XXV, § 2506 and Title XXXV, § 3557, 104 Stat. 4791-92, 4831, 4835, 4862 and 4927 became effective November 29, 1990. *Inter alia* it amended the provisions of section 1956(a)(2)(B) to permit the government to establish the defendant's knowledge of the illegality of his actions through the law enforcement officer's representations and the defendant's subsequent statements or actions indicating the defendant believed the representation, added violations of foreign law to the definition of "unlawful activity" (18 U.S.C. § 1956(c)(1)), amended the definition of "financial transaction" (section 1956(c)(4)) and "monetary instruments" (section 1956(c)(5)) to emphasize the alternative means of meeting the definitions, revised and expanded the scope of the term "specified unlawful activity" (SUA) (sections 1956(c)(7)(A) and (D), added as predicate SUA several "environmental" offenses (section 1956(c)(7)(E)), added a new section, 1956(c)(8), defining "state," and added agencies authorized to investigate section 1956 violations. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity), *infra*.

d. Effective October 28, 1992, Pub. L. 102-550, Title XV, §§ 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534 and 1536, 106 Stat. 4055 and 4064-67 added, *inter*

alia, use of a safe deposit box to the definition of "transaction" (section 1956(c)(3)), added transfer of title to real property, vehicles, vessels or aircraft to the definitions of "financial transaction" (section 1956(c)(4)), expanded the scope of the term "specified unlawful activity" regarding offenses against foreign nations (section 1956(c)(7)(B)), deleted and added several predicate SUA offenses (section 1956(c)(7)(D)) and created the offense of conspiracy to violate sections 1956 or 1957, carrying the same penalties as the object offenses. Instead of a statutory five-year maximum under 18 U.S.C. § 371, a conspiracy to violate 18 U.S.C. § 1956 now carries a 20-year statutory maximum. *See* 18 U.S.C. § 1956(g). Prior to the amendment, the five-year statutory maximum for conspiracy would have precluded imposition of a sentence corresponding to the sentencing guideline range for the defendants who conspired to launder large sums or who had significant prior criminal histories. *See* United States Sentencing Guideline § 2S1.1 and Chapter 5, Part A (Sentencing Table).

2. *See* Note 2, Instruction 6.18.1956A, *supra*.

3. The terms "transmit" and "transfer" were added, effective November 18, 1988. *See* Note 2, *supra*. Prior to that time at least one circuit had held that an international wire transfer constituted "transportation" of funds within the meaning of 1956(a)(2). *United States v. Monroe*, 943 F.2d 1007, 1015-16 (9th Cir. 1991).

4. *See* 18 U.S.C. § 1956(c)(5). *See also* Instruction 6.18.1956J(4) (Monetary Instrument), *infra*. The present definition became effective November 29, 1990. Although not listed in section 1956(c)(5), cashier's checks are negotiable instruments in "such form that title thereto passes upon delivery." S. Rep. No. 433, 99th Cong., 2d Sess. 13 (1986). This definition was explicitly clarified, effective May 8, 1987, when "cashier's checks" was added to the definition of "monetary instruments" in 31 C.F.R. § 103.11(j)(iii). *See* 52 Fed. Reg. 11436 (1987) (Final Rule).

5. *See* Instruction 6.18.1956J(3) (Funds), *infra*.

6. *See* Note 8, Instruction 6.18.1956A, *supra*; Instruction 6.18.1956J(8) (Knowledge), *infra*. *See generally, Cuellar v. United States*, 553 U.S. __, 128 S. Ct. 1994 (2008), where the Court held that a conviction under this statute requires proof that the transportation's purpose -- not merely its effect -- was to conceal or disguise, in whole or in part, one of the listed attributes (the funds' nature, location, source, ownership, or control). The Court held that the prosecution did not have to prove that a defendant intended to create the appearance of legitimate wealth.

The defendant need not have known the actual source of the monetary instruments or funds, as long as the defendant knew that they represented "some form of unlawful activity." 18 U.S.C. § 1956(a)(1). Section 1956(c)(1) defines the term broadly to require only 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 [1956(c)](7)." Although the most common situation will be that the defendant's knowledge and the actual source of the

proceeds coincide, where the evidence shows that the defendant thought that the property was proceeds from a different unlawful activity, the instruction should be tailored to reflect the defendant's knowledge, e.g., "at the time the defendant transmitted the funds, he believed that the money he used represented the proceeds of unlawful [prostitution] [dogfighting] [gambling]." *See, e.g., United States v. Long*, 977 F.2d 1264, 1277 (8th Cir. 1992) (discussing the laundering of "any proceeds from a myriad of specified unlawful activities," and how that results in different offense levels under section 2S1.1 of the Sentencing Guidelines).

If the monetary instrument or funds were not actually proceeds of some form of unlawful activity but were represented as such in a "sting" by law enforcement officers, this Instruction 6.18.1956E should be modified appropriately to address the meaning and method of proof that the defendant "knew" the source of the monetary instrument or funds and the purpose of their actual or attempted transportation, transmission or transfer. *See* Instructions 6.18.1956G, H & I, *infra*; *see also* Note 12, Instruction 6.18.1956B, *supra* (situations where Instruction 7.04, *infra*, on willful blindness is appropriate).

7. *See* Instruction 6.18.1956J(3) (Funds), *infra*.

8. *See* Note 7, Instruction 6.18.1956A, *supra*, and 6.18.1956J(7) (Specified Unlawful Activity), *infra*.

9. *See* Note 8, Instruction 6.18.1956B, *supra*.

10. *See* Instruction 8.01, *infra*.

11. *See* Note 11, Instruction 6.18.1956A, *supra*.

12. *See* Note 12, Instruction 6.18.1956B, *supra*.

Committee Comments

See generally United States v. Cruz, 993 F.2d 164 (8th Cir. 1993); *United States v. Peery*, 977 F.2d 1230, 1234 (8th Cir. 1992); *United States v. Turner*, 975 F.2d 490, 497 (8th Cir. 1992); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Davila*, 964 F.2d 778, 782 (8th Cir. 1992); *United States v. Sutera*, 933 F.2d 641, 644-46 (8th Cir. 1991); *United States v. Martin*, 933 F.2d 609, 610 (8th Cir. 1991); *United States v. Lucas*, 932 F.2d 1210, 1214 n.3, 1219 (8th Cir. 1991); *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990); *United States v. Lee*, 886 F.2d 998, 1002-03 (8th Cir. 1989). *See also* U.S. Dept. of Justice, *Money Laundering Federal Prosecution Manual* (Feb. 1992).

See Instruction 6.18.1956J, *infra*, for additional instructions which should be given in most cases.

6.18.1956F. MONEY LAUNDERING - MOVEMENT OF MONETARY INSTRUMENTS AND FUNDS TO AVOID REPORTING REQUIREMENTS (18 U.S.C. § 1956(a)(2)(B)(ii))

The crime of illegally [attempting to] [transport[ing]] [transmit[ting]] [transfer[ring] a monetary instrument as charged in [Count[s] ____ of] the Indictment has four elements which are:

One, on or about (date),[1] [the defendant] [defendant[s] (name[s])] knowingly [attempted to][2] [transport[ed]] [transmit[ted]] [transfer[red]][3] [a] [monetary instrument[s]][4] [funds];[5]

Two, at the time of the [attempted] act described in element one, above, the defendant[s] knew[6] the [monetary instrument[s]] [funds] represented the proceeds[7] of some form of unlawful activity[8]];

Three, at the same time, the defendant[s] knew[6] that the [attempted] act was designed in whole or in part to avoid a transaction reporting requirement under state or federal law;[9] and

Four, the [attempted] act 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].

[A defendant may be found to have attempted to [transport] [transmit] [transfer] [a] [monetary instrument[s]] [funds] if [he] [she] intended to commit the offense and voluntarily and intentionally carried out some act which was a substantial step toward conducting that offense, even if the [transportation] [transmission] [transfer] was never completed.][10]

[You are further instructed regarding the crime[s] charged in [Count[s] ____ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1956J, unless the Indictment charges multiple money laundering violations and there will be no confusion in adding the definitions common to all counts after all of the substantive money laundering instructions).][11]

[The Currency Transaction Reporting (CTR) requirement of federal law[12] requires financial institutions to file a report for each deposit, withdrawal, exchange of currency, or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Multiple currency transactions are treated as a single transaction

if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totaling more than $10,000 during any one business day. A financial institution includes all of its domestic branch offices for purposes of this requirement. The phrase "financial institution" includes (insert appropriate institution from 31 C.F.R. § 103.11(i), such as "bank" or "savings & loan").][13]

[You may find that [the defendant] [defendant[s] (name[s])] knew that the purpose of the [attempted] act was to avoid the CTR reporting requirement if you find beyond a reasonable doubt that (insert appropriate language from Instruction 7.04).][14]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statutes and implementing regulations have been amended frequently. The date of the offense is critical in verifying that the criminal conduct charged was covered by the statute and regulation in effect on that date. Additionally, changes in reporting requirements under Treasury regulations (31 C.F.R.) may affect offenses charged under sections 1956(a)(1)(B)(ii) and 1956(a)(2)(B)(ii).

a. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Title I, Subtitle H (Money Laundering Control Act of 1986), § 1352(a), 100 Stat. 3207-18 to 22, added sections 1956 and 1957 to Title 18 of the United States Code. The Anti-Drug Abuse Act of 1986, including the newly added sections 1956 and 1957 of Title 18, became effective on October 27, 1986.

b. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VI, §§ 6183, 6465, 6469(a)(1) and 6471(a)-(b), and Title VII, § 7031, 102 Stat. 4354, 4375, 4377, 4378 and 4398 became effective on November 18, 1988. *Inter alia* it added a new offense, section 1956(a)(1)(A)(ii), conducting a financial transaction with intent to engage in violations of the tax code (26 U.S.C. §§ 7201 or 7206), expanded the scope of section 1956(a)(2), added a "sting" section, 1956(a)(3), and added a number of "specified unlawful activity" predicate offenses as defined in section 1956(c)(7).

c. The Crime Control Act of 1990, Pub. L. No. 101-647, Title I, §§ 105-108, Title XII, § 1205(j), Title XIV, §§ 1402 and 1404, Title XXV, § 2506 and Title XXXV, § 3557, 104 Stat. 4791-92, 4831, 4835, 4862 and 4927 became effective November 29, 1990. *Inter alia* it amended the provisions of section 1956(a)(2)(B) to permit the government to establish the defendant's knowledge of the illegality of his actions through the law enforcement officer's representations and the defendant's subsequent statements or actions indicating the defendant believed the representation, added violations of foreign law to the definition of "unlawful activity" (18 U.S.C. § 1956(c)(1)), amended the definition of "financial transaction" (section 1956(c)(4)) and "monetary instruments"

(section 1956(c)(5)) to emphasize the alternative means of meeting the definitions, revised and expanded the scope of the term "specified unlawful activity" (SUA) (sections 1956(c)(7)(A) and (D), added as predicate SUA several "environmental" offenses (section 1956(c)(7)(E)), added a new section, 1956(c)(8), defining "state," and added agencies authorized to investigate section 1956 violations. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity), *infra*.

d. Effective October 28, 1992, Pub. L. 102-550, Title XV, §§ 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534 and 1536, 106 Stat. 4055 and 4064-67 added, *inter alia*, use of a safe deposit box to the definition of "transaction" (section 1956(c)(3)), added transfer of title to real property, vehicles, vessels or aircraft to the definitions of "financial transaction" (section 1956(c)(4)), expanded the scope of the term "specified unlawful activity" regarding offenses against foreign nations (section 1956(c)(7)(B)), deleted and added several predicate SUA offenses (section 1956(c)(7)(D)) and created the offense of conspiracy to violate sections 1956 or 1957, carrying the same penalties as the object offenses. Instead of a statutory five-year maximum under 18 U.S.C. § 371, a conspiracy to violate 18 U.S.C. § 1956 now carries a 20-year statutory maximum. *See* 18 U.S.C. § 1956(g). Prior to the amendment, the five-year statutory maximum for conspiracy would have precluded imposition of a sentence corresponding to the sentencing guideline range for the defendants who conspired to launder large sums or who had significant prior criminal histories. *See* United States Sentencing Guideline § 2S1.1 and Chapter 5, Part A (Sentencing Table).

2. *See* Note 2, Instruction 6.18.1956A, *supra*.

3. The terms "transmit" and "transfer" were added, effective November 18, 1988. *See* Note 2, *supra*. Prior to that time at least one circuit had held that an international wire transfer constituted "transportation" of funds within the meaning of 1956(a)(2). *United States v. Monroe*, 943 F.2d 1007, 1015-16 (9th Cir. 1991).

4. *See* 18 U.S.C. § 1956(c)(5). *See also* Instruction 6.18.1956J(4) (Monetary Instrument), *infra*. The present definition became effective November 29, 1990. Although not listed in section 1956(c)(5), cashier's checks are negotiable instruments in "[s]uch form that title thereto passes upon delivery." S. Rep. No. 433, 99th Cong., 2d Sess. 13 (1986). This definition was explicitly clarified, effective May 8, 1987, when "cashier's checks" was added to the definition of "monetary instruments" in 31 C.F.R. § 103.11(j)(iii). *See* 52 Fed. Reg. 11436 (1987) (Final Rule).

5. *See* Instruction 6.18.1956J(3) (Funds), *infra*.

6. *See* Note 8, Instruction 6.18.1956A, *supra*; Instruction 6.18.1956J(8) (Knowledge), *infra*. Effective November 29, 1990, section 1956(a)(2) was amended to permit the defendant's "knowledge" to be established by "proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true." This "sting" provision for

section 1956(a)(2) was added after Congress enacted section 1956(a)(3) ("sting" provision regarding financial transactions) effective November 18, 1988. The term "represented" is not defined in section 1956(a)(2), but has been in section 1956(a)(3) since November 18, 1988, and was specifically made applicable to section 1956(a)(2) on November 29, 1990. The representation must be made by a law enforcement officer or by another person, e.g., an informant or cooperating witness at the direction of a federal official authorized to investigate or prosecute section 1956 violations.

The defendant need not have known the actual source of the monetary instruments or funds, as long as the defendant knew that they represented "some form of unlawful activity." 18 U.S.C. § 1956(a)(1). Section 1956(c)(1) defines the term broadly to require only 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 [1956(c)](7)." Although the most common situation will be that the defendant's knowledge and the actual source of the proceeds coincide, where the evidence shows that the defendant thought that the property was proceeds from a different unlawful activity, the instruction should be tailored to reflect the defendant's knowledge, e.g., "at the time the defendant transmitted the funds, he believed that the money he used represented the proceeds of unlawful [prostitution] [dogfighting] [gambling]." *See, e.g., United States v. Long*, 977 F.2d 1264, 1277 (8th Cir. 1992) (discussing the laundering of "any proceeds from a myriad of specified unlawful activities," and how that results in different offense levels under section 2S1.1 of the Sentencing Guidelines).

If the monetary instrument or funds were not actually proceeds of some form of unlawful activity but were represented as such in a "sting" by law enforcement officers, Instruction 6.18.1956B, *supra*, should be modified appropriately to address the meaning and method of proof that the defendant "knew" the source of the monetary instrument or funds and the purpose of their actual or attempted transportation, transmission or transfer. *See* Instructions 6.18.1956G, H & I, *infra*; *see also* Note 12, Instruction 6.18.1956B, *supra* (situations where Instruction 7.04, *infra*, on willful blindness is appropriate).

7. *See* Instruction 6.18.1956J(6) (Proceeds), *infra*.

8. *See* Note 7, Instruction 6.18.1956A, *supra*, and 6.18.1956J(7) (Specified Unlawful Activity), *infra*. The phrase "unlawful activity" as used in this instruction is broader than the phrase "specified unlawful activity" as used in 18 U.S.C. § 1956.

9. *See* Notes 8, 12-15 and text preceding them, Instruction 6.18.1956C, *supra*.

10. *See* Instruction 8.01, *infra*.

11. *See* Note 11, Instruction 6.18.1956A, *supra*.

12. *See* Note 12, Instruction 6.18.1956C, *supra*.

13. *See* Note 13, Instruction 6.18.1956C, *supra*.

14. *See* Note 14, Instruction 6.18.1956C, *supra*.

Committee Comments

See generally United States v. Cruz; 993 F.2d 164 (8th Cir. 1993); *United States v. Peery*, 977 F.2d 1230, 1234 (8th Cir. 1992); *United States v. Turner*, 975 F.2d 490, 497 (8th Cir. 1992); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Davila*, 964 F.2d 778, 782 (8th Cir. 1992); *United States v. Sutera*, 933 F.2d 641, 644-46 (8th Cir. 1991); *United States v. Martin*, 933 F.2d 609, 610 (8th Cir. 1991); *United States v. Lucas*, 932 F.2d 1210, 1214 n.3, 1219 (8th Cir. 1991); *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990); *United States v. Lee*, 886 F.2d 998, 1002-03 (8th Cir. 1989). *See also* U.S. Dept. of Justice, *Money Laundering Federal Prosecution Manual* (Feb. 1992).

See Instruction 6.18.1956J, *infra*, for additional instructions which should be given in most cases.

6.18.1956G. MONEY LAUNDERING "STING" - FINANCIAL TRANSACTION WITH INTENT TO PROMOTE SPECIFIED UNLAWFUL ACTIVITY (18 U.S.C. § 1956(a)(3)(A))

The crime of [conducting] [attempting to conduct] an illegal financial transaction, as charged in [Count[s] ____ of] the Indictment has three elements, which are:

One, on or about (date),[1] [the defendant] [defendant[s] (name[s])] [conducted] [attempted to conduct][2] a financial transaction,[3] that is, (describe in simple terms, e.g., the purchase of an automobile), which in any way or degree affected interstate or foreign commerce;[4]

Two, the financial transaction involved (describe the "property," e.g., money) which was represented[5] to the defendant[s] by [a law enforcement officer] [a person acting at the direction of or with the approval of an agent of the (name of agency, *see* 18 U.S.C. § 1956(e))] to be the proceeds[6] of (describe the specified unlawful activity,[7] e.g., unlawful distribution of cocaine); and

Three, the defendant [conducted] [attempted to conduct] the financial transaction with the intent to promote the carrying on of (describe the specified unlawful activity).[8]

[A defendant may be found to have attempted to conduct a financial transaction if [he] [she] intended to conduct a financial transaction and voluntarily and intentionally carried out some act which was a substantial step toward conducting that financial transaction, even if the transaction was never completed.][9]

[The term "conducted," as used in [this] [Instruction[s] _____] includes initiating, concluding or participating in initiating or concluding a transaction.][10]

[You are further instructed regarding the crime[s] charged in [Count[s] ___ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1956J, unless the Indictment charges multiple money laundering violations and there will be no confusion in adding the definitions common to all counts after all of the substantive money laundering instructions).][11]

[It is not necessary to show that [a] [the] defendant intended to commit (specify additional crime) [himself] [herself];[12] it is sufficient that in [conducting] [attempting to conduct]

the financial transaction, [a] [the] defendant [himself] [herself] intended to make the unlawful activity easier or less difficult.]

[The crime charged in [Count[s] ____ of] the Indictment alleges multiple purposes for the crime, that is, that [the defendant] [defendant[s] (name[s])] knew that the transaction was [conducted] [attempted] for the purposes of (list all objectives). To find [the defendant] [defendant[s] (name[s])] guilty of the offense[s], you must agree unanimously that one or more of the objectives charged were proved beyond a reasonable doubt.][13]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statutes and implementing regulations have been amended frequently. The date of the offense is critical in verifying that the criminal conduct charged was covered by the statute and regulation in effect on that date. Additionally, changes in reporting requirements under Treasury regulations (31 C.F.R.) may affect offenses charged under sections 1956(a)(1)(B)(ii) and 1956(a)(2)(B)(ii).

a. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Title I, Subtitle H (Money Laundering Control Act of 1986), § 1352(a), 100 Stat. 3207-18 to 22, added sections 1956 and 1957 to Title 18 of the United States Code. The Anti-Drug Abuse Act of 1986, including the newly added sections 1956 and 1957 of Title 18, became effective on October 27, 1986.

b. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VI, §§ 6183, 6465, 6469(a)(1) and 6471(a)-(b), and Title VII, § 7031, 102 Stat. 4354, 4375, 4377, 4378 and 4398 became effective on November 18, 1988. *Inter alia* it added a new offense, section 1956(a)(1)(A)(ii), conducting a financial transaction with intent to engage in violations of the tax code (26 U.S.C. §§ 7201 or 7206), expanded the scope of section 1956(a)(2), added a "sting" section, 1956(a)(3), and added a number of "specified unlawful activity" predicate offenses as defined in section 1956(c)(7).

c. The Crime Control Act of 1990, Pub. L. No. 101-647, Title I, §§ 105-108, Title XII, § 1205(j), Title XIV, §§ 1402 and 1404, Title XXV, § 2506 and Title XXXV, § 3557, 104 Stat. 4791-92, 4831, 4835, 4862 and 4927 became effective November 29, 1990. *Inter alia* it amended the provisions of section 1956(a)(2)(B) to permit the government to establish the defendant's knowledge of the illegality of his actions through the law enforcement officer's representations and the defendant's subsequent statements or actions indicating the defendant believed the representation, added violations of foreign law to the definition of "unlawful activity" (18 U.S.C. § 1956(c)(1)), amended the definition of "financial transaction" (section 1956(c)(4)) and "monetary instruments" (section 1956(c)(5)) to emphasize the alternative means of meeting the definitions,

revised and expanded the scope of the term "specified unlawful activity" (SUA) (sections 1956(c)(7)(A) and (D), added as predicate SUA several "environmental" offenses (section 1956(c)(7)(E)), added a new section, 1956(c)(8), defining "state," and added agencies authorized to investigate section 1956 violations. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity), *infra*..

d. Effective October 28, 1992, Pub. L. 102-550, Title XV, §§ 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534 and 1536, 106 Stat. 4055 and 4064-67 added, *inter alia*, use of a safe deposit box to the definition of "transaction" (section 1956(c)(3)), added transfer of title to real property, vehicles, vessels or aircraft to the definitions of "financial transaction" (section 1956(c)(4)), expanded the scope of the term "specified unlawful activity" regarding offenses against foreign nations (section 1956(c)(7)(B)), deleted and added several predicate SUA offenses (section 1956(c)(7)(D)), and created the offense of conspiracy to violate sections 1956 or 1957, carrying the same penalties as the object offenses. Instead of a statutory five-year maximum under 18 U.S.C. § 371, a conspiracy to violate 18 U.S.C. § 1956 now carries a 20-year statutory maximum. *See* 18 U.S.C. § 1956(g). Prior to the amendment, the five-year statutory maximum for conspiracy would have precluded imposition of a sentence corresponding to the sentencing guideline range for the defendants who conspired to launder large sums or who had significant prior criminal histories. *See* United States Sentencing Guideline § 2S1.1 and Chapter 5, Part A (Sentencing Table).

2. Both types of activity have been proscribed since original enactment of section 1956. *See* 18 U.S.C. §§ 1956(a)(1), (a)(2) and (a)(3).

3. *See* Instruction 6.18.1956J(1) (Financial Transaction), *infra*. "Financial transaction" is a term of art originally defined in 18 U.S.C. § 1956(c)(4) and subsequently expanded and clarified through amendments. It encompasses another statutorily defined term of art, "transaction," which has also been expanded since the enactment of section 1956(c)(3). The Committee recommends careful review to determine which of the provisions of sections 1956(c)(3) and 1956(c)(4) were in effect at the time of the alleged financial transaction. *See* Note 1, *supra*.

4. *See* Instruction 6.18.1956J(2) (Interstate and Foreign Commerce), *infra*. All section 1956 offenses require proof that the financial transaction itself or the financial institution, if one was involved, in some way affected interstate or foreign commerce. *See* 18 U.S.C. § 1956(c)(4); *United States v. Baker*, 985 F.2d 1248, 1252 (4th Cir. 1993) (element under section 1956(a)(1)(B)(i)); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 n.6 (8th Cir. 1992) (expert witness testified as to issue), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 924 (5th Cir. 1992) (discussing *United States v. Gallo*, 927 F.2d 815, 823 (5th Cir. 1991) and *United States v. Hamilton*, 931 F.2d 1046, 1051-52 (5th Cir. 1991)). The Eighth Circuit has not ruled whether the indictment must explicitly allege the interstate/foreign commerce nexus. *United States v. Lucas*, 932 F.2d 1210, 1219 (8th Cir. 1991) (court was not required to reach the issue because the indictment which alleged construction of a

shopping center and purchase of merchandise could be reasonably construed to allege the element). *See also United States v. Green*, 964 F.2d 365, 374 (5th Cir. 1992) (citing *Lucas*); *United States v. Lovett*, 964 F.2d 1029, 1038 (10th Cir. 1992) (under section 1957, the interstate commerce nexus is jurisdictional but not an element of the crime charged) (citing *United States v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991)). Given the lack of controlling law on this issue, the Committee recommends that the nexus be alleged in the indictment. In any case, a finding of an effect on interstate or foreign commerce of either the transaction itself or the activities of the financial institution, if one was involved, is essential. *See United States v. Ben M. Hogan Co., Inc.*, 809 F.2d 480 (8th Cir. 1987) (failure to instruct jury that it must find an interstate commerce connection can be harmless error).

5. On the issue of what constitutes a sufficient representation, the Seventh Circuit has stated, "[i]t is enough that the government prove that an enforcement officer or authorized person made the defendant aware of circumstances from which a reasonable person would infer that the property was drug proceeds." *United States v. Kaufmann*, 985 F.2d 884, 893 (7th Cir. 1993).

6. *See* Instruction 6.18.1956J(6) (Proceeds). The term is not defined in 18 U.S.C. § 1956(c). In the event that the representation was that the property "was used to conduct or facilitate specified unlawful activity" rather than "constituted proceeds," the following language might be used: "property used to [conduct] [facilitate] (describe the specified unlawful activity)." There is some ambiguity as to whether this a crime as the statute is written. *See Money Laundering Federal Prosecution Manual*, p.277.

7. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity), *infra*. The term should not be confused with "unlawful activity" in general and has a specific, statutory meaning, as set forth in section 1956(c)(7). Because that section has had numerous amendments, and itself incorporates activities defined in several other statutes, the Committee recommends careful review of both the provisions of section 1956(c)(7) and of the incorporated statutes which were in effect at the time of the alleged financial transaction (1956(a)(1)) or transportation, transmission or transfer (1956)(a)(2)).

Throughout these instructions, the plain description of the offense has been substituted for the phrase "specified unlawful activity" (SUA), which is a term of art specifically defined in 18 U.S.C. § 1956(c)(7), and which incorporates *inter alia* most of 18 U.S.C. § 1961(1). If the indictment is read to the jury and contains the phrase, any inquiry by the jury as to whether a particular offense is "specified unlawful activity" can be answered as a matter of law. Section 1956(c)(7) as originally enacted effective October 27, 1986, was amended on November 18, 1988, on November 29, 1990, and on October 28, 1992. *See* Note 1, *supra*. The provisions of section 1956(c)(7) used should correspond to the alleged date of the offense. Further, many of the most common SUAs, such as drug trafficking, are derived from the definition of "racketeering activity," contained in 18 U.S.C. § 1961(1). That statute has also been amended since October 27, 1986, on November 10, 1986, November 18, 1988, and on November 29, 1990. Therefore, when determining whether an offense qualifies as an SUA, the applicable provisions of section 1961(1) should also be reviewed.

8. The mens rea required under sections 1956(a)(1)(A), (a)(2)(A), and (a)(3) offenses is more restrictive than under sections 1956(a)(1)(B) and (a)(2)(B). The former requires proof of the defendant's intent; the latter merely requires that the defendant have knowledge of the object of the financial transaction. *See* G. Richard Strafer, *Money Laundering: The Crime of the '90's*, 27 Amer. Crim. L. Rev. 149, 162, 172 (1989).

Under sections 1956(a)(1)(A)(i), 1956(a)(2)(a) and 1956(a)(3), the defendant must have acted with the intent to promote a "specified" unlawful activity, as defined in 18 U.S.C. § 1956(c)(7), rather than the more broadly described unlawful activity defined in 18 U.S.C. § 1956(c)(1). *See* Note 11, *infra*. Although the specified unlawful activity inserted in the second element, *see* Note 6, *supra*, will frequently be the same set forth regarding the defendant's intent, the two forms of specified unlawful activity need not be the same, e.g., drug proceeds with which the defendant conducts a transaction with the intent of making a fraudulent credit application.

9. *See* Instruction 8.01, *infra*.

10. *See* 18 U.S.C. § 1956(c)(2). This definition was included in the October 27, 1986, version of the statute and has not changed since.

11. The supplemental definitions and instructions contained in Instruction 6.18.1956J, *infra*, should be given in most cases. Whether they are inserted in each 6.18.1956 instruction or given after a series of 6.18.1956A through 6.18.1956I instructions is an option for the court to consider based on the number and types of money laundering counts and the ability of the jury to relate the definitions to the applicable counts.

12. *See United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991); *United States v. Rogers*, 788 F.2d 1472, 1476 (11th Cir. 1986) (facilitating the promotion of unlawful activity in the context of 18 U.S.C. § 1952(a)(3) ("Travel Act") cases is satisfied by proof the defendant's action made the unlawful activity easy or less difficult); *see also United States v. Corona*, 885 F.2d 766, 773 (11th Cir. 1989) (the defendant himself does not have to be involved in the offense being facilitated). The specified unlawful activity which a defendant intends to promote may be a continuing offense, may be still underway or may be an offense that will be committed in the future. The financial transaction need not be linked to a specific future offense; it is sufficient if a defendant intended to promote a specified unlawful activity generally. For example, issuing checks to vendors providing beeper and mobile telephone services used in a continuing criminal enterprise would qualify, but purchases of cellular phones not previously used or clearly intended for use in the enterprise would not.

13. The multiple objective situation may apply to multiple intent allegations, i.e., sections 1956(a)(3)(A), (B) and (C). The indictment, and the government, should provide notice of the provisions that are meant to apply in a particular case. *See United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991). Although there is no case law requiring unanimity on objectives, if an instruction to that effect is desired, *see* Instruction 5.06(F), *supra*.

Final Instructions: Elements of Offenses

Committee Comments

See generally United States v. Cruz, 993 F.2d 164 (8th Cir. 1993); *United States v. Peery*, 977 F.2d 1230, 1234 (8th Cir. 1992); *United States v. Turner*, 975 F.2d 490, 497 (8th Cir. 1992); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Davila*, 964 F.2d 778, 782 (8th Cir. 1992); *United States v. Sutera*, 933 F.2d 641, 644-46 (8th Cir. 1991); *United States v. Martin*, 933 F.2d 609, 610 (8th Cir. 1991); *United States v. Lucas*, 932 F.2d 1210, 1214 n.3, 1219 (8th Cir. 1991); *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990); *United States v. Lee*, 886 F.2d 998, 1002-03 (8th Cir. 1989). *See also* U.S. Dept. of Justice, *Money Laundering Federal Prosecution Manual* (Feb. 1992).

See Instruction 6.18.1956J, *infra*, for additional instructions which should be given in most cases.

6.18.1956H. MONEY LAUNDERING "STING" - FINANCIAL TRANSACTION WITH INTENT TO CONCEAL NATURE OF PROPERTY (18 U.S.C. § 1956(a)(3)(B))

The crime of [conducting] [attempting to conduct] an illegal financial transaction, as charged in [Count[s] ____ of] the Indictment has three elements, which are:

One, on or about (date),[1] [the defendant] [defendant[s] (name[s])] [conducted] [attempted to conduct][2] a financial transaction,[3] that is, (describe in simple terms, e.g., the purchase of an automobile), which in any way or degree affected interstate or foreign commerce;[4]

Two, the financial transaction involved (describe the "property," e.g., money) which was represented[5] to the defendant[s] by [a law enforcement officer] [a person acting at the direction of or with the approval of an agent of the (name of agency, *see* 18 U.S.C. § 1956(e))] to be the proceeds[6] of (describe the specified unlawful activity,[7] e.g., unlawful distribution of cocaine); and

Three, the defendant [conducted] [attempted to conduct] the financial transaction with the intent to conceal and disguise[8] the nature, location, source, ownership or control of (describe the "property") which the defendant believed[9] to be the proceeds of (describe the specified unlawful activity).

[A defendant may be found to have attempted to conduct a financial transaction if [he] [she] intended to conduct a financial transaction and voluntarily and intentionally carried out some act which was a substantial step toward conducting that financial transaction, even if the transaction was never completed.][10]

[The term "conducted," as used in [this] [Instruction[s] _____] includes initiating, concluding or participating in initiating or concluding a transaction.][11]

[You are further instructed regarding the crime[s] charged in [Count[s] ___ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1956J, unless the Indictment charges multiple money laundering violations and there will be no confusion in adding the definitions common to all counts after all of the substantive money laundering instructions).][12]

Final Instructions: Elements of Offenses

[It is not necessary to show that [a] [the] defendant intended to commit (specify additional crime) [himself] [herself], it is sufficient that in [conducting] [attempting to conduct] the financial transaction, [a] [the] defendant [himself] [herself] intended to make the unlawful activity easier or less difficult.].[13]

[The crime charged in [Count[s] ____ of] the Indictment alleges multiple purposes for the crime, that is, that [the defendant] [defendant[s] (name[s])] knew that the transaction was [conducted] [attempted] for the purposes of (list all objectives). To find [the defendant] [defendant[s] (name[s])] guilty of the offense[s], you must agree unanimously that one or more of the objectives charged were proved beyond a reasonable doubt.][14]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statutes and implementing regulations have been amended frequently. The date of the offense is critical in verifying that the criminal conduct charged was covered by the statute and regulation in effect on that date. Additionally, changes in reporting requirements under Treasury regulations (31 C.F.R.) may affect offenses charged under sections 1956(a)(1)(B)(ii) and 1956(a)(2)(B)(ii).

a. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Title I, Subtitle H (Money Laundering Control Act of 1986), § 1352(a), 100 Stat. 3207-18 to 22, added sections 1956 and 1957 to Title 18 of the United States Code. The Anti-Drug Abuse Act of 1986, including the newly added sections 1956 and 1957 of Title 18, became effective on October 27, 1986.

b. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VI, §§ 6183, 6465, 6469(a)(1) and 6471(a)-(b), and Title VII, § 7031, 102 Stat. 4354, 4375, 4377, 4378 and 4398 became effective November 18, 1988. *Inter alia* it added a new offense, section 1956(a)(1)(A)(ii), conducting a financial transaction with intent to engage in violations of the tax code (26 U.S.C. §§ 7201 or 7206), expanded the scope of section 1956(a)(2), added a "sting" section, 1956(a)(3), and added a number of "specified unlawful activity" predicate offenses as defined in section 1956(c)(7).

c. The Crime Control Act of 1990, Pub. L. No. 101-647, Title I, §§ 105-108, Title XII, § 1205(j), Title XIV, §§ 1402 and 1404, Title XXV, § 2506 and Title XXXV, § 3557, 104 Stat. 4791-92, 4831, 4835, 4862 and 4927 became effective November 29, 1990. *Inter alia* it amended the provisions of section 1956(a)(2)(B) to permit the government to establish the defendant's knowledge of the illegality of his actions through the law enforcement officer's representations and the defendant's subsequent statements or actions indicating the defendant believed the representation, added violations of

foreign law to the definition of "unlawful activity" (18 U.S.C. § 1956(c)(1)), amended the definition of "financial transaction" (section 1956(c)(4)) and "monetary instruments" (section 1956(c)(5)) to emphasize the alternative means of meeting the definitions, revised and expanded the scope of the term "specified unlawful activity" (SUA) (sections 1956(c)(7)(A) and (D), added as predicate SUA several "environmental" offenses (section 1956(c)(7)(E)), added a new section, 1956(c)(8), defining "state," and added agencies authorized to investigate section 1956 violations. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity), *infra*.

d. Effective October 28, 1992, Pub. L. 102-550, Title XV, §§ 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534 and 1536, 106 Stat. 4055 and 4064-67 added, *inter alia*, use of a safe deposit box to the definition of "transaction" (section 1956(c)(3)), added transfer of title to real property, vehicles, vessels or aircraft to the definitions of "financial transaction" (section 1956(c)(4)), expanded the scope of the term "specified unlawful activity" regarding offenses against foreign nations (section 1956(c)(7)(B)), deleted and added several predicate SUA offenses (section 1956(c)(7)(D)) and created the offense of conspiracy to violate sections 1956 or 1957, carrying the same penalties as the object offenses. Instead of a statutory five-year maximum under 18 U.S.C. § 371, a conspiracy to violate 18 U.S.C. § 1956 now carries a 20-year statutory maximum. *See* 18 U.S.C. § 1956(g). Prior to the amendment, the five-year statutory maximum for conspiracy would have precluded imposition of a sentence corresponding to the sentencing guideline range for the defendants who conspired to launder large sums or who had significant prior criminal histories. *See* United States Sentencing Guideline § 2S1.1 and Chapter 5, Part A (Sentencing Table).

2. Both types of activity have been proscribed since original enactment of section 1956. *See* 18 U.S.C. §§ 1956(a)(1), (a)(2) and (a)(3).

3. *See* Instruction 6.18.1956J(1) (Financial Transaction), *infra*. "Financial transaction" is a term of art originally defined in 18 U.S.C. § 1956(c)(4) and subsequently expanded and clarified through amendments. It encompasses another statutorily defined term of art, "transaction," which has also been expanded since the enactment of section 1956(c)(3). The Committee recommends careful review to determine which of the provisions of sections 1956(c)(3) and 1956(c)(4) were in effect at the time of the alleged financial transaction. *See* Note 1, *supra*.

4. *See* Instruction 6.18.1956J(2) (Interstate and Foreign Commerce), *infra*. All section 1956 offenses require proof that the financial transaction itself or the financial institution, if one was involved, in some way affected interstate or foreign commerce. *See* 18 U.S.C. § 1956(c)(4); *United States v. Baker*, 985 F.2d 1248, 1252 (4th Cir. 1993) (element under section 1956(a)(1)(B)(i)); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 n.6 (8th Cir. 1992) (expert witness testified as to issue), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 924 (5th Cir. 1992) (discussing *United States v. Gallo*, 927 F.2d 815, 823 (5th Cir. 1991) and *United States v. Hamilton*, 931 F.2d 1046, 1051-52 (5th

Cir. 1991)). The Eighth Circuit has not ruled whether the indictment must explicitly allege the interstate/foreign commerce nexus. *United States v. Lucas*, 932 F.2d 1210, 1219 (8th Cir. 1991) (court was not required to reach the issue because the indictment which alleged construction of a shopping center and purchase of merchandise could be reasonably construed to allege the element). *See also United States v. Green*, 964 F.2d 365, 374 (5th Cir. 1992) (citing *Lucas*); *United States v. Lovett*, 964 F.2d 1029, 1038 (10th Cir. 1992) (under section 1957, the interstate commerce nexus is jurisdictional but not an element of the crime charged) (citing *United States v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991)). Given the lack of controlling law on this issue, the Committee recommends that the nexus be alleged in the indictment. In any case, a finding of an effect on interstate or foreign commerce of either the transaction itself or the activities of the financial institution, if one was involved, is essential. *See United States v. Ben M. Hogan Co., Inc.*, 769 F.2d 1293, 1297 (8th Cir. 1985) (reversible error for a district court to give an instruction which could have been understood to include a conclusive presumption of effect on interstate commerce, where such a finding by the jury was essential in a prosecution under the Sherman Anti-Trust Act).

5. On the issue of what constitutes a sufficient representation, the Seventh Circuit has stated, "[i]t is enough that the government prove that an enforcement officer or authorized person made the defendant aware of circumstances from which a reasonable person would infer that the property was drug proceeds." *United States v. Kaufmann*, 985 F.2d 884, 893 (7th Cir. 1993).

6. *See* Instruction 6.18.1956J(6) (Proceeds), *infra*. The term is not defined in 18 U.S.C. § 1956(c). In the event that the representation was that the property "was used to conduct or facilitate specified unlawful activity" rather than "constituted proceeds," the following language might be used: "property used to [conduct] [facilitate] (describe the specified unlawful activity)." There is some ambiguity as to whether this is a crime as the statute is written. *See Money Laundering Federal Prosecution Manual*, p.277.

7. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity), *infra*. The term should not be confused with "unlawful activity" in general and has a specific, statutory meaning, as set forth in section 1956(c)(7). Because that section has had numerous amendments, and itself incorporates activities defined in several other statutes, the Committee recommends careful review of both the provisions of section 1956(c)(7) and of the incorporated statutes which were in effect at the time of the alleged financial transaction (section 1956(a)(1)) or transportation, transmission or transfer (section 1956)(a)(2)).

Throughout these instructions, the plain description of the offense has been substituted for the phrase "specified unlawful activity" (SUA), which is a term of art specifically defined in 18 U.S.C. § 1956(c)(7), and which incorporates *inter alia* most of 18 U.S.C. § 1961(1). If the indictment is read to the jury and contains the phrase, any inquiry by the jury as to whether a particular offense is "specified unlawful activity" can be answered as a matter of law. Section 1956(c)(7) as originally enacted effective October 27, 1986, was amended on November 18, 1988, on November 29, 1990, and on October 28, 1992. *See* Note 1, *supra*. The provisions of section 1956(c)(7) used should correspond to the alleged date of the offense. Further, many of

the most common SUAs, such as drug trafficking, are derived from the definition of "racketeering activity," contained in 18 U.S.C. § 1961(1). That statute has also been amended since October 27, 1986, on November 10, 1986, November 18, 1988, and on November 29, 1990. Therefore, when determining whether an offense qualifies as an SUA, the applicable provisions of section 1961(1) should also be reviewed.

8. There must be proof of a design to conceal or disguise the nature, location, source, ownership or control of the proceeds. A "typical" money laundering transaction involving purchases in third-party names frequently satisfies this element. Purchases in the names of close family members, however, are problematic, especially where the defendant's subsequent use of the asset is open and conspicuous. *Compare United States v. Sanders*, 929 F.2d 1466, 1472 (10th Cir. 1991) (contrasting *United States v. Lee*, 886 F.2d 998, 1002-03 (8th Cir. 1989)) *with United States v. Sutera*, 933 F.2d 641, 648 (8th Cir. 1991) (money laundering statute did not require that the defendant did a good job of laundering the proceeds; the jury simply had to find that the defendant intended to hide them) *and United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 n.7 (8th Cir. 1992) (the defendant commingled legitimate and illegitimate business receipts over a three year period; despite no attempt to disguise control of the account, one could infer from her record keeping and bank activity a design to conceal or disguise her illegal proceeds), *aff'd on other grounds*, 511 U.S. 513 (1994).

9. The government must prove that the defendant believed that the "property" was in fact proceeds of specified unlawful activity when prosecuting under section 1956(a)(3)(B). *United States v. Kaufmann*, 985 F.2d 884, 896-97 (7th Cir. 1993). "Knowledge" and "belief" are separate concepts, and a "willful blindness" or "deliberate ignorance" theory cannot be used to establish belief in the way it can be used to establish knowledge. *United States v. Kaufmann*.

10. *See* Instruction 8.01, *infra*.

11. *See* 18 U.S.C. § 1956(c)(2). This definition was included in the October 27, 1986, version of the statute and has not changed since.

12. The supplemental definitions and instructions contained in Instruction 6.18.1956J, *infra*, should be given in most cases. Whether they are inserted in each 6.18.1956 instruction or given after a series of 6.18.1956A through 6.18.1956I instructions is an option for the court to consider based on the number and types of money laundering counts and the ability of the jury to relate the definitions to the applicable counts.

13. *See United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991); *United States v. Rogers*, 788 F.2d 1472, 1476 (11th Cir. 1986) (facilitating the promotion of unlawful activity in the context of 18 U.S.C. § 1952(a)(3) ("Travel Act") cases is satisfied by proof the defendant's action made the unlawful activity easy or less difficult); *see also United States v. Corona*, 885 F.2d 766, 773 (11th Cir. 1989) (the defendant himself does not have to be involved in the offense being facilitated). The specified unlawful activity which a defendant intends to promote may be a continuing offense, may be still underway or may be an offense that will be committed in the future. The financial transaction need not be linked to a specific future offense; it is sufficient if

a defendant intended to promote a specified unlawful activity generally. For example, issuing checks to vendors providing beeper and mobile telephone services used in a continuing criminal enterprise would qualify, but purchases of cellular phones not previously used or clearly intended for use in the enterprise would not.

14. The multiple objective situation may apply to multiple intent allegations, i.e., sections 1956(a)(3)(A), (B) and (C). The indictment, and the government, should provide notice of the provisions that are meant to apply in a particular case. *See United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991). Although there is no case law requiring unanimity on objectives, if an instruction to that effect is desired, *see* Instruction 5.06(F), *supra*.

Committee Comments

See generally United States v. Cruz, 993 F.2d 164 (8th Cir. 1993); *United States v. Peery*, 977 F.2d 1230, 1234 (8th Cir. 1992); *United States v. Turner*, 975 F.2d 490, 497 (8th Cir. 1992); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Davila*, 964 F.2d 778, 782 (8th Cir. 1992); *United States v. Sutera*, 933 F.2d 641, 644-46 (8th Cir. 1991); *United States v. Martin*, 933 F.2d 609, 610 (8th Cir. 1991); *United States v. Lucas*, 932 F.2d 1210, 1214 n.3, 1219 (8th Cir. 1991); *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990); *United States v. Lee*, 886 F.2d 998, 1002-03 (8th Cir. 1989). *See also* U.S. Dept. of Justice, *Money Laundering Federal Prosecution Manual* (Feb. 1992).

See Instruction 6.18.1956J, *infra*, for additional instructions which should be given in most cases.

6.18.1956I. MONEY LAUNDERING "STING" - FINANCIAL TRANSACTION WITH INTENT TO AVOID TRANSACTION REPORTING REQUIREMENT (18 U.S.C. § 1956(a)(3)(C))

The crime of [conducting] [attempting to conduct] an illegal financial transaction, as charged in [Count[s] ____ of] the Indictment has three elements, which are:

One, on or about (date),[1] [the defendant] [defendant[s] (name[s])] [conducted] [attempted to conduct][2] a financial transaction,[3] that is, (describe in simple terms, e.g., the purchase of an automobile), which in any way or degree affected interstate or foreign commerce;[4]

Two, the financial transaction involved (describe the "property," e.g., money) which was represented[5] to the defendant[s] by [a law enforcement officer] [a person acting at the direction of or with the approval of an agent of the (name of agency, *see* 18 U.S.C. § 1956(e))] to be the proceeds[6] of (describe the specified unlawful activity,[7] e.g., unlawful distribution of cocaine); and

Three, the defendant [conducted] [attempted to conduct] the financial transaction with the intent to avoid a transaction reporting requirement of state or federal law.[8]

[A defendant may be found to have attempted to conduct a financial transaction if [he] [she] intended to conduct a financial transaction and voluntarily and intentionally carried out some act which was a substantial step toward conducting that financial transaction, even if the transaction was never completed.][9]

[The term "conducted," as used in [this] [Instruction[s] _____] includes initiating, concluding or participating in initiating or concluding a transaction.][10]

[You are further instructed regarding the crime[s] charged in [Count[s] ___ of] the Indictment that the following definitions apply: (Insert applicable portions of Instruction 6.18.1956J, unless the Indictment charges multiple money laundering violations and there will be no confusion in adding the definitions common to all counts after all of the substantive money laundering instructions).][11]

[The Currency Transaction Reporting (CTR) requirement of federal law[12] requires financial institutions to file a report for each deposit, withdrawal, exchange of currency, or other payment or transfer, by, through, or to such financial institution which involves a transaction in

currency of more than $10,000. Multiple currency transactions are treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totaling more than $10,000 during any one business day. A financial institution includes all of its domestic branch offices for purposes of this requirement. The phrase "financial institution" includes (insert appropriate institution from 31 C.F.R. § 103.11(i), such as "bank" or "savings & loan").][13]

[The crime charged in [Count[s] ____ of] the Indictment alleges multiple purposes for the crime, that is, that [the defendant] [defendant[s] (name[s])] knew that the transaction was [conducted] [attempted] for the purposes of (list all objectives). To find [the defendant] [defendant[s] (name[s])] guilty of the offense[s], you must agree unanimously that one or more of the objectives charged were proved beyond a reasonable doubt.][14]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statutes and implementing regulations have been amended frequently. The date of the offense is critical in verifying that the criminal conduct charged was covered by the statute and regulation in effect on that date. Additionally, changes in reporting requirements under Treasury regulations (31 C.F.R.) may affect offenses charged under sections 1956(a)(1)(B)(ii) and 1956(a)(2)(B)(ii).

a. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Title I, Subtitle H (Money Laundering Control Act of 1986), § 1352(a), 100 Stat. 3207-18 to 22, added sections 1956 and 1957 to Title 18 of the United States Code. The Anti-Drug Abuse Act of 1986, including the newly added sections 1956 and 1957 of Title 18, became effective on October 27, 1986.

b. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VI, §§ 6183, 6465, 6469(a)(1) and 6471(a)-(b), and Title VII, § 7031, 102 Stat. 4354, 4375, 4377, 4378 and 4398 became effective on November 18, 1988. *Inter alia* it added a new offense, section 1956(a)(1)(A)(ii), conducting a financial transaction with intent to engage in violations of the tax code (26 U.S.C. §§ 7201 or 7206), expanded the scope of section 1956(a)(2), added a "sting" section, 1956(a)(3), and added a number of "specified unlawful activity" predicate offenses as defined in section 1956(c)(7).

c. The Crime Control Act of 1990, Pub. L. No. 101-647, Title I, §§ 105-108, Title XII, § 1205(j), Title XIV, §§ 1402 and 1404, Title XXV, § 2506 and Title XXXV, § 3557, 104 Stat. 4791-92, 4831, 4835, 4862 and 4927 became effective on November 29, 1990. *Inter alia* it amended the provisions of section 1956(a)(2)(B) to permit the

government to establish the defendant's knowledge of the illegality of his actions through the law enforcement officer's representations and the defendant's subsequent statements or actions indicating the defendant believed the representation, added violations of foreign law to the definition of "unlawful activity" (18 U.S.C. § 1956(c)(1)), amended the definition of "financial transaction" (section 1956(c)(4)) and "monetary instruments" (section 1956(c)(5)) to emphasize the alternative means of meeting the definitions, revised and expanded the scope of the term "specified unlawful activity" (SUA) (sections 1956(c)(7)(A) and (D), added as predicate SUA several "environmental" offenses (section 1956(c)(7)(E)), added a new section, 1956(c)(8), defining "state," and added agencies authorized to investigate section 1956 violations. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity).

d. Effective October 28, 1992, Pub. L. 102-550, Title XV, §§ 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534 and 1536, 106 Stat. 4055 and 4064-67 added, *inter alia*, use of a safe deposit box to the definition of "transaction" (section 1956(c)(3)), added transfer of title to real property, vehicles, vessels or aircraft to the definitions of "financial transaction" (section 1956(c)(4)), expanded the scope of the term "specified unlawful activity" regarding offenses against foreign nations (section 1956(c)(7)(B)), deleted and added several predicate SUA offenses (section 1956(c)(7)(D)) and created the offense of conspiracy to violate sections 1956 or 1957, carrying the same penalties as the object offenses. Instead of a statutory five-year maximum under 18 U.S.C. § 371, a conspiracy to violate 18 U.S.C. § 1956 now carries a 20-year statutory maximum. *See* 18 U.S.C. § 1956(g). Prior to the amendment, the five-year statutory maximum for conspiracy would have precluded imposition of a sentence corresponding to the sentencing guideline range for the defendants who conspired to launder large sums or who had significant prior criminal histories. *See* United States Sentencing Guideline § 2S1.1 and Chapter 5, Part A (Sentencing Table).

2. Both types of activity have been proscribed since original enactment of section 1956. *See* 18 U.S.C. §§ 1956(a)(1), (a)(2) and (a)(3).

3. *See* Instruction 6.18.1956J(1) (Financial Transaction), *infra*. "Financial transaction" is a term of art originally defined in 18 U.S.C. § 1956(c)(4) and subsequently expanded and clarified through amendments. It encompasses another statutorily defined term of art, "transaction," which has also been expanded since the enactment of section 1956(c)(3). The Committee recommends careful review to determine which of the provisions of sections 1956(c)(3) and 1956(c)(4) were in effect at the time of the alleged financial transaction. *See* Note 1, *supra*.

4. *See* Instruction 6.18.1956J(2) (Interstate and Foreign Commerce), *infra*. All section 1956 offenses require proof that the financial transaction itself or the financial institution, if one was involved, in some way affected interstate or foreign commerce. *See* 18 U.S.C. § 1956(c)(4); *United States v. Baker*, 985 F.2d 1248, 1252 (4th Cir. 1993) (element under 1956(a)(1)(B)(i)); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 n.6 (8th Cir. 1992) (expert witness

testified as to issue), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 924 (5th Cir. 1992) (discussing *United States v. Gallo*, 927 F.2d 815, 823 (5th Cir. 1991) and *United States v. Hamilton*, 931 F.2d 1046, 1051-52 (5th Cir. 1991)). The Eighth Circuit has not ruled whether the indictment must explicitly allege the interstate/foreign commerce nexus. *United States v. Lucas*, 932 F.2d 1210, 1219 (8th Cir. 1991) (court was not required to reach the issue because the indictment which alleged construction of a shopping center and purchase of merchandise could be reasonably construed to allege the element). *See also United States v. Green*, 964 F.2d 365, 374 (5th Cir. 1992) (citing *Lucas*); *United States v. Lovett*, 964 F.2d 1029, 1038 (10th Cir. 1992) (under section 1957, the interstate commerce nexus is jurisdictional but not an element of the crime charged) (citing *United States v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991)). Given the lack of controlling law on this issue, the Committee recommends that the nexus be alleged in the indictment. In any case, a finding of an effect on interstate or foreign commerce of either the transaction itself or the activities of the financial institution, if one was involved, is essential. *See United States v. Ben M. Hogan Co., Inc.*, 769 F.2d 1293, 1297 (8th Cir. 1985) (reversible error for a district court to give an instruction which could have been understood to include a conclusive presumption of effect on interstate commerce, where such a finding by the jury was essential in a prosecution under the Sherman Anti-Trust Act).

5. On the issue of what constitutes a sufficient representation, the Seventh Circuit has stated, "[i]t is enough that the government prove that an enforcement officer or authorized person made the defendant aware of circumstances from which a reasonable person would infer that the property was drug proceeds." *United States v. Kaufmann*, 985 F.2d 884, 893 (7th Cir. 1993).

6. *See* Instruction 6.18.1956J(6) (Proceeds), *infra*. The term is not defined in 18 U.S.C. § 1956(c). In the event that the representation was that the property "was used to conduct or facilitate specified unlawful activity" rather than "constituted proceeds," the following language might be used: "property used to [conduct] [facilitate] (describe the specified unlawful activity)." There is some ambiguity as to whether this is a crime as the statute is written. *See Money Laundering Federal Prosecution Manual*, p.277.

7. *See* Instruction 6.18.1956J(7) (Specified Unlawful Activity), *infra*. The term should not be confused with "unlawful activity" in general and has a specific, statutory meaning, as set forth in section 1956(c)(7). Because that section has had numerous amendments, and itself incorporates activities defined in several other statutes, the Committee recommends careful review of both the provisions of section 1956(c)(7) and of the incorporated statutes which were in effect at the time of the alleged financial transaction (section 1956(a)(1)) or transportation, transmission or transfer (section 1956)(a)(2)).

Throughout these instructions, the plain description of the offense has been substituted for the phrase "specified unlawful activity" (SUA), which is a term of art specifically defined in 18 U.S.C. § 1956(c)(7), and which incorporates *inter alia* most of 18 U.S.C. § 1961(1). If the indictment is read to the jury and contains the phrase, any inquiry by the jury as to whether a particular offense is "specified unlawful activity" can be answered as a matter of law. Section

1956(c)(7) as originally enacted effective October 27, 1986, was amended on November 18, 1988, on November 29, 1990, and on October 28, 1992. *See* Note 1, *supra*. The provisions of section 1956(c)(7) used should correspond to the alleged date of the offense. Further, many of the most common SUAs, such as drug trafficking, are derived from the definition of "racketeering activity," contained in 18 U.S.C. § 1961(1). That statute has also been amended since October 27, 1986, on November 10, 1986, November 18, 1988, and on November 29, 1990. Therefore, when determining whether an offense qualifies as an SUA, the applicable provisions of section 1961(1) should also be reviewed.

8. *See* Instruction 6.18.1956J(1) (Financial Transaction), *infra*. Determination of the transaction reporting requirements in effect on the date of the alleged transaction requires reviewing the provisions of both 31 U.S.C. §§ 5311-5327 and 31 C.F.R. Chapter 103, in effect on that date. Further, if the alleged financial transaction involves the use of a "financial institution," both 31 U.S.C. § 5312(a)(2) and the regulations promulgated thereunder, should be reviewed to ensure that the entity was a financial institution. *See* 18 U.S.C. § 1956(c)(6) (incorporating by reference 31 U.S.C. § 5312(a)(2) and its regulations).

The decision in *Ratzlaf v. United States*, 510 U.S. 135 (1994) is not likely applicable to violations of 18 U.S.C. § 1956. *Ratzlaf* involved an interpretation of 31 U.S.C. § 5324 and the mental state required under that statute. Because the mental state requirements of 18 U.S.C. § 1956 are clearly different, the applicability of *Ratzlaf* is doubtful.

9. *See* Instruction 8.01, *infra*.

10. *See* 18 U.S.C. § 1956(c)(2). This definition was included in the October 27, 1986, version of the statute and has not changed since.

11. The supplemental definitions and instructions contained in Instruction 6.18.1956J, *infra*, should be given in most cases. Whether they are inserted in each 6.18.1956 instruction or given after a series of 6.18.1956A through 6.18.1956I instructions is an option for the court to consider based on the number and types of money laundering counts and the ability of the jury to relate the definitions to the applicable counts.

12. In addition to Currency Transaction Report (CTR) requirements under 31 U.S.C. § 5313, two other common reporting requirements are Currency and Monetary Instrument Reports (CMIR) under 31 U.S.C. § 5316 and Forms 8300, under 26 U.S.C. § 6050I. Analogous instructions about those reporting requirements and their applicable provisions can be tailored for such cases.

13. *See* 31 U.S.C. § 5313; 31 C.F.R. § 103.22. Care should be taken to use the versions of the statutes and regulations in effect on the date of the transaction. For CMIRs the applicable references are 31 U.S.C. § 5316 and 31 C.F.R. § 103.23. For Forms 8300, *see* 26 U.S.C. § 6050I.

14. The multiple objective situation may apply to multiple intent allegations, i.e., sections 1956(a)(3)(A), (B) and (C). The indictment, and the government, should provide notice

of the provisions that are meant to apply in a particular case. *See United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991). Although there is no case law requiring unanimity on objectives, if an instruction to that effect is desired, *see* Instruction 5.06(F), *supra*.

Committee Comments

See generally United States v. Cruz, 993 F.2d 164 (8th Cir. 1993); *United States v. Peery*, 977 F.2d 1230, 1234 (8th Cir. 1992); *United States v. Turner*, 975 F.2d 490, 497 (8th Cir. 1992); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Davila*, 964 F.2d 778, 782 (8th Cir. 1992); *United States v. Sutera*, 933 F.2d 641, 644-46 (8th Cir. 1991); *United States v. Martin*, 933 F.2d 609, 610 (8th Cir. 1991); *United States v. Lucas*, 932 F.2d 1210, 1214 n.3, 1219 (8th Cir. 1991); *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990); *United States v. Lee*, 886 F.2d 998, 1002-03 (8th Cir. 1989). *See also* U.S. Dept. of Justice, *Money Laundering Federal Prosecution Manual* (Feb. 1992).

See Instruction 6.18.1956J, *infra*, for additional instructions which should be given in most cases.

Final Instructions: Elements of Offenses

6.18.1956J. SUPPLEMENTAL INSTRUCTIONS [1]

(1) Financial Transaction

[The phrase "financial transaction," as used in [this] [Instruction[s] _____] means[2] [a transaction which in any way or degree affects interstate or foreign commerce [involving the movement of funds by wire or other means.] [involving one or more monetary instruments.][3] [involving the transfer of title to any [real property] [vehicle] [vessel] [aircraft.]][4] [a transaction involving the use of a financial institution[5] which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.][6]

The term "transaction," as used above, means[7] [a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition of property] [with respect to a financial institution, a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, [use of a safe deposit box][8] or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means.]]

(2) Interstate and Foreign Commerce

[The phrase "interstate commerce," as used above, means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia.][9]

[The phrase "foreign commerce," as used above, means commerce between any state, territory or possession of the United States and a foreign country.][9]

[The term "commerce" includes, among other things, travel, trade, transportation and communication.][10]

[It is not necessary for the Government to show that [the defendant] [defendant[s] (name[s])] actually intended or anticipated an effect on interstate or foreign commerce. All that is necessary is that interstate or foreign commerce was affected as a natural and probable consequence of [the defendant's] [defendant[s] (name['s][s'])] actions.][11]

[You may find an effect on [interstate] [foreign] commerce has been proven if you find from the evidence beyond a reasonable doubt: (describe Government's evidence at trial of effect

on interstate or foreign commerce, *e.g.* that currency is printed in Washington D.C., that the gemstones came from another country.)][12]

[It is not necessary for the Government to show that [the defendant's] [defendant[s] (name['s][s'])] transaction with a financial institution, that is with (name institution) itself affected interstate or foreign commerce. All that is necessary is that at the time of the alleged offense (name institution) was engaged in or had other activities which affected interstate or foreign commerce in any way or degree.][13]

[You may find that the transaction involved the use of a financial institution which engaged in or the activities of which affected interstate or foreign commerce in any way or degree if you find from the evidence beyond a reasonable doubt: (describe Government's evidence at trial that the financial institution engaged in or affected interstate or foreign commerce, *e.g.*, that it sent checks for clearing to another state or transferred funds to another country).]][14]

(3) Funds

[The term funds includes (specify the property involved which the court determines constitutes "funds" under the statute).][15]

(4) Monetary Instrument

[The phrase "monetary instrument," means, among other things, [coin or currency of the United States [or of any other country]] [traveler's checks] [cashier's checks] [personal checks] [bank checks] [money orders] [investment securities] [[negotiable instruments] in bearer form or otherwise in such form that title thereto passes upon delivery.][16]

(5) Financial Institution

[The phrase "financial institution," means, among other things, (insert applicable definitions from 31 U.S.C. § 5312(a)(2)(A)-(Y) and 31 C.F.R. § 103.11(i).][17]

[The phrase "financial institution," includes each agent, agency, branch or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern, as a[n] (insert appropriate reference from 31 C.F.R. § 103.11(i)).] [Individuals, groups of individuals, and businesses not formally established as financial

institutions, may in fact be a financial institution if they act in one of the capacities I have listed.][18] [In this case, the Government alleges that (name of individual, group or entity) was a financial institution in that (name) acted in the capacity of (insert one of the categories from 31 C.F.R. § 103.11(i)). If you find beyond a reasonable doubt that (name of individual, group or entity) did act as a (insert appropriate reference from 31 C.F.R. § 103.11(i)), whether or not (name) did so on a regular basis or as an organized business concern, then you may find that the Government has established that the transaction in this case involved a financial institution.]][19]

(6) Proceeds

[The term "proceeds" means any property, or any interest in property, that someone derives from, or obtains or retains, either directly or indirectly, as a result of the commission of (describe the specified unlawful activity).[20] [It includes the gross receipts of (describe the specified unlawful activity).][21] [Proceeds can be any kind of property, not just money. It can include personal property, like a car or a piece of jewelry, or real property, like an interest in land.][22] [So, for example:] [If someone robs a bank, the money he takes from the teller is the proceeds of the bank robbery.] [If someone steals a car, the car is the proceeds of the theft.] [If someone commits a fraud scheme and thereby acquires an interest in land, or shares of stock, or a joint interest in a bank account, that interest, whatever it may be, is the proceeds of the crime.] [If someone sells drugs for cash and uses the cash to buy a cashier's check, the cash received is proceeds and the cashier's check is still proceeds of the crime.][23]

[It does not matter whether or not the person who committed the underlying crime, and thereby acquired or retained the proceeds, was [the] [a] defendant. It is a crime to [conduct a financial transaction] [transport, transmit or transfer monetary instruments or funds][24] involving property that is the proceeds of a crime, even if that crime was committed by another person, as long as all of the elements of the offense are satisfied.][25]

[The Government is not required to trace the property it alleges to be proceeds of (describe the specified unlawful activity) to a particular underlying offense. It is sufficient if the Government proves that the property was the proceeds of (describe the specified unlawful activity) generally.[26] [For example, in a case involving alleged drug proceeds, the Government

would not have to trace the money to a particular drug offense, but could satisfy the requirement by proving that the money was the proceeds of drug trafficking generally.][27]

[The Government need not prove that all of the property involved in the [transaction] [transportation, transmission or transfer][23] was the proceeds of (describe the unlawful activity). It is sufficient if the Government proves that at least part of the property represents such proceeds.]][26]

(7) Specified Unlawful Activity

[The phrase "specified unlawful activity," means any one of a large variety of offenses defined by statute. I instruct you as a matter of law that (describe the specified unlawful activity) falls within the definition. To assist you in determining whether someone [committed] [attempted to commit] (describe the specified unlawful activity), you are advised that the elements of (name offense) are: (set out elements).][28]

(8) Knowledge

[The phrase "knew the (describe property) represented the proceeds of some form of unlawful activity," means that [the defendant] [defendant[s] (name[s])] knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony offense under [state or federal] [or] [foreign] law.[29] Thus, the Government need not prove that the defendant specifically knew that the (describe property) involved in the financial transaction represented the proceeds of (describe the specified unlawful activity which is the predicate offense) or any other specific offense; it need only prove that [he] [she] [they] knew it represented the proceeds of some form, though not necessarily which form, of felony under [state] [or] [federal] [or] [foreign] law. [I instruct you as a matter of law (describe offense) is a felony under (insert applicable jurisdiction) law.]]

Notes on Use

1. The Committee recommends the Court explain the terms set forth in this instruction which are applicable to the section 1956 count[s] in the indictment. They should, of course, be tailored to the facts of the particular case.

2. *See* 18 U.S.C. § 1956(c)(4).

> Section 1956(c)(4) defines the term "financial transaction" very broadly. Because of the broad definition of the term "transaction" [*see* Note 6, *infra*] in section [1956](c)(3), the term "financial transaction" is not limited to transactions involving financial institutions. It includes all forms of commercial activity. The only requirement is that the transaction must "affect interstate or foreign commerce" or be conducted through or by a financial institution "which is engaged in or the activities of which affect interstate or foreign commerce," in any way or degree. S. Rep. No. 433, 99th Cong. 2d Sess 13 (1986).

3. Use where the transaction involves monetary instruments. "Transaction" includes the purchase, sale or disposition of any kind of property as long as the disposition involves a monetary instrument. *See United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990); *United States v. Lee*, 886 F.2d 998, 1002-03 (8th Cir. 1989). A "financial transaction" includes transferring cash from one person to another without involvement of a financial institution, as long as it affects interstate or foreign commerce. *See United States v. Kaufmann*, 985 F.2d 884, 892 n.3 (7th Cir. 1993) ("financial transaction" found for cash sale of car); *United States v. Isabel*, 945 F.2d 1193, 1201 (1st Cir. 1991) (giving a check in exchange for cash); *United States v. Hamilton*, 931 F.2d 1046, 1051-52 (5th Cir. 1991) (sending cash through the mail); *United States v. Gallo*, 927 F.2d 815, 822 (5th Cir. 1991) (transfer of a box of currency between individuals). It may also include merely writing a check. *See United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991); *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990).

Although not listed in section 1956(c)(5), cashier's checks are negotiable instruments in "[s]uch form that title thereto passes upon delivery." S. Rep. No. 433, 99th Cong., 2d Sess. 13 (1986). This definition was explicitly clarified, effective May 8, 1987, when "cashier's checks" was added to the definition of "monetary instruments" in 31 C.F.R. § 103.11(j)(iii). *See* 52 Fed. Reg. 11436 (1987) (Final Rule).

4. This third alternative definition involving the transfer of titles became effective October 28, 1992. Previously, only the other two types of transactions affecting interstate or foreign commerce applied. *See* Note 1, Instruction 6.18.1956A, *supra*.

5. *See* Notes 17-19, *infra*. The term "financial institution" is generally defined for purposes of Title 18 in 18 U.S.C. § 20. However, 18 U.S.C. § 1956(c)(6) specifically incorporates for section 1956 purposes the somewhat different definition found in 31 U.S.C. § 5312(a)(2) *and* its implementing regulations, *e.g.* 31 C.F.R. § 103.11(i). The scope is quite broad and includes insurance companies, pawnbrokers, travel agencies, vehicle dealers, realtors, the United States Postal Service and a number of other entities which a lay person might not consider to be a financial institution. Because of the periodic amendments to section 5312(a)(2) and to 31 C.F.R. § 103.11 the Committee recommends reviewing the versions applicable at the time of the alleged transaction.

6. As defined in 18 U.S.C. § 1956(c)(4), the financial transaction may itself affect interstate or foreign commerce. Alternatively, the transaction, regardless of whether it itself has such a nexus, may involve the use of a "financial institution" which supplies the nexus. Section 1956(a)(1) does not require that the use of the financial institution, i.e., the financial transaction,

with the interstate commerce nexus, be a part of or even contribute to or facilitate the requisite design to conceal the nature, ownership or source of the proceeds. *See United States v. Koller*, 956 F.2d 1408, 1412 (7th Cir. 1992) (the defendant purchased money order at a bank which he then took to the probation officer to satisfy his girlfriend's restitution).

7. *See* 18 U.S.C. § 1956(c)(3). According to the legislative history, the term "also includes activities not involving banks such as the purchase, sale or other disposition of property of all kinds . . . . [E]ach transaction involving "dirty money" is intended to be a separate offense." S. Rep. No. 433, 99th Cong., 2d Sess. 13 (1986). The history uses the example of a drug dealer who takes $1 million in cash from drug sales, deposits portions in ten different banks, withdraws some and then uses the money withdrawn to purchase a luxury item. There are twelve violations, ten for the deposits, one for the withdrawal and one for the purchase. *Id.*

8. Until the October 28, 1992, amendments, merely depositing money in a safe deposit box in a financial institution was not a transaction. *See* Instruction 6.18.1956A, *supra*, Note 1; *United States v. Bell*, 936 F.2d 337, 340-41 (7th Cir. 1991) (holding that use of a safe deposit box to hold the proceeds of specified unlawful activity did not constitute a "transaction"). Since that date, mere "use of a safe deposit box" with respect to a financial institution is explicitly included.

9. *See* 18 U.S.C. § 10; 18 U.S.C. § 1951(b)(3); 18 U.S.C. § 1956(c)(8) (definition of "state"). The terms "interstate," "foreign" and "commerce" are not specifically defined in 18 U.S.C. § 1956. The statutory definitions in other portions of Title 18 define them consistently with the ordinary meanings of the terms. Optional definitions are included for use if the facts of the case raise an issue in this regard or if the jury should have a question.

10. The term "commerce" as used throughout Title 18 was intended to avoid the narrower connotation of the word "transportation." 18 U.S.C. § 10, Revision Notes.

11. Use where the transaction itself affected interstate or foreign commerce. *See United States v. Evans*, 272 F.3d 1069 (8th Cir. 2001). The legislative history of section 1956 indicates that the phrase was derived from the Hobbs Act, 18 U.S.C. § 1951, and "intended to reflect the full exercise of Congress's power under the Commerce Clause." S. Rep. No. 433, 99th Cong. 2d Sess. 13 (1986). *See also United States v. Perez*, 402 U.S. 146, 154 (1971) (loan sharking).

12. Because there is no clear requirement that the commerce nexus be alleged in the detail required under the Hobbs Act, the wording of Instruction 6.18.1951, *supra*, is different. If this instruction does not precede a paragraph describing the government's burden of proof, the Committee recommends adding "otherwise, you must find [the] [that particular] defendant not guilty [under Count[s] ____]." *See* Instruction 3.09, *supra*.

13. *See* 18 U.S.C. § 1956(c)(4). Use when a "financial institution" [*see* Note 5, *supra*] is involved, regardless of whether the transaction itself had an effect on interstate or foreign commerce.

14. Because the requirement under the Hobbs Act is somewhat different, the wording of Instruction 6.18.1951, *supra*, is different. If this instruction does not precede a paragraph describing the government's burden of proof, the Committee recommends adding, "[o]therwise, you must find [the] [that particular] defendant not guilty [under Count[s] ____]." The Committee has been unable to find a definition specifically applicable to sections 1956 and 1957.

15. *See generally Black's Law Dictionary* 673 (6th ed. 1990) ("monies and much more, such as notes, bills, checks, drafts, stocks and bonds....") For use where the financial transaction involved the movement of funds rather than monetary instruments or the transfer of title to property. *See* Notes 2-4, *supra*.

16. For use where the financial transaction involved the use of a monetary instrument. *See* Notes 2-4, *supra*.

17. *See* Note 5, *supra*. For use in response to a question by the jury or where the nature of the financial institution is not intuitive. Section 5312(a)(2) was already in effect on October 27, 1986, and was amended November 18, 1988. Section 103.11 was effective October 27, 1986, and amended May 8, 1987, *inter alia* adding cashier checks to the definition of "monetary instruments."

18. *See* 31 C.F.R. § 103.11(a). This portion of the regulation was already in effect on October 27, 1986. *See* 50 Fed. Reg. 42691 (1985) and corrected at 50 Fed. Reg. 47390 (1985) (Final Rule). On May 8, 1987, the definition was expanded to include persons whether or not on a regular basis or as an organized business concern. *See* 52 Fed. Reg. 11436 (1987) (Final Rule). *See also United States v. Tannebaum*, 934 F.2d 8, 11-12 (2d Cir. 1991) (an individual can be a financial institution); *United States v. Gollott*, 939 F.2d 255, 258 (5th Cir. 1991) (group of individuals laundering cash for undercover agent was a financial institution required to file Currency Transaction Reports).

19. This optional expansion of the instruction may be given when this is an issue.

20. Before May 20, 2009, "proceeds" was not defined in 18 U.S.C. § 1956(c). The definition of the term was based on 18 U.S.C. § 1957(f)(2), which referred to "any property *constituting, or derived from*, proceeds obtained from a criminal offense" (emphasis added), on 18 U.S.C. § 853(A)(1), and on limited case law.

The Supreme Court considered the definition of “proceeds” in *United States v. Santos*, 553 U.S. 507 (2008), a case involving an illegal lottery operator’s payments to his winners and runners using the receipts from his lottery operation. A plurality of the Supreme Court found that the term “proceeds” in section 1956(a)(1)(A)(i) applied only to criminal profits, not criminal receipts. Justice Stevens, in a concurring opinion which was the determinative opinion, concluded that the term "proceeds" did not include revenue used to pay essential operating expenses in a gambling business, but it did include gross revenue from the sale of contraband and the operation of organized crime syndicates.

21. Do not use this bracketed language in illegal gambling cases charging conduct prior to May 20, 2009. *See United States v. Santos*, 553 U.S. 507 (2008).

In response to the decision in *Santos*, Congress amended the statute May 20, 2009, adding a definition of "proceeds." 18 U.S.C. § 1956(c)(9) ("the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity").

Santos involved an illegal gambling operation that did not involve contraband. As discussed in *United States v. Williams*, 605 F.3d 556, 568-69 (8th Cir. 2010), the Court divided on the definition of "proceeds" in certain money laundering contexts: four in the majority held that "proceeds" means "profits" in all contexts; the four in dissent held that "proceeds" always means "gross receipts," Justice Stevens, who cast the decisive vote for the majority in his concurrence, concluded that "proceeds" means profits in some cases and gross receipts in others, depending on the legislative history. "Because *Santos* was a plurality opinion, its precedent is the narrowest holding that garnered five votes." That is Justice Stevens' concurrence that "[t]he revenue generated by a gambling business that is used to pay the essential expenses of operating that business is not 'proceeds' within the meaning of the money laundering statute." *United States v. Spencer*, 592 F.3d 866, 879 (8th Cir. 2010) (quoting *Santos*, 553 U.S. at___, 128 S. Ct. at 2033). Accordingly, this Circuit and many others have limited the precedential value of *Santos* to an illegal gambling charge. *Spencer*, 592 F.3d at 879-880.

Moreover, the amendment to the statute on May 20, 2009, adding a definition of "proceeds," was designed to correct the problem the Supreme Court found with the statutory definition by clearly defining the term "proceeds." The ruling in *Santos* thus is limited to money laundering charges relating to illegal gambling activities before May 20, 2009.

22. These optional expansions of the definition should be tailored to the facts of a specific case. For an example where the court found that proceeds can include other than money or cash equivalents, even where that property was not purchased with the monetary proceeds of unlawful activity, *see United States v. Werber*, 787 F. Supp. 353, 357 (S.D.N.Y. 1992).

23. Use with Instructions 6.18.1956D, E & F (18 U.S.C. § 1956(a)(2)).

24. *See United States v. Atterson*, 926 F.2d 649, 656 (7th Cir. 1991) (the defendant was girlfriend of a drug dealer who wired cash for him); *United States v. Isabel*, 945 F.2d 1193, 1202-03 (1st Cir. 1991) (the defendant issued false paycheck in return for cash received from person who said he was a drug dealer).

25. The statute merely requires that the transaction "involves" the proceeds. *See United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990); *accord United States v. Jackson*, 983 F.2d 757, 766 (7th Cir. 1993) (citing *Blackman*); *United States v. Isabel*, 945 F.2d 1193, 1201 (1st Cir. 1991) (citing *Blackman* and *United States v. Jackson*, 935 F.2d 832, 840 (8th Cir. 1991)).

26. This optional example, which should be tailored to the facts of the case, is based on facts in *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990).

27. The requirement that the financial transaction "involves the proceeds" of unlawful activity does not require that the government prove that the transaction involved only illegally derived proceeds. The sanction of the statute cannot be avoided by commingling funds. *See United States v. Jackson*, 983 F.2d 757, 765 (7th Cir. 1993) (citing *United States v. Jackson*, 935 F.2d 832, 840 (7th Cir. 1991)). Nor need the evidence of criminally derived funds be direct. *See United States v. Turner*, 975 F.2d 490, 497 (8th Cir. 1992) (reasonable for jury to infer that money used to purchase and renovate a building came from drug sales, where there was extensive testimony about the defendant's drug operations and evidence that his expenses far exceeded his income). *But Cf. United States v. Baker*, 985 F.2d 1248, 1254, 1261-62 (4th Cir. 1993) (reversal of jury's verdict in absence of specific evidence identifying the boat purchased by a third party, identifying the defendant as the owner or possessor of the boat, showing that the money used by the third party belonged to the defendant and that the money was the product of drug transactions).

28. Throughout these instructions, the plain description of the offense has been substituted for the phrase "specified unlawful activity" (SUA) which is a term of art specifically defined in 18 U.S.C. § 1956(c)(7), and which incorporates *inter alia* most of 18 U.S.C. § 1961(1). If the indictment is read to the jury and contains the phrase, any inquiry by the jury as to whether a particular offense is "specified unlawful activity" can be answered as a matter of law. Section 1956(c)(7) as originally enacted effective October 27, 1986, was amended on November 18, 1988, on November 29, 1990, and on October 28, 1992. *See* Note 1, Instruction 6.18.1956A, *supra*. The provisions of section 1956(c)(7) used should correspond to the alleged date of the offense. Further, many of the most common SUAs, such as drug trafficking, are derived from the definition of "racketeering activity," contained in 18 U.S.C. § 1961(1). That statute has also been amended since October 27, 1986, on November 10, 1986, November 18, 1988, and on November 29, 1990. Therefore, when determining whether an offense qualifies as an SUA, the applicable provisions of section 1961(1) should also be reviewed. *NOTE:* Although the general trend of amendments to section 1956(c)(7) has been to *expand* the statute, the 1990 amendment added violations of sections 1341 and 1343 (mail and wire fraud) "affecting a financial institution." Because all RICO (18 U.S.C. § 1961) predicates, including sections 1341 and 1343, were already incorporated within section 1956(c)(7), it is unclear whether Congress intended to *restrict* section 1956(c)(7) and exclude section 1341 and 1343 offenses *not* affecting a financial institution after November 29, 1990. *See United States v. Taylor*, 984 F.2d 298, 301-02 (9th Cir. 1993). This ambiguity was eliminated, effective October 28, 1992, when the questionable references to sections 1341 and 1343 (as well as the section 1344 relating to bank fraud) were deleted. Where the substantive offense constituting the SUA is not also charged in the indictment, the Committee recommends that, upon request of either party, the jury be instructed as to the elements of the SUA[s] alleged in the money laundering counts. *See, e.g.*, Instruction 5.06C, *supra*.

Final Instructions: Elements of Offenses

29. The financial transaction (or transportation, transmission or transfer, in the case of 18 U.S.C. § 1956(a)(2)) must have involved proceeds from "specified" unlawful activity, as defined in 18 U.S.C. § 1956(c)(7); however, the defendant need not have known the actual source of the proceeds, as long as the defendant knew that the proceeds represented "some form of unlawful activity." 18 U.S.C. § 1956(a)(1). Section 1956(c)(1) defines the term broadly to require only 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 [1956(c)](7)." Although the most common situation will be that the defendant's knowledge and the actual source of the proceeds coincide, where the evidence shows that the defendant thought that the property used in the transaction was proceeds from a different unlawful activity, the instruction should be tailored to reflect the defendant's knowledge, *e.g.* "at the time the defendant conducted the financial transaction, he believed that the money he used in the financial transaction represented the proceeds of unlawful [prostitution] [dogfighting] [gambling]." *See, e.g., United States v. Long*, 977 F.2d 1264, 1277 (8th Cir. 1992) (discussing the laundering of "any proceeds from a myriad of specified unlawful activities," and how that results in different offense levels under section 2S1.1 of the Sentencing Guidelines).

Committee Comments

See Committee Comments and Notes on Use, Instructions 6.18.1956A through I, *supra*.

6.18.1957. ENGAGING IN MONETARY TRANSACTIONS IN PROPERTY DERIVED FROM SPECIFIED UNLAWFUL ACTIVITY (18 U.S.C. § 1957)

The crime of engaging in a monetary transaction in property derived from (describe specified unlawful activity), as charged in [Count[s] ____ of] the Indictment, has five elements, which are:

One, on or about (date),[1] the defendant[s] knowingly (describe the "monetary transaction," e.g., withdrew funds from an account at ABC Bank);[2]

Two, the (describe "monetary transaction," e.g., withdrawal) was [of] [in] property[3] of a value greater than $10,000 derived from (describe "specified unlawful activity," e.g., bank fraud) as defined in Instruction No. _____;[4]

Three, the defendant[s] then knew that (describe the "monetary transaction") involved proceeds of a criminal offense;[5]

Four, the (describe the "monetary transaction") took place in (describe location of the transaction);[6] and

Five, the (describe the "monetary transaction") in some way or degree affected interstate commerce.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. *See* Note 1, Instruction 6.18.1956A, *supra*. The statute became effective October 27, 1986. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Title I, § 1352(a), 100 Stat. 3207-21. Effective November 18, 1988, the definition of "monetary transaction" was decoupled from the definition of "monetary instrument" under 31 U.S.C. § 5312 and made the same as 18 U.S.C. § 1956(c)(5). Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VI, §§ 6182, 6184 and 6469(a)(2), 102 Stat. 4354 and 4377. The statute was further amended, effective October 28, 1992. Pub. L. 102-550, Title XV, §§ 1526(b) and 1527(b), 106 Stat. 4065. That change decoupled the definition of "financial institution" from 31 U.S.C. § 5312 and made it the same as 18 U.S.C. § 1956[(c)(6)], thus requiring a consideration of not only 31 U.S.C. § 5312 but its implementing regulations.

2. The term "monetary transaction" is defined in 18 U.S.C. § 1957(f)(1). The section defining "monetary transaction" adopts by reference the section 1956 definition of "financial institution," which in turn adopts definitions contained in or promulgated under Title 31. Therefore, a wide variety of transactions beyond dealings with traditional financial institutions

such as banks are covered by the statute. *See, e.g., United States v. Kelley*, 929 F.2d 582 (10th Cir. 1991) (section 1957 violated by purchase of automobile with proceeds from fraud scheme). The definition of "monetary transaction" excludes "any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution." The Committee recommends that the "monetary transaction" be described in simple terms, e.g., "a withdraw from ABC Bank," or "purchase of an automobile," according to the allegations of the indictment and the evidence in the case. The "monetary transaction" must also, by definition, be "in or affecting interstate or foreign commerce." *Cf. United States v. Kelley*, 929 F.2d at 585-86 (commerce nexus jurisdictional, but not an element of the offense). *See* Note 4, Instruction 6.18.1956A, *supra*.

3. The term "property" is not defined in the statute. In some situations, it may be preferable to use a term such as "currency" to more precisely describe the property at issue in the case. In other situations, it may be helpful to include a separate paragraph defining "property" in terms of what is included or excluded in the application of the statute to the facts of the particular case. The statutory language -- "a monetary transaction in criminally derived property" -- is awkward when describing certain transactions. The Committee recommends using "of" when describing transactions such as "withdrawal of," "deposit of," etc.

4. The government must prove that the property was, in fact, derived from "specified unlawful activity" as defined in section 1957(f)(3), which adopts the definition from section 1956. *See, e.g., United States v. Hare*, 49 F.3d 447, 451 (8th Cir. 1995). However, it is not necessary to prove that the defendant knew that the offense from which the property was derived was specified unlawful activity. 18 U.S.C. § 1957(c). If the underlying criminal activity, e.g., bank fraud, is charged in the same indictment, a reference to the instruction defining the elements of the underlying specified unlaw activity may be included in this instruction. For example, "The withdrawal was of funds of a value greater than $10,000 derived from bank fraud as defined in Instruction No. _____." If the underlying criminal activity is not charged in the same indictment, the government will be required to prove that the underlying criminal activity occurred by proving the elements of the underlying offense or a prior conviction of it. In such a case, the elements of the underlying offense should be spelled out as part of this instruction. *See also* Note 27, Instruction 6.18.1956J, *supra*, and Instruction 5.06C, *supra*.

5. The knowledge element of a section 1957 offense requires proof that the defendant knew the transaction involved "criminally derived property" as defined in section 1957(f)(2), that is, "property constituting, or derived from, proceeds obtained from a criminal offense." While reference to the definition (elements) of specified unlawful activity is recommended in all cases, any issues about whether the defendant believed that the activity generating the proceeds did not amount to a criminal offense should be dealt with in a defense theory instruction. *See* part 9 of this manual, Defenses and Theories of Defense. The Committee has avoided use of the statutory term "criminally derived property" in drafting this instruction since that phrase would require further definition and the statutory requirement can be explained in more understandable language.

Final Instructions: Elements of Offenses

6. There must be proof that the offense occurred within the United States or within special maritime and territorial jurisdiction. 18 U.S.C. § 1957(a) and (d). Special maritime and territorial jurisdiction is defined in 18 U.S.C. § 7. When the indictment alleges such a "circumstance," the court should determine whether the evidence permits a finding that the element has been established and then submit to the jury the more precise question of whether the offense, or transaction, occurred at the location alleged in the indictment. As an alternative, the government may allege and prove that the defendant was a person defined in 18 U.S.C. § 3077(2)(A), (B), (C), (E) or (F). The Committee assumes that prosecutions under the latter alternative "circumstance" will be rare, but the fourth element would have to be redrafted to fit the situation in such cases.

Committee Comments

Section 1957 of Title 18 applies to monetary transactions occurring after the completion of the underlying criminal activity. *United States v. Johnson*, 971 F.2d 562, 567-70 (10th Cir. 1992). Such an interpretation of the statute means that the proceeds must have been "obtained" from the underlying criminal activity before the monetary transaction prohibited by section 1957 occurs. Monetary transactions occurring simultaneously with the efforts to "obtain" proceeds of crime, that is, simultaneously with the underlying drug sale, execution of the scheme to defraud, etc., would not be covered. *Id.*, 971 F.2d at 569.

Final Instructions: Elements of Offenses

6.18.1962A. RICO-PARTICIPATION IN THE AFFAIRS THROUGH A PATTERN OF RACKETEERING ACTIVITY (18 U.S.C. § 1962(c))

The crime of participating in a racketeering enterprise[1] as charged in [Count ____] of the Indictment has five elements, which are:

One, an enterprise existed as alleged in the Indictment;[2]

Two, the enterprise [was engaged in] [had some affect on] interstate commerce;[3]

Three, the defendant was [associated with] [employed by][4] the enterprise;

Four, the defendant participated, either directly or indirectly, in the conduct of the affairs of the enterprise[5]; and

Five, the defendant's participation was through a pattern of racketeering activity,[6] and consisted of the [knowing] [willful][7] commission of at least two racketeering acts.

The term "racketeering activity," as used in [the] [this] Instruction[s] includes the acts charged as separate crimes in Counts ___, ___, and ___. The element of the crimes charged in Count ___, ___, and ___ are defined in Instructions ___, ___, and ___. [If the predicate acts are not charged in separate counts, instructions on the elements of each racketeering activity must be given as part of the racketeering charge.][8]

For you to find [a] defendant guilty of this crime the Government must prove all of these elements beyond a reasonable doubt [as to that defendant]; otherwise you must find [that] [the] defendant not guilty.[9]

Notes on Use

1. If the violation of section 1962 (c) is through the collection of an unlawful debt, substitute "collection of an unlawful debt" for "pattern of racketeering activity." An unlawful debt is defined at 18 U.S.C. § 1961(6). *See* Committee Comments, *infra*.

2. The jury should be instructed on the meaning of "enterprise." *See infra*, Instruction D.

3. The racketeering activity must have some effect on interstate commerce. However, the element may be satisfied when the predicate acts form a nexus with interstate commerce; when the interstate commerce is affected by either the enterprise or its activities. *See United States v. Muskovsky* , 863 F.2d 1319 (7th Cir. 1988); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985); *United States v. Barton*, 647 F.2d 224 (2d Cir. 1981).

4. Proof of association-in-fact enterprise requires evidence that a group of persons associated together for a common purpose of engaging in a course of conduct. *United States v. Turkette*, 452 U.S. 576 (1981). The enterprise element may also be satisfied if the entity has a legal existence. *United States v. Kirk*, 844 F.2d 660 (9th Cir. 1988); *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983).

5. A defendant's participation must be in the conduct of the affairs of the enterprise which means either some participation in the operation or management of the enterprise itself. *Reves v. Ernst & Young*, 507 U.S. 170, (1993); *United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir. 1995). Participation may be direct or indirect. *See e.g., United States v. Martino*, 648 F.2d 367 (5th Cir. 1981); *United States v. Starnes*, 644 F.2d 673 (7th Cir. 1981).

6. The jury should be instructed on the meaning of "pattern of racketeering." *See infra*, Instruction E.

7. The RICO statute does not require any *mens rea* beyond that necessary for the predicate acts. The Instruction should be modified to conform to the *mens rea* requirement contained within the statute governing the predicate act.

8. "Racketeering activity" is defined at 18 U.S.C. § 1961 (1).

9. The jury must be instructed that in order to convict, the government must prove beyond a reasonable doubt each element of the charge. It is recommended that the burden of proof paragraph be included in the element instruction. *See United States v. Fairchild*, 122 F.3d 605, 612 (8th Cir. 1997); Instruction 3.09, *supra*.

Committee Comments

See 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 56.03 (5th ed. 2000); *United States v. Ellison*, 793 F.2d 942 (8th Cir. 1986).

A violation of section 1962 may occur either by a defendant engaging in a "pattern of racketeering activity" or "collection of an unlawful debt." An unlawful debt is defined in 18 U.S.C. § 1961(6). *See, e.g., United States v. Wong*, 40 F.3d 1347 (2d Cir. 1994); *United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994); *United States v. DiSalvo*, 34 F.3d 1204 (3d Cir. 1994); *United States v. Aucoin*, 964 F.2d 1492 (5th Cir. 1992); *United States v. Tripp*, 782 F.2d 38 (6th Cir. 1986).

RICO requires proof of the conduct of an enterprise effecting commerce through a pattern of racketeering activity involving two or more predicate acts. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *United States v. Ellison*, 793 F.2d 942 (8th Cir. 1986). *See also Salinas v. United States*, 522 U.S. 52, __, 118 S. Ct. 469, 476 (1997) (discussing elements of substantive RICO violation). A RICO defendant does not have to be convicted of each racketeering activity before a substantive RICO offense may be charged, as long as the racketeering activity is indictable under an applicable criminal statute. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. at 488. While a minimum of two predicate acts are necessary, more than two may be required to establish a RICO violation. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492

U.S. 229 (1989). 18 U.S.C. § 1961(1) describes those state and federal crimes which constitute racketeering activity.

A conviction under RICO requires no proof of a connection between organized crime and the defendant. *See Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *modified*, 710 F.2d 1361 (8th Cir. 1983) (en banc); *Moss v. Morgan Stanley Inc.*, 719 F.2d 5 (2d Cir. 1983); *Schact v. Brown*, 711 F.2d 1343 (7th Cir. 1983).

The RICO statute does not specify any *mens rea* beyond that specified in the predicate acts. *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980). It is recommended that the elements of the offense instruction clearly set out the *mens rea* requirement of the predicate acts in that portion which pertains to the predicate acts.

To prove the existence of an enterprise, the government must prove (1) a common purpose; (2) a formal or informal organization of the participants in which they function as a unit; and (3) an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity. *United States v. Kehoe*, 310 F.3d 579, 586 (8th Cir. 2002); *United States v. Darden*, 70 F.3d 1507 (8th Cir. 1995); *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982). The enterprise element may be satisfied upon a showing either that the entity has a legal existence or proof of an association in fact. *United States v. Turkette*, 452 U.S. 576 (1981). The enterprise must have an existence entirely separate and independent of the racketeering activity. *See also United States v. Console*, 13 F.3d 641 (3d Cir. 1993); *United States v. Masters*, 924 F.2d 1362 (7th Cir. 1991); *United States v. Tillett*, 763 F.2d 628 (4th Cir. 1985).

Section 1962(c) requires a relationship between the pattern of racketeering and the enterprise. Conduct forms a pattern of racketeering activity if it embraces criminal acts that have the same or similar purpose, results, participants, victims or methods of commission or are inextricably intertwined and not isolated events. *United States v. Ellison*, 793 F.2d 942 (8th Cir. 1986). The necessary nexus only exists when the defendant's predicate acts "rise to the level" of participation in the management or operation of the enterprise. *Reves v. Ernst & Young*, 507 U.S. 170 (1993). Mere participation in the predicate offenses in conjunction with a RICO enterprise may be insufficient to support a RICO charge. *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *modified*, 710 F.2d 1361 (en banc 1983). An enterprise may be "operated" or "managed" by others "associated with" the enterprise who exert control of the enterprise. *Reves v. Ernst & Young*, 507 U.S. 170 (1993). A person may also be liable under section 1962(c) even though he had no control of the enterprise but participated or operated in the conduct of the enterprise. *United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir. 1995). Yet the Eighth Circuit has held that Congress did not mean for 1962(c) to penalize all who are employed by or associated with a RICO enterprise, but only those, who by virtue of their association of employment, play a part in directing the enterprise' affairs. *Handeen v. Lemaire*, 112 F.3d 1339, 1347 (8th Cir. 1997). An attorney or other professional does not conduct an enterprise' affairs through run-of-the-mill professional services. *Id.*

The government need not prove that the racketeering activity benefitted the enterprise but only that the predicate acts affected the enterprise. *United States v. Cauble*, 706 F.2d 1322 (5th

Cir. 1983). The same piece of evidence may establish both pattern and enterprise elements. *United States v. Darden*, 70 F.3d 1507, 1521 (8th Cir. 1995).

Isolated predicate acts do not constitute a pattern. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). In order to prove a pattern of racketeering activity, the government must show both relationship and continuity as separate elements. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Generally continuity over a close period is not met when the predicate acts extend less than one year. *Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208 (8th Cir. 1993); *see also Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918 (7th Cir. 1992); *Aldridge v. Lily-Tulip Inc. Salary Retirement Plan*, 961 F.2d 224 (11th Cir. 1992); *Hughes v. Consolidated Pennsylvania Coal Co.*, 945 F.2d 594 (3d Cir. 1991). Generally pattern requires a showing of a relationship plus continuity. However, determining what constitutes a pattern is ultimately a question of fact. *Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765 (8th Cir. 1992); *Atlas Pile Driving Co. v. DiCon Financial Co.*, 886 F.2d 986 (8th Cir. 1989).

Courts have provided a broad interpretation to the interstate commerce requirement. *See e.g., United States v. Robertson*, 514 U.S. 669 (1995) (purchase of equipment and supplies from out of state as well as employment of out of state persons to work mine constituted interstate commerce); *see also United States v. Qaoud*, 777 F.2d 1105 (6th Cir. 1985) (activities of United States District Court constituted interstate commerce.)

The jury must be unanimous that predicate acts had been committed and the defendant committed at least two of the predicate acts. It is recommended that the instructions require the jury to be unanimous as to which acts have specifically been committed by the defendant. *United States v. Flynn*, 87 F.3d 996 (8th Cir. 1996); *see also United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987); 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 56.03 (5th ed. 2000).

Final Instructions: Elements of Offenses

6.18.1962B. RICO - CONSPIRACY (18 U.S.C. § 1962(d))

The crime of conspiracy[1] to [invest or use income derived from racketeering activity] [acquire or maintain an interest in or control of an enterprise] [participate, directly or indirectly, in the affairs of an enterprise] through a pattern of racketeering activity as charged in [Count ____] of the Indictment has five elements, which are:[2]

One, an enterprise existed as alleged in the Indictment;[3]

Two, the enterprise [was engaged in] [had some effect on] interstate commerce;[4]

Three, the defendant was [associated with] [employed by] an enterprise;[5]

Four, that on or about [insert date] two [or more] persons reached an agreement or came to an understanding [to invest or use income derived from racketeering activity] [to acquire or maintain an interest in or control of an enterprise] [to conduct or participate in the affairs of an enterprise, directly or indirectly,] through a pattern of racketeering activity; [6] and

Five, that the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in existence, and at the time the defendant joined in the agreement or understanding [he] [she] specifically intended to otherwise participate in the affairs of the enterprise.[7]

For you to find [a] defendant guilty of this crime the Government must prove all of these elements beyond a reasonable doubt [as to that defendant]; otherwise you must find [that] [the] defendant not guilty.[8]

Notes on Use

1. The general conspiracy statute is 18 U.S.C. § 371. Unlike the general conspiracy statute, the government need not prove an overt act was committed in furtherance of the conspiracy.

2. Section 1962(d) prohibits conspiring to violate any provision of § 1962 (a)(b)(c).

3. The jury should be instructed on the meaning of "enterprise." *See infra*, Instruction D.

4. The racketeering activity must have some effect on interstate commerce. Section 1962 (c) also provides that a pattern of racketeering activity which affects foreign commerce is unlawful. If supported by evidence, substitute foreign commerce for interstate commerce. However the element may be satisfied when the predicate acts form a nexus with interstate commerce; when the interstate commerce is affected by either the enterprise or its activities. *See*

United States v. Muskovsky , 863 F.2d 1319 (7th Cir 1988); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985); *United States v. Barton*, 647 F.2d 224 (2d Cir. 1981).

5. Proof of association-in-fact enterprise requires evidence that a group of persons associated together for a common purpose of engaging in a course of conduct. *United States v. Turkette*, 452 U.S. 576 (1981). The enterprise element may also be satisfied if the entity has a legal existence. *United States v. Kirk*, 844 F.2d 660 (9th Cir. 1988); *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983).

6. The jury should be instructed on the meaning of "pattern of racketeering." *See infra*, Instruction E.

7. The government must prove that the defendant objectively manifested an agreement to participate in the affairs of the enterprise. *United States v. Darden*, 70 F.3d 1507, 1518 (1995). The Court's statement in Darden regarding "objectively manifested" appears to be a comment on the amount of evidence the government must introduce to allow the jury to infer an intent to participate. The Committee does not believe that the term "objectively manifest" is an element of the offense because it would lessen the level of intent. Proof of an express agreement is not required. The government need only establish a tacit understanding between the parties and this may be shown wholly through circumstantial evidence of each defendant's actions. *Id.*

8. The jury must be instructed that in order to convict, the government must prove beyond a reasonable doubt each element of the charge. It is recommended that the burden of proof paragraph be included in the element instruction. *See United States v. Fairchild*, 122 F.3d 605, 612 (8th Cir. 1997); Instruction 3.09, *supra*.

Committee Comments

See 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 56.11 (5th ed. 2000); *United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir. 1995).

See Committee Comments and Notes on Use, Instruction 6.18.1962A, *supra*.

Unlike the general conspiracy statute, 18 U.S.C. § 371, the RICO conspiracy statute does not require the government to either plead or prove that an overt act was committed in furtherance of the conspiracy. *Salinas v. United States*, 522 U.S. 52, 63 (1997); *United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984); *United States v. Barton*, 647 F.2d 224 (2d Cir. 1981). Therefore the RICO conspiracy provision is more comprehensive than the general conspiracy statute, 18 U.S.C. § 371. *Salinas v. United States*, 522 U.S. at 61. Proof of an express agreement is not required; the government need only establish a tacit understanding between the parties. *United States v. Darden*, 70 F.3d 1507 (8th Cir. 1995). However, mere association with a RICO enterprise, in itself, is not violative of a conspiracy under § 1962(d). *See, e.g., United States v. Neapolitan*, 791 F.2d 489 (7th Cir. 1986).

In order to prove a RICO conspiracy, the government need only show that the defendant agreed to the criminal objective. *Salinas v. United States*, 522 U.S. at 52; *United States v. Bennett*, 44 F.3d 1364 (8th Cir. 1995) (it is not necessary that the defendant personally agree to

commit requisite acts, but only that he agrees to join conspiracy). *United States v. Leisure*, 844 F.2d 1347 (8th Cir. 1988); *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987). In order to be guilty of conspiracy under RICO, a defendant must simply agree to the objective of the RICO violation and need not himself have committed or agreed to commit the two predicate acts. *See Salinas v. United States*, 522 U.S. at 52. A defendant may be acquitted of the substantive offense but still convicted of conspiracy if there is proof of an agreement to commit the substantive act. *See, e.g.*, *Salinas v. United States*, 522 U.S. at 55. *United States v. Alonso*, 740 F.2d 862 (11th Cir. 1985).

Withdrawal from a RICO conspiracy is a permissible defense but the defendant must prove that he took affirmative steps, inconsistent with the object of the conspiracy, to disavow or to defeat the conspiratorial objectives. *See United States v. Starrett*, 55 F.3d 1525 (11th Cir. 1995). Further, the defendant must have made a reasonable effort to communicate these steps to his co-conspirators or disclosed their conspiracy to law enforcement authorities. *See United States v. Finestone*, 816 F.2d 583 (11th Cir. 1987); *see also Hyde v. United States*, 225 U.S. 347 (1912).

Final Instructions: Elements of Offenses

6.18.1962C. RICO - CONSPIRACY - AGREEMENT EXPLAINED

The Government must prove beyond a reasonable doubt that the defendant knowingly reached an agreement[1] or understanding with at least one other person to [invest or use income derived from racketeering activity] [acquire or maintain an interest in or control of an enterprise] [participate, directly or indirectly, in the affairs of an enterprise] through a pattern of racketeering activity.[2] However, you don't have to find that any racketeering acts were actually committed.[3]

The agreement or understanding need not be an express or formal agreement or be in writing or cover all the details of how it is to be carried out. Nor is it necessary that the members have directly stated between themselves the details or purpose of the scheme.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has joined in an agreement or understanding. A person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of one does not thereby become a member.

But a person may join in an agreement or understanding, as required by this element, without knowing all the details of the agreement or understanding, and without knowing who all the other members are. Further it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

In determining whether the alleged conspiracy existed you may consider the actions and statements of all the alleged participants. The agreement may be inferred from all the circumstances and the conduct of the alleged participants. [4]

[Acts and statements which are made before the conspiracy began or after it ended are admissible only against the person making them and should not be considered by you against any other defendant.][5]

Final Instructions: Elements of Offenses

Notes on Use

1. Where enterprise is defined as an association in fact, proof of that enterprise may prove an unlawful agreement. *United States v. Bennett*, 44 F.3d 1364, 1372 (8th Cir. 1995); *United States v. Pungitore*, 910 F.2d 1084, 1114 (3d Cir. 1990).

2. The United States Supreme Court has held that it is not necessary that a defendant personally agreed to commit the requisite acts, but only that he agreed to join the conspiracy. *Salinas v. United States*, 522 U.S. 52, 65 (1997). *United States v. Bennett*, 44 F.3d at 1374; *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987).

3. A person may be liable for the RICO conspiracy even thought he was incapable of committing the substantive offense. *See Salinas v. United States*, 522 U.S. 52, 64 (1997).

4. For purposes of a RICO prosecution an enterprise may only be comprised of the defendants. *United States v. Nabors*, 45 F.3d 238, 240 (8th Cir. 1995).

5. An explicit limiting instruction must be given if evidence of acts or statements by any co-conspirator made before or after the conspiracy began or ended has been admitted. *See United States v. Snider*, 720 F.2d 985, 989 (8th Cir. 1983).

Committee Comments

See Model Federal Jury Instructions, Criminal 52-31, 32; *Salinas v. United States*, 522 U.S. 52 (1997); *United States v. Bennett*, 44 F.3d 1364 (8th Cir. 1995); *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978).

The RICO conspiracy statute is designed to facilitate prosecution of multi-faceted, highly diversified criminal activity by creating a substantive offense which ties together the diverse parties and crimes. In order to be convicted of a RICO conspiracy, an individual must have, by words or actions, objectively manifested an agreement to participate in the affairs of the enterprise. *United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir. 1995); *United States v. Bennett*, 44 F.3d at 1372; see *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982); *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981). Conspiracy to commit a narcotics violation may be a proper predicate act for a conspiracy to commit RICO. *United States v. Darden*, 70 F.3d 1507, 1524 (8th Cir. 1995). Simple possession cannot serve as a predicate act under the RICO statute. *Id.* at 1525.

6.18.1962D. "ENTERPRISE" DEFINED

An enterprise includes any individual, partnership, corporation, association, or other legal entity, in any union or group of individuals associated in fact, although not a legal entity.[1]

The term "enterprise," as used in these instructions, may include a group of people associated in fact, even though this association is not recognized as a legal entity.[2] A group or association of people can be an enterprise if these individuals have joined together for the purpose of engaging in a common course of conduct. This group of people, in addition to having a common purpose, must have personnel who function as a continuing unit. This group of people does not have to be a legally recognized entity, such as a partnership or corporation.[3] Such an association of individuals may retain its status as an enterprise even though the membership of the association changes by adding or losing individuals during the course of its existence.

If you find that this was, in fact, a legal entity such as a partnership, corporation, or association, then you may find that an enterprise existed.[4]

The Government must also prove that the association had a structure distinct from that necessary to conduct the pattern of racketeering activity.[5]

Notes on Use

1. The first paragraph of the instruction includes the entire definition of enterprise provided by Congress and found at 18 U.S.C. § 1961(4).

2. *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987) (approved jury instruction as to definition of enterprise and RICO drug prosecution, which included the definition of the term "enterprise" as including any group of individuals associated in fact, although not a legal entity).

3. Associations, in fact, may include legal entities. *See* 18 U.S.C. § 1961(4); *United States v. Darden*, 70 F.3d 1507, 1541 (8th Cir. 1995). Thus, the group may be organized for a legitimate and lawful purpose or may be organized for an unlawful purpose.

4. Courts have provided broad interpretation as to the term "legal entity" in the enterprise requirement. Courts have held that various enterprise categories listed in the RICO statute are illustrative but not exhaustive. *See United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983). The enterprise concept can encompass a combination of entities. *See, e.g., United States v. Stolfi*, 889 F.2d 378 (2d Cir. 1989); *United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988).

Final Instructions: Elements of Offenses

5. The Fourth and Eighth Circuits have held that the government must prove that the association or enterprise exists separate and apart from the pattern of racketeering in which it engages. *See United States v. Leisure*, 844 F.2d 1347 (8th Cir. 1988); *United States v. Lemm*, 680 F.2d 1193 (8th Cir. 1982).

Committee Comments

See 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 56.04 (5th ed. 2000).

Courts have given a broad reading to the term "enterprise." Congress has mandated a liberal construction of the RICO statute in order to effectuate its remedial purpose. Therefore, courts have held that the various enterprise categories listed in the RICO statute are illustrative but not exhaustive. *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983). The definition of the term "enterprise" is of a necessity, a shifting one given the fluid nature of criminal associations. *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978).

A RICO enterprise is a group of persons associated together for a common purpose in a course of conduct. *United States v. Turkette*, 452 U.S. 576 (1981). A RICO enterprise must exhibit three basic characteristics: (1) a common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that in a pattern of racketeering. *United States v. Kehoe*, 310 F.3d 579, 586 (8th Cir. 2002); *United States v. Nabors*, 45 F.3d 238 (8th Cir. 1995); *see also United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988); *United States v. Mazzei*, 700 F.2d 85 (2d Cir. 1983).

The enterprise element is satisfied upon a showing that the entity has a legal existence. *See, e.g., United States v. Kirk*, 844 F.2d 660 (9th Cir. 1988); *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1984). Proof of an association in fact enterprise requires proof that a group of persons associated together for a common purpose of engaging in a course of conduct. *United States v. Turkette*, 452 U.S. 576 (1981). While the enterprise in existence of a racketeering activity are distinct elements of a RICO charge, the proof needed to establish either can consist of the same evidence. *United States v. Turkette*, 452 U.S. 576 (1981). However, more than proof of a pattern of racketeering activity is necessary to establish the existence of an enterprise. An enterprise must have an existence entirely separate and independent of the racketeering activity. *See Bennett v. Berg*, 685 F.2d 1053 (8th Cir.), *modified*, 710 F.2d 1361 (en banc 1983). The government must demonstrate that the alleged enterprise functions as a continuing unit has an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity and has associates who have a common or shared purpose. *Id.*; *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982).

Several circuits have refused to distinguish between legal and non-legal entity categories. *See, e.g., United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988); *McCullough v. Suter*, 757 F.2d 142 (7th Cir. 1985); *United States v. Navarro-Ordas*, 770 F.2d 959 (11th Cir. 1985); *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983); *see also United States v. Turkette*, 452 U.S. 576 (1981) (rejects claim that RICO only reaches entities performing illegal acts).

Actions brought under section 1962(a) or (b) do not require a separate RICO defendant and enterprise. *See Bennett v. Berg*, 685 F.2d 1053, *modified*, 710 F.2d 1361 (en banc 1983). However, section 1962(c) requires the person liable to be separate from the enterprise which has its affairs conducted through a pattern of racketeering. *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986 (8th Cir. 1989).

6.18.1962E. "CONDUCT/PARTICIPATION" DEFINED

A person conducts or participates in the conduct of the affairs of an enterprise if that person uses [his][her] position in, or association with[1] the enterprise, to [participate in the operation or management of the enterprise itself] [2] [to perform acts which are involved in some way in the operation or management of the enterprise][3] directly or indirectly, or if the person causes another to do so. [A person participates in the operation of the affairs of the enterprise if [he][she] has some part in directing those affairs.][4] [An enterprise may be "operated" not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management.][5]

In order to have conducted or participated in the conduct of the affairs of an enterprise, a person need not have participated in all the activity alleged in [Count(s) ____] of the Indictment.

Notes on Use

1. There must be a distinction between those who merely participate in the enterprise and those who are liable for the operation or management of the enterprise. See *United States v. Darden*, 70 F.3d at 1543. Liability under the statute, however, is not limited to those who are employed by the enterprise, but may also extend to those outside the enterprise, who are associated with the enterprise and who exert control over it. *Reves v. Ernst & Young*, 507 U.S. at 184. The committee recognizes that evidence presented at a specific trial may raise issues regarding upper and lower rung management. .

2. Liability is limited and excludes complete outsiders who do not participate in the conduct of the enterprise' affairs, but rather their own affairs. *Reves v. Ernst & Young*, 507 U.S. at 185.

3. The Supreme Court in *Reves v. Ernst & Young*, 507 U.S. at 185, specifically defines "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs", as "one must participate in the operation or management of the enterprise itself." The Seventh Circuit Federal Jury Instructions: Criminal at 315-18 (1999) Conduct-Definition, defines conduct or participate, directly or indirectly, in the conduct of such enterprise' affairs as "to perform acts which are involved in some way in the operation or management of the enterprise". The Committee takes no position as to whether the Supreme Court language is mandatory, or whether the Seventh Circuit language is sufficiently analogous.

4. The Supreme Court in *Reves v. Ernst & Young*, 507 U.S. at 177-79, goes into detail explaining ascertaining the meaning of the terms "conduct" and "participation." It found by finding that in order to participate, directly or indirectly, in the conduct of such enterprise' affairs, "one must have some part in directing those affairs." The Committee believes that this

definition may be helpful in certain specific cases, to assist the jury, and in such cases recommends the inclusion of the definition.

5. The committee recognizes that evidence presented at a specific trial may raise issues regarding upper and lower rung management. In such cases, the committee recommends that the bracketed language be used. The Supreme Court, while discussing the operation and management test, did not decide the extent the "ladder of operation" could apply. *Reves v. Ernst & Young*, 507 U.S. at 185 n.9.

Committee Comments

See 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 56.08 (5th ed. 2000); *Reves v. Ernst & Young*, 507 U.S. 170 (1993); *United States v. Darden*, 70 F.3d 1507 (8th Cir. 1996).

An enterprise may be "operated" or "managed" by others "associated with" the enterprise who exert control of the enterprise. *Reves v. Ernst & Young*, 507 U.S. 170, 184-85 (1993). A person may also be liable under § 1962(c) even though he had no control of the enterprise but participated or operated in the conduct of the enterprise. *United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir. 1995). The government need only prove that the defendant had some part in the *direction*, not control of the enterprise affairs. *Id.* (citing *Reves v. Ernst & Young*, 507 U.S. at 184-85). The Eighth Circuit has held that section 1962(c) does not penalize all who are employed by or associated with a RICO enterprise, but rather only those, who by virtue of their association or employment play a part in directing the enterprise' affairs. *Handeen v. Lemaire*, 112 F.3d 1339, 1347 (8th Cir. 1997).

However, as noted by the Supreme Court in *Reves*, liability under section 1962 may not be limited to upper management, but may also be extended to lower rung participants who are under the direction of upper management. *Reves v. Ernst & Young*, 507 U.S. at 184.

6.18.1962F. RICO - PATTERN OF RACKETEERING

In order to establish a pattern of racketeering activity, the Government must prove beyond a reasonable doubt that: (1) at least two acts of racketeering, (list acts as detailed in the Indictment or which are defined under 18 U.S.C. § 1961(1) for which there is sufficient evidence)[1] were committed within ten years of each other;[2] (2) the racketeering acts [had the same or similar purpose, results, participants, victims, or methods of commission,] or [are interrelated by distinguishing characteristics and are not isolated events];[3] and (3) the racketeering acts themselves amount to or otherwise constitute a threat of continued activity.[4] Continued activity is sufficiently established when [predicate acts can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes] [racketeering acts were a regular way of conducting the defendant's ongoing legitimate business].[5]

Notes on Use

1. *See* 18 U.S.C. § 1961(1) which enumerates acts which may constitute racketeering activity.

2. 18 U.S.C. § 1961(5); *see Thornton v. Bank of Joplin*, 4 F.3d 650, 652 (8th Cir. 1993) (statute defines pattern of racketeering activity as at least two acts of racketeering, one of which occurred after RICO was enacted, and the last of which occurred within ten years after the commission of a prior act of racketeering activity.)

3. *See Sedima, S.P.R.L. v. Imrex Co*., 473 U.S. 479 (1985).

4. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34 (1st Cir. 1991) (describes threat approach).

5. *See H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); *United States v. Fairchild*, 122 F.3d 605, 611-12 (8th Cir. 1997). Continuity is both a closed and open ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. Whether predicates proved or establish a threat of continued racketeering activity depends on the specific facts of each case. Use of bracketed language, is dependent on whether the government proves a closed or open threat.

Committee Comments

See 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 56.07 (5th ed. 2000); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985).

RICO requires the commission of two predicate acts constituting a pattern. In construing the pattern requirement, the Supreme Court has held that in order to prove a pattern of racketeering activity, the prosecutor must show both relationship and continuity as separate elements. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). These elements may, however, overlap. *Id.* The Court has held that criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. *Id.*

Continuity is proven if the government can show actual continuity during a past, close period of repeated conduct or the threat of continuity of racketeering activity in the future. *Id. See also United HealthCare Corp. v. American Trade Ins. Co., Ltd.*, 88 F.3d 563, 571-72 (8th Cir. 1996). A pattern consists of continuity plus relationship. *See Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765 (8th Cir. 1992); *Atlas Pile Driving Co. v. DiCon Financial Co.*, 886 F.2d 986 (8th Cir. 1989) (listing pattern factors, including length of time, number of episodes and victims, and complexity of scheme). *See also Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208 (8th Cir. 1993) (continuity over a closed period is not met when predicate act extends less than one year); *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918 (7th Cir. 1992) (seven to eight months insufficient). Continuity over a closed period is generally proven by a showing of a series of related predicate acts extending over a period of time. Continuity generally is not met when the predicate acts extend less than a year. *See Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d at 1215; *Aldridge v. Lily-Tulip, Inc. Salary Requirement Plan Benefits Committee*, 953 F.2d 587, 593 (11th Cir. 1992) (six months to a year insufficient).

6.18.1962G. SAMPLE VERDICT FORM - RICO (18 U.S.C. § 1962(c))

We, the jury, find Defendant (name) _____

guilty/not guilty

of the crime of participating in racketeering enterprise [as charged in Count __ of the Indictment] [under instruction No. ___]

If you find the defendant guilty of [Count ___] [under Instruction No. ___] beyond a reasonable doubt check the predicate acts you unanimously found to have been proven with respect to Defendant (name) _____.

Racketeering Act Number 1 (Narcotics conspiracy 1989-1991) _____

Racketeering Act Number 2 (Murder of Jane Doe) _____

Racketeering Act Number 3 (Attempted Possession of Ephedrine) _____

Racketeering Act Number 4 (Narcotics Conspiracy 1996-1998) _____

_____

Foreperson

_____

Date

Notes on Use

1. *See* Instructions 3.09 and 3.12, *supra*. If the elements instructions does not refer to a count in the indictment, the verdict form should refer to the elements instruction.

Committee Comments

The jury must be unanimous that the predicate acts have been committed and the defendant committed at least two of the predicate acts. It is recommended that the instructions require the jury to be unanimous as to which acts have specifically been committed by the defendant. *United States v. Flynn*, 87 F.3d 996 (8th Cir. 1996); *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987); *see also United States v. Ham*, 58 F.3d 78 (4th Cir. 1995).

Double jeopardy may not attach and retrial may not be barred should a jury fail to check a predicate act. *See United States v. Petty*, 62 F.3d 265, 266-67 (8th Cir. 1995); *United States v. Ham*, 58 F.3d 78, 85 (4th Cir. 1995). A jury's failure to decide an issue will be treated as an implied acquittal only where the jury's verdict necessarily resolves an issue in the defendant's favor. *See Schiro v. Farley*, 510 U.S. 222, 235 (1994).

Final Instructions: Elements of Offenses

6.18.2113A. BANK ROBBERY (18 U.S.C. § 2113(a)) (First Paragraph)

The crime of bank robbery, as charged in [Count __ of] the Indictment, has three elements, which are:

One, the defendant [took] [attempted to take] (describe property, money, etc.) from the [person] [presence] of [another] [(name of person)][1], while that (describe property, money, etc.) was in the care or custody of (name of bank, etc.[2]).

Two, such [taking] [attempted taking] was by [force and violence] [intimidation][3]; and

Three, the deposits of (name of bank, etc.) were then insured by (name insuring agency, e.g., the FDIC).[4]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. In certain fact situations the money may be taken from the presence of literally everyone in the bank, for example when the defendant has everyone including the bank employees lie face on the floor in middle of the bank while he enters all the tellers' drawers. In such a fact situation, the alternative "taken from the presence of *another*" should be used rather than inserting the names of the persons.

2. The statute also applies to robbery of any credit union or savings and loan association. Appropriate terms should be used. The terms "bank," "savings and loan association" and "credit union" are defined in sections 2113(f), (g) and (h).

3. "Intimidation" may be defined in a proper case. A concise definition of "intimidation" is as follows:

> Intimidation means doing something that would make an ordinary person fear bodily harm.

Ninth Cir. Crim. Jury Instr. 8.35.1 (1997). *See also* 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 57.10 (5th ed. 2000). The meaning of "intimidation" is thoroughly treated in *United States v. Brown*, 412 F.2d 381 (8th Cir. 1969).

4. Most institutions are covered by virtue of the insurance of their deposits by some federal agency. If the institution is one which is covered by the statute for some other reason, Element *Three* should be modified accordingly.

Absent a stipulation between the government and the defendant, this instruction must include the element that the affected financial institution was of the nature covered by the statute. *See United States v. Glidden*, 688 F.2d 58 (8th Cir. 1982); *United States v. Brown*, 616 F.2d 844 (5th Cir. 1980).

Final Instructions: Elements of Offenses

Committee Comments

See Seventh Circuit Federal Jury Instructions: Criminal at 325 (1999).

Final Instructions: Elements of Offenses

6.18.2113B. BANK ROBBERY (18 U.S.C. § 2113(d))

The crime of bank robbery, as charged in [Count __ of] the Indictment, has four elements, which are:

One, the defendant [took] [attempted to take] (describe property, money, etc.) from the [person] [presence] of [another] [(name of person)],[1] while that (describe property, money, etc.) was in the care or custody of (name of bank, etc.[2]),

Two, such [taking] [attempted taking] was by [force and violence] [intimidation];

Three, the defendant [assaulted (name of victim)] [put the life of (name of victim) in jeopardy][3] by use of a dangerous [weapon] [device][4] while [taking] [attempting to take] (describe property, money, etc.); and

Four, the deposits of (name of bank, etc.) were then insured by (name insuring agency, e.g., the FDIC).[5]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. In certain fact situations the money may be taken from the presence of literally everyone in the bank, for example when the defendant has everyone including the bank employees lie face on the floor in middle of the bank while he enters all the tellers' drawers. In such a fact situation, the alternative "taken from the presence of *another*" should be used rather than inserting the names of the persons.

2. The statute also applies to robbery of any credit union or savings and loan association. Appropriate terms should be used. The terms "bank," "savings and loan association" and "credit union" are defined in sections 2113(f), (g) and (h).

3. In the ordinary case where the life of the victim was actually put in jeopardy by the use of a dangerous weapon such as a loaded gun, definitions of "assault" and "put life in jeopardy" such as those that appear 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 57.07-.08 (5th ed. 2000) would be appropriate.

Where the weapon was not recovered and there is no evidence whether it was operable or not, the jury may infer that the weapon was loaded and that the victim's life was placed in jeopardy. *Morrow v. United States*, 408 F.2d 1390, 1391 (8th Cir. 1969). *See also United States v. Terry*, 760 F.2d 939, 942 (9th Cir. 1985); *United States v. Wardy*, 777 F.2d 101, 105-06 (2d Cir. 1985).

Where the weapon is proved to be inoperable, it can still be dangerous. *McLaughlin v. United States*, 476 U.S. 16 (1986); *United States v. York*, 830 F.2d 885, 891 (8th Cir. 1987).

These and subsequent opinions should be consulted in drafting definitions of "assault" and "put life in jeopardy" in this situation. The Committee has not formulated definitions to cover this situation.

4. An unloaded gun is a dangerous weapon or device within the meaning of the statute. *McLaughlin v. United States*, 476 U.S. at 6. The Court held:

> Three reasons, each independently sufficient, support the conclusion that an unloaded gun is a "dangerous weapon." First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.

The Court noted that Congress regarded incitement of fear as sufficient to characterize an apparently dangerous article (such as a wooden gun) as "dangerous" within the meaning of the statute.

The Eighth Circuit has followed *McLaughlin* to hold that an inoperable gun is a "dangerous weapon." *United States v. York*, 830 F.2d at 891. Prior to *McLaughlin*, the Eighth Circuit used an "objective" standard to determine what constituted a dangerous or deadly weapon. *See Morrow v. United States*, 408 F.2d at 1391.

The phrase "by use of a dangerous weapon or device" modifies both the "assault" provision and the "putting in jeopardy" provision of section 2113(d). *Simpson v. United States*, 435 U.S. 6, 11 (1978).

5. Most institutions are covered by virtue of the insurance of their deposits by a federal agency. If the institution is one which is covered by the statute for some other reason, Element *Four* of the instruction should be modified accordingly.

Absent a stipulation between the government and the defendant, this instruction must include the element that the affected financial institution was of the nature covered by the statute. *See United States v. Glidden*, 688 F.2d 58 (8th Cir. 1982); *United States v. Brown*, 616 F.2d 844 (5th Cir. 1980).

Committee Comments

See Seventh Circuit Federal Jury Instructions: Criminal at 325 (1999).

Final Instructions: Elements of Offenses

6.18.2119A. CARJACKING (No Serious Bodily Injury or Death) (18 U.S.C. § 2119(1)) [1]

The crime of carjacking has four elements, which are:

One, the defendant, [took] [attempted to take] a (describe the motor vehicle, *e.g.*, 1998 Ford Explorer, VIN #000000000000) from the [person] [presence of another];

Two, the defendant did so by means of [force and violence] [intimidation];

Three, the (describe motor vehicle) had been [transported] [shipped] [received] in [interstate] [foreign] commerce;

Four, at or during the time the defendant [took] [attempted to take] (describe the motor vehicle) (he) (she) intended to cause death or serious bodily injury[2].

"Serious bodily injury" means an injury that involves [a substantial risk of death] [extreme physical pain] [long term and obvious disfigurement] [the long-term loss or impairment of a function of a bodily member or organ] [the long term loss or impairment of a mental function].

Notes on Use

1. If "serious bodily injury" resulted from the commission of the offense, Instruction 6.18.2119B should be used. If death resulted from the commission of the offense, Instruction 6.18.2119C should be used. The United States Supreme Court has held that the enhancements set out in the statute which increase penalties for "serious bodily injury" and "death" are, "distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." *Jones v. United States*, 526 U.S. 227 (1999).

2. The statute uses the term "harm" in some places and "injury" in others, apparently interchangeably. A conditional intent to kill or cause serious bodily injury is sufficient to establish the intent requirement under the statute. "The intent requirement of section 2119 is satisfied when the Government proves that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car . . ." *Holloway v. United States*, 526 U.S. 1 (1999).

Committee Comments

The intent of Congress regarding the intended scope and purpose of the original 1992 version of the carjacking statute can be found in section 101(b) of Pub. L. 102-519. The statute has been subsequently amended by the Violent Crime Control and Law Enforcement Act of 1994, § 60003(a)(14), 108 Stat. 1970, and the Carjacking Correction Act of 1996, § 2, 110 Stat. 3020.

Final Instructions: Elements of Offenses

Guidance in interpretation of section 2119 may be obtained by reference to similar statutes since section 2119 tracks the language used in other federal robbery statutes (18 U.S.C. §§ 2111, 2113 and 2118). H.R. Rep. No. 851, 102d Cong. 2d Sess., pt. 1, at 17 (1992), U.S. Code Cong. & Admin. News 1992, p. 2834.

The term "motor vehicle" means a completely assembled automotive vehicle of some sort. *United States v. Johnson*, 56 F.3d 947, 957 (8th Cir. 1995).

"Intimidation" has been defined under the bank robbery statute (18 U.S.C. § 2113) as conduct reasonably calculated to put another in fear; under this test, subjective courageousness or timidity of the victim is irrelevant; the acts of the defendant must constitute an intimidation to an ordinary, reasonable person. *United States v. Smith*, 973 F.2d 603, 604 (8th Cir. 1992) (citing *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987)).

The carjacking statute is a constitutional exercise of Congress' power under the Commerce Clause. *United States v. Robinson*, 62 F.3d 234 (8th Cir. 1995). The "carjacking statute regulates an item of interstate commerce . . . [t]herefore fits squarely within the second category of activities regulable by Congress under the commerce clause." Also, the express findings by Congress of a direct link between carjacking and negative effects on interstate commerce provide additional support that the statute is constitutional. *Robinson*, 62 F.3d at 236-37. *See also United States v. Harris*, 25 F.3d 1275 (5th Cir. 1994); *United States v. Johnson*, 32 F.3d 82 (4th Cir. 1995); *United States v. Martinez*, 49 F.3d 1398, 1400-01 (9th Cir. 1995); *United States v. Overstreet*, 40 F.3d 1090 (10th Cir. 1994); *United States v. Williams*, 51 F.3d 1004, 1008-09 (11th Cir. 1995).

Final Instructions: Elements of Offenses

6.18.2119B. CARJACKING (Serious Bodily Injury) (18 U.S.C. § 2119(2)) [1]

The crime of carjacking has five elements which are:

One, the defendant, [took] [attempted to take] a (describe the motor vehicle, *e.g.*, 1998 Ford Explorer, VIN #000000000000) from a [person];

Two, the defendant did so by means of [force and violence] [intimidation];

Three, the (describe motor vehicle) had been [transported] [shipped] [or] [received] in [interstate] [foreign] commerce;

Four, at the time the defendant [took] [attempted to take] the motor vehicle (he) (she) intended to cause death or serious bodily injury[2].

Five, the defendant [caused serious bodily injury to] [committed an act of [sexual abuse] [aggravated sexual abuse] upon] a person while [taking] [attempting to take] the (describe the motor vehicle).

"Serious bodily injury" means an injury that involves [a substantial risk of death] [extreme physical pain] [long-term and obvious disfigurement] [the long-term loss or impairment of a function of a bodily member or organ] [the long-term loss or impairment of a mental function].[3]

["Sexual abuse" means to cause another person to engage in a sexual act by threat or fear.]

["Aggravated sexual abuse" means to cause another person to engage in a sexual act by [force] [a threat of death or serious bodily injury] [a threat of kidnaping].]

Notes on Use

1. This Instruction should only be used where the indictment alleges "serious bodily injury" or the defendant committed an act of sexual abuse during the carjacking for purposes of the enhanced sentence in accordance with 18 U.S.C. § 2119(2). The crime of carjacking subject to the enhanced penalties under section 2119(2) may be committed by either causing serious bodily injury as defined in 18 U.S.C. § 1365 or by an act of sexual abuse during the course of the carjacking as defined in 18 U.S.C. §§ 2241 and 2242. There may be instances in which the indictment alleges that both an act of sexual abuse and serious bodily injury occurred, in which case both definitions should be given.

2. The statute uses the term "harm" in some places and "injury" in others, apparently interchangeably. A conditional intent to kill or cause serious bodily injury is sufficient to

establish the intent requirement under the statute. "The intent requirement of section 2119 is satisfied when the Government proves that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car. . . ." *Holloway v. United States*, 526 U.S. 1 (1999).

3. The court should, if requested by a party, give 6.18.2119A as a lesser-included offense instruction. If a lesser-included offense instruction is given, the format in Instruction 3.10 should be used.

Committee Comments

See, generally, comments for 6.18.2119A.

"Serious bodily injury" is defined in 18 U.S.C. § 1365. Serious bodily injury may include protracted impairment of mental faculties resulting from rape committed in the course of a carjacking even though evidence of extreme physical pain was lacking. *United States v. Vasquez-Rivera*, 135 F.3d 172 (1st Cir. 1998). *See also United States v. Lowe*, 145 F.3d 45 (1st Cir. 1998).

Sexual abuse is defined in 18 U.S.C. § 2242. Aggravated sexual abuse is defined in 18 U.S.C. § 2241.

Final Instructions: Elements of Offenses

6.18.2119C. CARJACKING (Death Resulting) (18 U.S.C. § 2119(3)) [1]

The crime of carjacking has five elements, which are:

One, the defendant(s), [took] [attempted to take] a (describe the motor vehicle, *e. g.*, 1998 Ford Explorer, VIN #000000000000) from a [person];

Two, the defendant did so by means of [force and violence] [intimidation];

Three, the (describe motor vehicle) had been [transported] [shipped] [or] [received] in [interstate] [foreign] commerce;

Four, at the time the defendant [took] [attempted to take] the motor vehicle (he) (she) (they) intended to cause death or serious bodily injury[2, 3].

Five, the death of a person resulted from [taking] [attempting to take] the (describe the motor vehicle).[4]

"Serious bodily injury" means an injury that involves [a substantial risk of death] [extreme physical pain] [long term and obvious disfigurement] [the long-term loss or impairment of a function of a bodily member or organ] [the long term loss or impairment of a mental function].

Notes on Use

1. This Instruction should only be used where the indictment alleges that the defendant caused the death of a person for purposes of the enhanced sentence in accordance with 18 U.S.C. § 2119(c).

2. The statute uses the term "harm" in some places and "injury" in others, apparently interchangeably.

3. A conditional intent to kill or cause serious bodily injury is sufficient to establish the intent requirement under the statute. "The intent requirement of section 2119 is satisfied when the Government proves that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car . . ." *Holloway v. United States*, 526 U.S. 1 (1999).

4. The court should, if requested by a party, give Instructions 6.18.2119A, 6.18.2119B, *supra*, or both, as lesser-included offense instructions. If lesser-included offense instructions are given, the format in Instruction 3.10, *supra*, should be used.

Committee Comments

See comments for Instruction 6.18.2119A., *supra*.

6.18.2251(a). SEXUAL EXPLOITATION OF A CHILD BY A PERSON OTHER THAN PARENT OR GUARDIAN (18 U.S.C. § 2251(a)) [1]

The crime of sexual exploitation of a child, as charged in [Count ___ of] the Indictment, has four elements, which are:

One, at the time alleged, (name of minor) was under the age of eighteen years;

Two, the defendant knowingly:

a) [employed] [used] [persuaded] [induced] [enticed] [coerced] (name of minor) to engage in sexually explicit conduct; or

b) had (name of minor) assist another person or persons to engage in sexually explicit conduct; or

c) transported (name of minor) [across state lines] [in foreign commerce] [in any Territory or Possession of the United States] with the intent that (name of minor) engage in sexually explicit conduct;

Three, the defendant acted with the purpose of [producing a visual depiction of such conduct] [transmitting a live visual depiction of such conduct]; and

Four, a) the defendant knew or had reason to know that such visual depiction [*e.g.*, video tape] would be [mailed] [transported across state lines or in foreign commerce]; or

b) the visual depiction was produced using materials that had been mailed, shipped, or transported across state lines or in foreign commerce by any means, including by computer or cellular phone[2]; or

c) the visual depiction was actually [mailed or transported across state lines or in] [transported or transmitted using any means or facility of interstate or] foreign commerce.[3]

A person is “used” if they are photographed or videotaped.[4]

"Sexually explicit conduct" means actual or simulated sexual intercourse, including [genital-genital] [oral-genital] [anal-genital] [oral-anal], whether between persons of the same or

opposite sex]; [bestiality] [masturbation] [sadistic or masochistic abuse] [lascivious exhibition of the genitals or pubic area of any person].[5]

The term "visual depiction"includes [a] [any] [photograph] [film] [video] [picture] [or] [computer or computer-generated image or picture], whether made or produced by electronic, mechanical, or other means. [It includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image.][6]

An item is "produced" if it is produced, directed, manufactured, issued, published, advertised, created, made, or is in any other way brought into being by the involvement of an individual participating in the recording of child pornography.[7]

The Government is not required to prove that the defendant knew that (minor's name) was under the age of eighteen.

[Insert paragraph describing the Government's burden of proof. *See* Instruction 3.09, *supra*.]

Notes on Use

1. In the case of attempted sexual exploitation of a child, *see United States v. Pierson*, 544 F.3d 933 (8th Cir. 2008).

2. The fact that an item used in the production of the child pornography had traveled in interstate commerce is, by itself, sufficient to satisfy the analysis of whether there is an impact on interstate commerce sufficient to prohibit the charged conduct under Congress' Commerce Clause powers. *See United States v. Betcher*, 534 F.3d 820 (8th Cir. 2008) (discussing several other Eighth Circuit cases on the matter).

3. The indictment will generally determine the appropriate instruction. If the government proceeds on more than one theory, however, and each theory would either constitute a separate offense or a separate element of the same statutory offense, then such alternatives should be submitted in the disjunctive and the jury instructed that all jurors must agree as to the particular theory. *See* Instruction 6.18.1341, Note 2, for sample language. On the other hand, if each theory is merely a means of satisfying a single element, there is no need for a unanimity instruction. *See Schad v. Arizona*, 501 U.S. 624, 636-47 (1991) (plurality opinion).

4. *See United States v. Fadl*, 498 F.3d 862, 867 (8th Cir. 2007).

5. The term "sexually explicit conduct" is defined in 18 U.S.C. § 2256(2). If lascivious exhibition of the genitals is at issue, it should be further defined. *See* Instruction 6.18.2252A(1).

6. 18 U.S.C. §§ 2256(5) and (8).

Final Instructions: Elements of Offenses

7. The term "producing" is defined in 18 U.S.C. § 2256(3). A defendant who allegedly took no directorial, editorial, or managerial role when he filmed minors engaged in explicit sexual conduct, or intended that the photographs be disseminated commercially, nonetheless, "produces" child pornography, within the meaning of the statute prohibiting production of child pornography because Congress' intention was to enact a broad definition of "producing" that encompassed the various means by which an individual might actively participate in the creation and distribution of child pornography. *See United States v. Fadl*, 498 F.3d 862, 867 (8th Cir. 2007).

Committee Comments

Knowledge of the age of the minor victim is not an element of the offense. *See United States v. Wilson*, 565 F.3d 1059, 1066 (8th Cir. 2009); *United States v. Pliego*, 578 F.3d 938 (8th Cir. 2009); see *also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 76 n.5 (1994) ("[P]roducers may be convicted under § 2251(a) without proof they had knowledge of age . . ."). Mistake of age is not a defense to this crime. *Wilson*, 565 F.3d at 1069; *Pliego*, 578 F.3d at 944; *United States v. McCloud*, 590 F.3d 560 (8th Cir. 2009).

The age of the child depicted may be proved by, *inter alia*, language used by the defendant in correspondence, Postal Inspector's professional and personal familiarity with child development, and a pediatrics professor's testimony. *United States v. Broyles*, 37 F.3d 1314, 1317-18 (8th Cir. 1994); *United States v. Rayl*, 270 F.3d 709, 714 (8th Cir. 2001). In *United States v. Vig*, 167 F.3d 443, 449-50 (8th Cir. 1999), the court found that the jury could draw its own independent conclusion as to whether real children were depicted by examining the images presented to them.

The Eighth Circuit has repeatedly found federal jurisdiction based solely on the use of a camera or camera equipment that previously crossed state lines. *See United States v. Betcher*, 534 F.3d 820 (8th Cir. 2008); *United States v. Fadl*, 498 F.3d 862 (8th Cir. 2007).

Transportation in interstate or foreign commerce can be accomplished by any means, including by a computer. 18 U.S.C. § 2251(b).

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. § 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. *See United States v. Horn*, 187 F.3d 781 (8th Cir. 1999).

6.18.2251(b). SEXUAL EXPLOITATION OF A CHILD BY A PARENT OR GUARDIAN (18 U.S.C. § 2251(b)) [1]

The crime of sexual exploitation of a child, as charged in [Count ___ of] the Indictment, has five elements, which are:

One, at the time, (name of minor) was under the age of eighteen years;

Two, the defendant was the [parent] [legal guardian] [person having custody or control] of (name of minor).

Three, the defendant knowingly:

a) permitted (name of minor) to engage in sexually explicit conduct; or

b) permitted (name of minor) to assist another person or persons to engage in sexually explicit conduct;

Four, the defendant acted with the purpose of [producing any visual depiction of such conduct] [transmitting a live visual depiction of such conduct]; and

Five, a) the defendant knew or had reason to know that such visual depiction [*e.g.*, video tape] would be [mailed] [transmitted] [transported across state lines or in foreign commerce]; or

b) the visual depiction was produced using materials that had been mailed, shipped, transmitted, or transported across state lines or in foreign commerce by any means, including by computer or cellular phone[2]; or

c) the visual depiction was actually [mailed or transported across state lines or in] [transported or transmitted using any means or facility of interstate or] foreign commerce.[3]

"Sexually explicit conduct" means actual or simulated sexual intercourse, including [genital-genital] [oral-genital] [anal-genital] [oral-anal], whether between persons of the same or opposite sex]; [bestiality] [masturbation] [sadistic or masochistic abuse]] [lascivious exhibition of the genitals or pubic area of any person][4].

The term “visual depiction”includes [a] [any] [photograph] [film] [video] [picture] [or] [computer or computer-generated image or picture], whether made or produced by electronic,

mechanical, or other means. [It includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image.][5]

An item is "produced" if it is produced, directed, manufactured, issued, published, advertised, created, made, or is in any other way brought into being by the involvement of an individual participating in the recording of child pornography.[6]

The Government is not required to prove that the defendant knew that (minor's name) was under the age of eighteen.

[Insert paragraph describing the Government's burden of proof. *See* Instruction 3.09, *supra*.]

Notes on Use

1. In the case of attempted sexual exploitation of a child, *see United States v. Pierson*, 544 F.3d 933 (8th Cir. 2008).

2. The fact that an item used in the production of the child pornography had traveled in interstate commerce is, by itself, sufficient to satisfy the analysis of whether there is an impact on interstate commerce sufficient to prohibit the charged conduct under Congress' Commerce Clause powers. *See United States v. Betcher*, 534 F.3d 820 (8th Cir. 2008) (discussing several other Eighth Circuit cases on the matter).

3. The indictment will generally determine the appropriate instruction. If the government proceeds on more than one theory, however, and each theory would either constitute a separate offense or a separate element of the same statutory offense, then such alternatives should be submitted in the disjunctive and the jury instructed that all jurors must agree as to the particular theory. *See* Instruction 6.18.1341, Note 2, for sample language. On the other hand, if each theory is merely a means of satisfying a single element, there is no need for a unanimity instruction. *See Schad v. Arizona*, 501 U.S. 624, 636-47 (1991) (plurality opinion).

4. The term "sexually explicit conduct" is defined in 18 U.S.C. § 2256(2). If lascivious exhibition of the genitals is at issue, it should be further defined. *See* Instruction 6.18.2252A(1).

5. 18 U.S.C. §§ 2256(5) and (8).

6. The term "producing" is defined in 18 U.S.C. § 2256(3). A defendant who allegedly took no directorial, editorial, or managerial role when he filmed minors engaged in explicit sexual conduct, or intended that the photographs be disseminated commercially, nonetheless, "produces" child pornography, within the meaning of the statute prohibiting production of child pornography because Congress' intention was to enact a broad definition of "producing" that encompassed the various means by which an individual might actively participate in the creation and distribution of child pornography. *See United States v. Fadl*, 498 F.3d 862, 867 (8th Cir. 2007).

Final Instructions: Elements of Offenses

Committee Comments

Knowledge of the age of the minor victim is not an element of the offense. *See United States v. Wilson*, 565 F.3d 1059, 1066 (8th Cir. 2009); United States v. Pliego, 578 F.3d 938 (8th Cir. 2009); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 76 n.5 (1994) ("[P]roducers may be convicted under § 2251(a) without proof they had knowledge of age . . . "). Mistake of age is not a defense to this crime. *Wilson*, 565 F.3d at 1069; *Pliego*, 578 F.3d at 944; *United States v. McCloud*, 590 F.3d 560 (8th Cir. 2009).

The age of the child depicted may be proved by, *inter alia*, language used by the defendant in correspondence; Postal Inspector's professional and personal familiarity with child development; and a pediatrics professor's testimony. *United States v. Broyles*, 37 F.3d 1314, 1317-18 (8th Cir. 1994); *United States v. Rayl*, 270 F.3d 709, 714 (8th Cir. 2001). In *United States v. Vig*, 167 F.3d 443, 449-50 (8th Cir. 1999), the court found that the jury could draw its own independent conclusion as to whether real children were depicted by examining the images presented to them.

The Eighth Circuit has repeatedly found federal jurisdiction based solely on the use of a camera or camera equipment that previously crossed state lines. *See United States v. Fadl*, 498 F.3d 862 (8th Cir. 2007).

Transportation in interstate or foreign commerce can be accomplished by any means, including by a computer. 18 U.S.C. § 2251(b).

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. § 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999).

6.18.2251(c). SEXUAL EXPLOITATION OF A CHILD OUTSIDE THE UNITED STATES (18 U.S.C. § 2251(c)) [1]

The crime of sexual exploitation of a child, as charged in [Count ___ of] the Indictment, has four elements, which are:

One, at the time, (name of minor) was under the age of eighteen years;

Two, the defendant:

a) [employed] [used] [persuaded] [induced] [enticed] [coerced] (name of minor) to engage in sexually explicit conduct outside the United States, its territories, or possessions; or

b) had (name of minor) assist another person or persons to engage in sexually explicit conduct outside the United States, its territories, or possessions;

Three, for the purpose of producing any visual depiction of such conduct; and

Four, a) the defendant intended such visual depiction to be transported to the United States, its territories, or possessions by any means, including by using mail or any means or facility of interstate or foreign commerce; or

b) the defendant did transport such visual depiction to the United States, its territories, or possessions by any means, including by using mail or any means or facility of interstate or foreign commerce.[2]

A person is "used" if they are photographed or videotaped.[3]

"Sexually explicit conduct" means actual or simulated sexual intercourse, including [genital-genital] [oral-genital] [anal-genital] [oral-anal], whether between persons of the same or opposite sex; [bestiality] [masturbation] [sadistic or masochistic abuse] [lascivious exhibition of the genitals or pubic area of any person].[4]

The term "visual depiction" includes [a] [any] [photograph] [film] [video] [picture] [or] [computer or computer-generated image or picture], whether made or produced by electronic, mechanical, or other means. [It includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image.][5]

Final Instructions: Elements of Offenses

An item is "produced" if it is produced, directed, manufactured, issued, published, advertised, created, made, or is in any other way brought into being by the involvement of an individual participating in the recording of child pornography.[6]

The Government is not required to prove that the defendant knew that (minor's name) was under the age of eighteen.

[Insert paragraph describing the Government's burden of proof. *See* Instruction 3.09, *supra*.]

Notes on Use

1. In the case of attempted sexual exploitation of a child, *see United States v. Pierson*, 544 F.3d 933 (8th Cir. 2008).

2. The fact that an item used in the production of the child pornography had traveled in interstate commerce is, by itself, sufficient to satisfy the analysis of whether there is an impact on interstate commerce sufficient to prohibit the charged conduct under Congress' Commerce Clause powers. *See United States v. Betcher*, 534 F.3d 820 (8th Cir. 2008) (discussing several other Eighth Circuit cases on the matter).

3. *See United States v. Fadl*, 498 F.3d 862, 867 (8th Cir. 2007).

4. The term "sexually explicit conduct" is defined in 18 U.S.C. § 2256(2). If lascivious exhibition of the genitals is at issue, it should be further defined. *See* Instruction 6.18.2252A(1).

5. 18 U.S.C. §§ 2256(5) and (8).

6. The term "producing" is defined in 18 U.S.C. § 2256(3). A defendant who allegedly took no directorial, editorial, or managerial role when he filmed minors engaged in explicit sexual conduct, or intended that the photographs be disseminated commercially, nonetheless, "produces" child pornography, within the meaning of the statute prohibiting production of child pornography because Congress' intention was to enact a broad definition of "producing" that encompassed the various means by which an individual might actively participate in the creation and distribution of child pornography. *See United States v. Fadl*, 498 F.3d 862, 867 (8th Cir. 2007).

Committee Comments

Knowledge of the age of the minor victim is not an element of the offense. *See United States v. Wilson*, 565 F.3d 1059, 1066 (8th Cir. 2009); *United States v. Pliego*, 578 F.3d 938 (8th Cir. 2009); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 76 n.5 (1994) ("[P]roducers may be convicted under § 2251(a) without proof they had knowledge of age . . . "). Mistake of age is not a defense to this crime. *Wilson*, 565 F.3d at 1069; *Pliego*, 578 F.3d at 944.

The age of the child depicted may be proved by, *inter alia*, language used by the defendant in correspondence; Postal Inspector's professional and personal familiarity with child development; and a pediatrics professor's testimony. *United States v. Broyles*, 37 F.3d 1314, 1317-18 (8th Cir. 1994); *United States v. Rayl*, 270 F.3d 709, 714 (8th Cir. 2001). In *United States v. Vig*, 167 F.3d 443, 449-50 (8th Cir. 1999), the court found that the jury could draw its own independent conclusion as to whether real children were depicted by examining the images presented to them.

The Eighth Circuit has repeatedly found federal jurisdiction based solely on the use of a camera or camera equipment that previously crossed state lines. *See United States v. Fadl*, 498 F.3d 862 (8th Cir. 2007).

Transportation in interstate or foreign commerce can be accomplished by any means, including by a computer. 18 U.S.C. § 2251(b).

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. § 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999).

6.18.2251(d)(1). SEXUAL EXPLOITATION OF A CHILD - NOTICE OR ADVERTISEMENT TO ACQUIRE (18 U.S.C. § 2251(d))

The crime of Sexual Exploitation of a Child, as charged in [Count ___ of] the Indictment, has three elements, which are:

One, the defendant knowingly [made] [printed] [published] [caused to be made] [caused to be printed] [caused to be published] a [notice] [advertisement];

Two, the [notice] [advertisement] sought or offered:

a) to [receive] [exchange] [buy] [produce] [reproduce] [display] any (describe the visual depiction, *e.g.* a video tape), if the requested production of [the visual depiction] would involve a real person under the age of 18 years engaging in sexually explicit conduct,[1] or

b) participation in any act of sexually explicit conduct [by] [with] a person under the age of 18 years for the purpose of producing a visual depiction of such conduct; and

Three:

a) the defendant knew or had reason to know the [notice] [advertisement] would be transported [in interstate or foreign commerce by any means] [or transmitted using any means of facility of interstate or foreign commerce], including by computer or by mail; or

b) such [notice] [advertisement] was actually transported [in interstate or foreign commerce by any means] [using any means or facility of interstate or foreign commerce], including by computer or by mail.

"Sexually explicit conduct" means actual or simulated sexual intercourse, including [genital-genital] [oral-genital] [anal-genital] [oral-anal], whether between persons of the same or opposite sex; [bestiality] [masturbation] [sadistic or masochistic abuse] [lascivious exhibition of the genitals or pubic area of any person].[2]

The term “visual depiction” includes [a] [any] [photograph] [film] [video] [picture] [or] [computer or computer-generated image or picture], whether made or produced by electronic,

mechanical, or other means. [It includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image.][3]

An item is "produced" if it was produced, directed, manufactured, issued, published, advertised, created, made, or in any other way brought into being by the involvement of an individual participating in the recording of child pornography.[4]

Notes on Use

1. Although the statute requires "and such visual depiction is of such conduct," that language is unclear in situations in which child pornography has been solicited but there is no evidence that such a request was acted upon (i.e. there is no evidence that materials were produced or transmitted). Some courts have interpreted this clause to mean that the government must show that the defendant requested child pornography, and that the defendant intended it be of a real child. *See United States v. Pabon-Cruz*, 255 F. Supp. 2d 200 (S.D.N.Y. 2003), *affirmed at* 391 F.3d 86 (2d Cir. 2004). This instruction reflects the same understanding. There is no Eighth Circuit case law on this subject.

2. If lascivious exhibition of the genitals is at issue, it should be further defined. *See* Instruction 6.18.2252A(1).

3. 18 U.S.C. §§ 2256(5) and (8).

4. A defendant who allegedly took no directorial, editorial, or managerial role when he filmed minors engaged in explicit sexual conduct, or did not intend that the photographs be disseminated commercially, nonetheless "produces" child pornography, within the meaning of the statute prohibiting production of child pornography because Congress' intention was to enact a broad definition of "producing" that encompassed the various means by which an individual might actively participate in the creation and distribution of child pornography. *United States v. Fadl*, 498 F.3d 862, 867 (8th Cir. 2007).

Committee Comments

In cases involving the intended acquisition of child pornography, proof that the defendant intentionally sought visual depictions of persons actually under the age of 18 (as opposed to simulated images or images of adults who looked younger than their actual age) is required. However, proof that images were then, in fact, produced using minors actually under the age of 18 is not required. *See* reasoning at *United States v. Pabon-Cruz*, 255 F. Supp. 2d 200 (S.D.N.Y. 2003), *affirmed at* 391 F.3d 86 (2d Cir. 2004). There is no Eighth Circuit case law on this subject.

6.18.2251(d)(2). SEXUAL EXPLOITATION OF A CHILD - NOTICE OR ADVERTISEMENTS TO FURNISH (18 U.S.C. § 2251(d))

The crime of Sexual Exploitation of a Child by, as charged in [Count ___ of] the Indictment, has three elements, which are:

One, the defendant knowingly [made] [printed] [published] [caused to be made] [caused to be printed] [caused to be published] a [notice] [advertisement];

Two, the [notice] [advertisement] offered:

a) to [produce] [display] [distribute] [reproduce] any visual depiction (describe the visual depiction, *e.g.* a video tape), if the production of the visual depiction involves a person under the age of 18 years engaging in sexually explicit conduct and such visual depiction is of such conduct, or

b) participation in any act of sexually explicit conduct [by] [with] a person under the age of 18 years for the purpose of producing a visual depiction of such conduct; and

Three:

a) the defendant knew or had reason to know the [notice] [advertisement] would be transported in interstate or foreign commerce by any means, including by computer or by mail; or

b) such [notice] [advertisement] was actually transported in interstate or foreign commerce by any means, including by computer or by mail.

"Sexually explicit conduct" means actual or simulated sexual intercourse, including [genital-genital] [oral-genital] [anal-genital] [oral-anal], whether between persons of the same or opposite sex; [bestiality] [masturbation] [sadistic or masochistic abuse] [lascivious exhibition of the genitals or pubic area of any person].[1]

The term “visual depiction” includes [a] [any] [photograph] [film] [video] [picture] [or] [computer or computer-generated image or picture], whether made or produced by electronic, mechanical, or other means. [It includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image.][2]

An item is "produced" if it is produced, directed, manufactured, issued, published, advertised, created, made, or in any other way brought into being by the involvement of an individual participating in the recording of child pornography.[3]

Notes on Use

1. If lascivious exhibition of the genitals is at issue, it should be further defined. *See* Instruction 6.18.2252A(1).

2. 18 U.S.C. §§ 2256(5) and (8).

3. A defendant who allegedly took no directorial, editorial, or managerial role when he filmed minors engaged in explicit sexual conduct, or did not intend that the photographs be disseminated commercially, nonetheless "produces" child pornography, within the meaning of the statute prohibiting production of child pornography because Congress' intention was to enact a broad definition of "producing" that encompassed the various means by which an individual might actively participate in the creation and distribution of child pornography. *United States v. Fadl*, 498 F.3d 862, 867 (8th Cir. 2007).

6.18.2252. RECEIPT, POSSESSION OR DISTRIBUTION OF MATERIAL CONTAINING CHILD PORNOGRAPHY (18 U.S.C. §§ 2252A(a)(2)(A) and (B) and (a)(5)(B))

The crime of [receipt] [possession] [distribution] of child pornography[, as charged in [Count__] of the Indictment,] has three elements, which are:

One, that on or about (date) the defendant knowingly [received] [possessed][1] [distributed] (name of item or items, e.g., a book, magazine, periodical, film, videotape, computer disk, etc.) that [were] [contained] [a] [multiple] visual depiction(s) of child pornography;

Two, that the defendant knew that the visual depiction(s) [was] [were] of a minor engaging in sexually explicit conduct;[2] and

Three, that the [material containing the] visual depiction(s) [[was] [were] produced using materials that][3] had been [mailed] [shipped] [transported] [by computer] in interstate or foreign commerce.[4]

[You have heard evidence of more than one visual depiction involved in the offense. You must agree unanimously as to which visual depiction(s) the defendant possessed.]

The term "minor" means any person under the age of eighteen years.[5]

The phrase "child pornography" means any visual depiction of a minor engaging in sexually explicit conduct, where the minor was engaged in the sexually explicit conduct during production of the depiction.[6] The term "visual depiction"includes [a] [any] [photograph] [film] [video] [picture] [or] [computer or computer-generated image or picture], whether made or produced by electronic, mechanical, or other means. [It includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image.][7]

The term "sexually explicit conduct" means actual or simulated [sexual intercourse, including [genital-genital] [oral-genital] [anal-genital] [oral-anal], whether between persons of the same or opposite sex]; [bestiality] [masturbation] [sadistic or masochistic abuse]] [lascivious exhibition of the genitals or pubic area of any person].[8]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Final Instructions: Elements of Offenses

Notes on Use

1. Presence of child pornography images in a computer's temporary cache file is not sufficient to establish the defendant's knowing possession of the images. *See, e.g., United States v. Stulock*, 308 F.3d 922, 925 (8th Cir. 2002) (the district court in a bench trial held that "one cannot be guilty of possession for simply having viewed an image on a web site, thereby causing the image to be automatically stored in the browser's cache, without having purposely saved or downloaded the image." The government did not appeal.); *but see United States v. Tucker*, 305 F.3d 1193, 1205 (10th Cir. 2002) (the defendant's knowledge that the images would be stored in the temporary cache file was sufficient to show knowing possession of the images located there).

2. The Supreme Court in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1992), held with respect to a different statute, 18 U.S.C. § 2252(a)(1) and (2), that proof of scienter as to the age of the person depicted is required for conviction. While the phraseology of § 2252A(a) is different, in that it uses the phrase "child pornography" instead of "visual depiction involving the use of a minor," the statute also contains as an element scienter of the age of the person depicted. *See United States v. Acheson*, 195 F.3d 645, 653 (11th Cir. 1999). Courts have also held that the scienter requirement extends to knowledge that the visual depictions were sexually explicit. *X-Citement Video, Inc.*, 513 U.S. at 78 (§ 2252(a)(2)); *United States v. Fabiano*, 169 F.3d 1299, 1303-04 (10th Cir. 1999); *United States v. Cedelle*, 89 F.3d 181, 185 (4th Cir. 1996).

The age of the child depicted may be proved by, *inter alia*, language used by the defendant in correspondence; Postal Inspector's professional and personal familiarity with child development; and a pediatrics professor's testimony. *United States v. Broyles*, 37 F.3d 1314, 1317-18 (8th Cir. 1994); *United States v. Rayl*, 270 F.3d 709, 714 (8th Cir. 2001). In *United States v. Vig*, 167 F.3d 443, 449-50 (8th Cir. 1999), the court found that the jury could draw its own independent conclusion as to whether real children were depicted by examining the images presented to them. *But see United States v. Hilton*, 363 F.3d 58, 64-65 (1st Cir. 2004) ("the government must introduce relevant evidence *in addition to* the images to prove the children are real."). Finally, in *United States v. Deaton*, 328 F.3d 454, 455 (8th Cir. 2003), the court held that the government is not required to introduce affirmative evidence that images of children were *not* computer generated.

3. This bracketed material, which refers to production using materials that had been mailed, shipped or transported in interstate commerce, is for possible inclusion <u>only</u> in prosecutions brought under § 2252A(a)(5)(B). If the government alleges that multiple depictions are involved, the court may consider submitting special interrogatories. *See* 11.03.

4. Whether the statute requires the defendant have knowledge that the item traveled in interstate commerce has not yet been resolved by the Eighth Circuit; if analyzed similarly to federal gun statutes, interstate transportation without the knowledge of the defendant is sufficient. *See United States v. Robinson*, 137 F.3d 652, 655 (1st Cir. 1998) (§ 2252); *but see United States v. Colavito*, 19 F.3d 69, 71 (2d Cir. 1994) (§ 2252) (the defendant must know that he was receiving material through interstate commerce and that the materials contained sexually explicit depictions of minors). *See* 6.18.2252B for definitions of interstate commerce.

5. 18 U.S.C. § 2256(1).

6. 18 U.S.C. § 2256(8)(A). The Committee believes that the greatest number of prosecutions will be brought under this subsection of the statute. Section 2256(8)(B) and (C) contain two additional definitions of child pornography.

Section 2256(8)(B) was amended in response to *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) to provide that:

> such visual depiction is a digital image, computer image, or computer generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.

The Committee expresses no opinion whether this provision will be found to have the same constitutional infirmity as its predecessor.

Section 2256(8)(C) can be instructed as follows:

> The phrase "child pornography" means a visual depiction that has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

If this subsection is used, the following definition of "identifiable minor" should be included:

> The term "identifiable minor" as used in the definition of child pornography
>
> means a person [who was a minor at the time the visual depiction was created, adapted or modified] [whose image as a minor was used in creating, adapting, or modifying the visual depiction] and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature. [The government is not required to prove the actual identity of the identifiable minor.]

18 U.S.C. § 2256(9).

7. 18 U.S.C. §§ 2256(5) and (8).

8. 18 U.S.C. § 2256(2)(A). If the prosecution is brought under 18 U.S.C. § 2256(8)(B), the definition of sexually explicit conduct should be taken from 18 U.S.C. § 2256(2)(B).

Committee Comments

This instruction has been drafted to comply with amendments made to § 2252A by the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003). The amendments are effective April 30, 2003. If the criminal conduct occurred prior to April 30, 2003, the instruction should be revised to comply with the unamended statute.

Final Instructions: Elements of Offenses

6.18.2252A. "LASCIVIOUS" EXPLAINED

Whether a visual depiction of the genitals or pubic area constitutes a lascivious exhibition requires a consideration of the overall content of the material. You may consider such factors as (1) whether the focal point of the picture is on the minor's genitals or pubic area; (2) whether the setting of the picture is sexually suggestive, that is, in a place or pose generally associated with sexual activity; (3) whether the minor is depicted in an unnatural pose or in inappropriate attire, considering the age of the minor; (4) whether the minor is fully or partially clothed, or nude; (5) whether the picture suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the picture is intended or designed to elicit a sexual response in the viewer; (7) whether the picture portrays the minor as a sexual object; and (8) the caption(s) on the picture(s).

It is for you to decide the weight or lack of weight to be given to any of these factors. A picture need not involve all of these factors to constitute a lascivious exhibition of the genitals or pubic area.

Committee Comments

Title 18, United States Code, § 2256(2). The first six factors are derived from *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub. nom. United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987) and are generally cited. *See, e.g., United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999); *United States v. Carroll*, 190 F.3d 290, 296 (5th Cir. 1999); *United States v. Amirault*, 173 F.3d 28, 31 (1st Cir. 1999). The seventh and eighth factors were added by the court in *United States v. Arvin*, 900 F.2d 1385 (9th Cir. 1990) (interpreting the definition of "lascivious" found in 18 U.S.C. § 2256(2)(E) for purposes of § 2252).

The factors are "neither comprehensive nor necessarily applicable in every situation. . . [T]here may be other factors that are equally if not more important in determining whether a photograph contains a lascivious exhibition." *United States v. Amirault*, 173 F.3d at 32.

In *United States v. Rayl*, 270 F.3d 709, 714 (8th Cir. 2001), the court held that the question whether materials depict a "lascivious exhibition of the genitals" is for the finder of fact. However, the meaning of "lascivious exhibition of the genitals" is an issue of law. The district court therefore should, before submitting materials offered by the government to the jury, conduct a preliminary review of whether those materials depict sexually explicit conduct as a matter of law. *Accord United States v. Horn*, 187 F.3d at 789.

Final Instructions: Elements of Offenses

6.18.2252B. "INTERSTATE COMMERCE" DEFINED

The phrase "interstate commerce" means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia.[1]

[The phrase "foreign commerce," as used above, means commerce between any state, territory or possession of the United States and a foreign country.][1]

[The term "commerce" includes, among other things, travel, trade, transportation and communication.][1]

[Images transmitted or received over the Internet have moved in interstate or foreign commerce.[2] It is for you to determine, however, if [the material containing] the visual depiction [had been transmitted or received over the Internet] [was produced using materials that had been transmitted or received over the Internet]].[3]

Notes on Use

1. *See* 6.18.1956J(2); *United States v. Hampton*, 260 F.3d 832 (8th Cir. 2001); *United States v. Bausch*, 140 F.3d 739 (8th Cir. 1998).

2. *See United States v. Smith*, 47 M.J. 588 (1997) (relying in part on *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997); *United States v. Thomas*, 74 F.3d 701, 706-07 (6th Cir. 1996); *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002). Each item must be independently linked to the Internet. *United States v. Henriques*, 234 F.3d 263, 266 (5th Cir. 2000); *United States v. Wilson*, 182 F.3d 737, 744 (10th Cir. 1999).

3. The last bracketed portion of this sentence is applicable only in prosecutions under § 2252A(a)(5)(B).

6.18.2252C. "COMPUTER" DEFINED

The term "computer" as used in this instruction means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.

Committee Comments

See 18 U.S.C. §§ 1030(e), 2252A(a)(5)(B) and 2256(6).

Final Instructions: Elements of Offenses

6.18.2312. INTERSTATE TRANSPORTATION OF STOLEN VEHICLE (18 U.S.C. § 2312)

The crime of [interstate] [foreign] transportation of a stolen motor vehicle, as charged in [Count ___ of] the Indictment, has three elements, which are:

One, the (describe vehicle) was stolen;

Two, after the vehicle was stolen, the defendant [moved] [caused it to be moved] across a [state line] [United States border];

Three, at the time he [moved the vehicle][caused the vehicle to be moved] across a [state line] [United States border], the defendant knew it was stolen.

Property has been "stolen" when it has been taken with the intent to permanently or temporarily deprive the owner of the rights and benefits of ownership.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Committee Comments

See United States v. Harris, 528 F.2d 1327, 1330 (8th Cir. 1975); *United States v. Gilliss*, 645 F.2d 1269, 1279-80 n.25 (8th Cir. 1981).

"Stolen" is defined in *United States v. Turley*, 352 U.S. 407, 410-17 (1957).

Where a person lawfully obtains possession of a motor vehicle and later forms an intent to convert it to his own use, and in furtherance of that intention transports it across state lines, there is a violation of section 2312. *United States v. Miles*, 472 F.2d 1145, 1146 (8th Cir. 1973); *United States v. Bruton*, 414 F.2d 905 (8th Cir. 1969). In such a case, the following paragraph should be added:

> It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed 'stolen' if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use.

The taking need not be done with the intent to permanently deprive the owner of the vehicle. *See United States v. Bruton*, 414 F.2d at 908.

The defendant must know that the vehicle in question is stolen, but need not know that it is being transported across state lines. *See United States v. Spoone*, 741 F.2d 680, 686 (4th Cir. 1984); *United States v. Martinez*, 694 F.2d 71, 72 (5th Cir. 1982).

6.18.2313. RECEIPT OR SALE OF A STOLEN MOTOR VEHICLE OR AIRCRAFT (18 U.S.C. § 2313)

The crime of [receiving] [possessing] [concealing] [storing] [selling] [disposing of] a stolen [motor vehicle] [aircraft], as charged in [Count ___ of] the Indictment, has four elements, which are:

One, the (describe vehicle or aircraft) was stolen;

Two, after it was stolen, the [vehicle] [aircraft] was moved across a [state line] [United States border];

Three, after the [vehicle] [aircraft] had been stolen and moved across a [state line] [United States border], the defendant [received] [possessed] [concealed] [stored] [sold] [disposed of][1] it; and

Four, at the time the defendant [received] [concealed] [stored] [sold] [disposed of] the [vehicle] [aircraft], he knew it had been stolen.

Property has been "stolen" when it has been taken with the intent to permanently or temporarily deprive the owner of the rights and benefits of ownership.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. If acts constituting both housing of stolen vehicles and disposal of stolen vehicles are charged, further instructions will be necessary to assure jury unanimity on at least one theory. *See United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977).

Committee Comments

See 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 59.06 (5th ed. 2000); *United States v. Brady*, 425 F.2d 309, 311 (8th Cir. 1970). *BUT NOTE*: Those referenced instructions are all based on 18 U.S.C. § 2313 *prior* to being amended on October 25, 1984. This instruction 6.18.2313 reflects 18 U.S.C. § 2313 as amended.

Section 2313 relates to the receipt or sale of stolen motor vehicles and aircraft. Section 2315 relates to the receipt or sale of stolen money, securities, or other property. The elements of the two offenses are virtually identical except that section 2315 requires that the stolen property had a value of at least $5,000, while section 2313 contains no such requirement. "Value" means market value. *United States v. Williams*, 657 F.2d 199, 202 (8th Cir. 1981). If the defendant is charged under section 2315, an additional element positing a minimum value of $5,000.00 must be included in this instruction.

This statute was amended as of October 25, 1984, to provide that federal criminal jurisdiction continues over a stolen motor vehicle once it crosses a state line even after it ceases to be part of the flow of interstate commerce. Thus it is no longer necessary to prove that a vehicle stolen after October 25, 1984 was still in interstate commerce at the time of receipt, possession, etc. A similar amendment was made to section 2315 as of November 10, 1986.

With respect to stolen vehicles taken across a state line prior to October 25, 1984, the question of whether property was moving in interstate commerce at the relevant time is ordinarily for the jury. *United States v. Tobin*, 576 F.2d 687, 691 (5th Cir. 1978). *See also United States v. Hiscott*, 586 F.2d 1271, 1274 (8th Cir. 1978); *United States v. Briddle*, 430 F.2d 1335, 1338-39 (8th Cir. 1970).

The defendant's knowledge that the property was stolen is an element of each offense covered by sections 2312-2315. *United States v. Miller*, 725 F.2d 462, 468 (8th Cir. 1984); *United States v. Wilson*, 523 F.2d 828, 829-30 (8th Cir. 1975). Such knowledge may be established by evidence of the defendant's unexplained possession of recently stolen property. *Id.*; *United States v. Brotherton*, 427 F.2d 1286, 1288 (8th Cir. 1970). An explanation of possession or receipt by the defendant does not automatically preclude the jury from weighing the inference created by possession. *United States v. Burns*, 597 F.2d 939, 943-44 n.7 (5th Cir. 1979). *See* Instruction 4.13, *supra*. Knowledge of the involvement of interstate commerce is not necessary for conviction. *United States v. Wilson*, 523 F.2d at 829 n.2.

"Stolen" is defined in *United States v. Turley*, 352 U.S. 407, 410-17 (1957).

"Possession" will not ordinarily need to be defined. "Where the proof of possession is overwhelming or where ordinary laymen's concepts of possession will suffice, no legal definition is necessary." *Kramer v. United States*, 408 F.2d 837, 840-41 (8th Cir. 1969) and cases cited therein. *Kramer* does recognize that in certain factual situations it might be more desirable to define the word "possession" in order to more precisely delineate the issues. 408 F.2d at 840 n.2. *See* Instruction 8.02, *infra*.

Likewise "conceal" is to be given its ordinary meaning by the jury, although the court may illustrate or expand on that meaning. *See United States v. Folsom*, 479 F.2d 1, 3 (8th Cir. 1973); *United States v. Sherriff*, 546 F.2d 604, 608 (5th Cir. 1977). Concealing does require some overt act beyond mere possession. *United States v. Powell*, 420 F.2d 949, 950 (6th Cir. 1970). *See also United States v. Mahanna*, 461 F.2d 1110, 1117 (8th Cir. 1972).

6.18.2314. INTERSTATE TRANSPORTATION OF STOLEN PROPERTY (18 U.S.C. § 2314) (First Paragraph)

The crime of [interstate] [foreign] transportation of [stolen] [converted] [fraudulently taken] property,[1] as charged in [Count ___ of] the Indictment, has four elements, which are:

One, the (describe property) was [stolen] [converted] [taken by fraud];

Two, the (describe property) then had a value[2] of $5,000.00 or more;

Three, after the (describe property) was [stolen] [converted] [taken by fraud], the defendant [moved it] [caused it to be moved] across a [state line] [United States border]; and

Four, at the time the defendant [moved the (describe property)] [caused the (describe property) to be moved] across a [state line] [United States border], [he] [she] knew that it had been [stolen] [converted] [taken by fraud].

[Property has been "stolen" when it has been taken with the intent to permanently or temporarily deprive the owner of the rights and benefits of ownership.]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statute specifically applies to "goods, wares, merchandise, securities or money." Any of these terms may be substituted for the word "property" as is applicable. "Money" and "Securities" are defined in section 2311.

2. "Value" is defined in section 2311. If value is a disputed issue, a definition should be given to the jury. *See* Committee Comments, *supra*.

Committee Comments

See 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 59.09 (5th ed. 2000). *See generally Gay v. United States*, 408 F.2d 923, 926-29 (8th Cir. 1969).

See Committee Comments, Instructions 6.18.2312 and 6.18.2313, *supra*.

Knowledge that the property was stolen or taken by fraud is an element of this offense, but "specific intent" is not. *United States v. Miller*, 725 F.2d 462, 468 (8th Cir. 1984); *United States v. Zarattini*, 552 F.2d 753, 760 (7th Cir. 1977). Knowledge or foreseeability of interstate transportation is not necessary for conviction. *United States v. Kibby*, 848 F.2d 920, 923 (8th Cir. 1988); *United States v. Ludwig*, 523 F.2d 705, 707 (8th Cir. 1975).

This offense is not limited to the physical movement of tangible property from one state to another; it is a violation of Section 2314 to cause an interstate wire transfer of stolen funds. *See United States v. Wright*, 791 F.2d 133 (10th Cir. 1986).

"Stolen" is defined in *United States v. Turley*, 352 U.S. 407, 410-17 (1957).

Fraud includes false representation, dishonesty and deceit. "It may result from reckless representation even when not made with a deliberate intent to deceive." *United States v. Grainger*, 701 F.2d 308, 311 (4th Cir. 1983).

"Value" is defined in section 2311. Market value is ordinarily used to determine the value of stolen property. However any reasonable method may be used to ascribe a monetary value to goods which have no market value or the value of which depends on intangible components, including development and production costs, revenues, or price in a "thieves' market." *See United States v. Stegora*, 849 F.2d 291, 292 (8th Cir. 1988).

Separate transactions under $5,000 may be aggregated for the purpose of meeting the $5,000 limit of 18 U.S.C. § 2314 provided they are substantially related and charged as a single offense. *United States v. Lagerquist*, 758 F.2d 1279 (8th Cir. 1985); *Schaffer v. United States*, 362 U.S. 511 (1960). In such a case, Element *Two* should be modified to include "total value."

Final Instructions: Elements of Offenses

6.18.2421. TRANSPORTATION FOR PROSTITUTION (18 U.S.C. § 2421)

The crime of [attempted] [interstate] [foreign] transportation of an individual to engage in [prostitution] [(any sexual activity for which a person can be charged with a criminal offense)][1] as charged in [Count ____ of] the Indictment has two elements, which are:

One, the defendant knowingly [transported] [attempted to transport] (name of person alleged in Indictment) across a state line or across a national border; and

Two, the defendant [transported] [attempted to transport] (name of person alleged in Indictment) with the intent that such person engage in [prostitution] [(describe sexual activity charged in the Indictment)].

[Prostitution means (set out elements of crime of prostitution from jurisdiction in which act occurred or would have occurred).][2]

[(Set out elements of applicable federal or state law) [is] [are] [a crime] [crimes] under the laws of [the United States] [the State of (identify the state)].][3]

[A person may be found guilty of an attempt if [he] [she] intended to (describe attempted act, i.e., transport Jane Doe across a state line with the intent that Jane Doe engage in prostitution) and voluntarily and intentionally carried out some act which was a substantial step[4] toward that (describe attempted act).][5]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. "Prostitution" or "any sexual activity for which a person can be charged with a criminal offense" should be defined in this instruction.

2. Use when the defendant is charged with travel or attempted travel to engage in prostitution.

3. Use when the defendant is charged with travel or attempted travel to engage in any sexual activity for which any person can be charged with a criminal offense.

4 An instruction defining "substantial step" may be given. *See* Instruction 8.01, Notes on Use, n.2, *infra*.

5. Use when the defendant is charged with an attempt. *See generally*, Instruction 8.01, *infra*.

6.18.2422A. PERSUADING OR COERCING TO TRAVEL TO ENGAGE IN PROSTITUTION (18 U.S.C. § 2422(a))

The crime of [persuading] [inducing] [enticing] [coercing] an individual to travel in [interstate] [foreign] commerce to engage in [prostitution] [(any sexual activity for which a person can be charged with a criminal offense)] as charged in [Count _____ of] the Indictment has three elements, which are:

[*One*, the defendant knowingly [persuaded] [induced] [enticed] [coerced] (name person alleged in Indictment) to travel in [interstate] [foreign] commerce;]

[*One*, the defendant attempted to [persuade] [induce] [entice] [coerce] (name of person alleged in Indictment) to travel in [interstate] [foreign] commerce;][1]

[*Two*, during such travel a [state line] [national boundary] was crossed; and]

[*Two*, had such travel occurred, a [state line] [national boundary] would have been crossed; and][1]

Three, the defendant [did so] [attempted to do so] with the intent that (name of person alleged in Indictment) engage in [prostitution] [(any sexual activity for which a person can be charged with a criminal offense)].

[A person may be found guilty of an attempt if [he] [she] intended to (describe attempted act, i.e., persuade Jane Doe to travel in interstate commerce with the intent that Jane Doe engage in prostitution) and voluntarily and intentionally carried out some act which was a substantial step[2] toward that (describe attempted act).][3]

[(Set out elements of applicable federal or state law) [is] [are] [a crime] [crimes] under the laws of [the United States] [the State of (identify the state)].][4]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. Use when the defendant is charged with an attempt.

2 An instruction defining "substantial step" may be given. *See* Instruction 8.01, Notes on Use, n.2, *infra*.

3. Use when the defendant is charged with an attempt. *See generally*, Instruction 8.01, *infra*.

4. Use when the defendant is charged with persuading or coercing an individual to engage in any activity for which any person can be charged with a criminal offense, or an attempt to do so.

6.18.2422B. PERSUADING OR COERCING A MINOR TO ENGAGE IN SEXUAL ACTIVITY (18 U.S.C. § 2422(b))

The crime of [using the mail] [using any facility or means of [interstate] [foreign] commerce] to [persuade] [induce] [entice] [coerce] anyone under eighteen (18) years of age to engage in [prostitution] [(any sexual activity for which any person can be charged with a criminal offense)] as charged in [Count ____ of] the Indictment has [two][1] [three][2] elements, which are:

One, the defendant knowingly used [the mail] [a computer] (describe other interstate facility as alleged in the Indictment) to [attempt to] [persuade] [induce] [entice] [coerce] an individual under the age of eighteen (18) years of age to engage in [prostitution] [(describe sexual activity charged in Indictment)]; and

Two, the defendant believed that such individual was less than eighteen (18) years of age; [and]

[*Three*, that [if the sexual activity had occurred] [based upon the sexual activity that occurred], the defendant could have been charged with a criminal offense under the laws of [the United States] (identify the state)].[3]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

It is not necessary for the Government to prove that the individual was, in fact, less than eighteen (18) years of age; but it is necessary for the Government to prove the defendant believed such individual to be under that age.

[It is not necessary for the Government to prove that the individual was actually [persuaded] [induced] [enticed] [coerced] to engage in [prostitution] [(describe sexual activity charged in Indictment)]; but it is necessary for the Government to prove that the defendant intended to engage in [prostitution] [(some form of unlawful sexual activity)] with the individual and knowingly and willfully took some action that was a substantial step toward bringing about or engaging in [prostitution] [(describe sexual activity charged in Indictment)].][4]

[Set out elements of applicable federal or state law) [is] [are] [a crime] [crimes] under the laws of [the United States] [the State of (identify the state)].[5]

Final Instructions: Elements of Offenses

Notes on Use

1. Use when the defendant is charged with persuading or coercing a minor to engage in prostitution.

2. Use when the defendant is charged with persuading or coercing a minor to engage in any sexual activity for which any person can be charged with a criminal offense.

3. Use when the defendant is charged with persuading or coercing a minor to engage in any sexual activity for which any person can be charged with a criminal offense.

4. Use when the defendant is charged with an attempt.

5. Use when the defendant is charged with persuading or coercing a minor to engage in any sexual activity for which any person can be charged with a criminal offense.

Committee Comments

There is no requirement that the defendant complete a sex act with the intended victim to support a conviction under this section, even if the crime is not charged as an attempt. *United States v. Bailey*, 228 F.3d 637, 638-39 (6th Cir. 2000).

The defendant need not know the age of the intended victim, so long as the defendant believes that the victim is under the age of eighteen (18). *United States v. Helder*, 452 F.3d 751, 756 (8th Cir. 2006); *United States v. Hicks*, 457 F.3d 838, 841 (8th Cir. 2006).

An actual minor victim is not required for an attempt conviction under section 2422(b); the "victim" may, in fact, be an undercover police officer. *Helder*, 452 F.3d at 753-56; *Hicks*, 457 F.3d at 839-41.

The Eighth Circuit has upheld attempt convictions under section 2422(b) where the means of interstate communication used was the internet. *See, e.g.*, *Helder*, *supra*; *Hicks*, *supra*; *United States v. Patten*, 397 F.3d 1100 (8th Cir. 2005).

6.18.2423A. TRANSPORTATION OF MINOR TO ENGAGE IN CRIMINAL SEXUAL ACTIVITY (18 U.S.C. § 2423(a)) [1]

The crime of [interstate] [foreign] transportation of anyone under eighteen (18) years of age to engage in [prostitution] [(specify sexual activity for which a person can be charged with a criminal offense)] as charged in [Count ___ of] the Indictment has [three][2] [four][3] elements, which are:

One, the defendant knowingly [transported] [attempted to transport] (name of person alleged in Indictment) across a state line or national border;

Two, the defendant [transported] [attempted to transport] (name of person alleged in Indictment) with the intent such person engage in [prostitution] [(describe sexual activity charged in Indictment)]; and

Three,[4] [(name of person alleged in Indictment) was under the age of eighteen (18) years][5] [the defendant believed such individual was under the age of eighteen (18) years of age][6, 7] [; and]

[*Four*, (describe sexual activity charged in Indictment) is a crime under the law of the State of (identify state).] [8]

[Prostitution means (set out elements of crime of prostitution from jurisdiction in which act occurred or would have occurred).][9]

[(Set out elements of applicable federal or state law) [is] [are] [a crime] [crimes] under the laws of [the United States] [the State of (identify state)].][10]

[A person may be found guilty of an attempt if [he] [she] intended to (describe attempted act, i.e., transport Jane Doe across a state line with the intent that Jane Doe engage in prostitution) and voluntarily and intentionally carried out some act which was a substantial step[11] toward that (describe attempted act).][12]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

[It is not necessary for the Government to prove that the defendant knew that (name of person alleged in Indictment) was, in fact, less than eighteen (18) years of age.][13]

Final Instructions: Elements of Offenses

[It is not necessary for the Government to prove that the individual was, in fact, less than eighteen (18) years of age; but it is necessary for the Government to prove the defendant believed such individual to be under that age.][14]

Notes on Use

1. Title 18 U.S.C. § 2423(e) authorizes the charging of an attempt or conspiracy under this statute. If a conspiracy is charged, modify instruction accordingly.

2. Use when the defendant is charged with transporting a minor to engage in prostitution.

3. Use when the defendant is charged with transporting a minor to engage in any sexual activity for which a person can be charged with a criminal offense.

4. Use when the defendant is charged with transporting a minor to engage in prostitution.

5. Use when the defendant is charged with the actual transportation of the victim.

6. Use when the defendant is charged with the attempted transportation and the "victim" is an undercover officer.

7. When the defendant is charged with transporting a minor to engage in any sexual activity for which a person can be charged with a criminal offense, and mistake of age is a defense to such offense, instruction must be modified to set out elements of that offense.

8. Use when the defendant is charged with transporting a minor to engage in any sexual activity for which a person can be charged with a criminal offense.

9. Use when the defendant is charged with transporting a minor to engage in prostitution.

10. Use when the defendant is charged with transporting a minor to engage in any sexual activity for which a person can be charged with a criminal offense.

11. An instruction defining "substantial step" should be given. *See* Instruction 8.01, Notes on Use, n.2, *infra*.

12. Use when the defendant is charged with an attempt. *See generally*, Instruction 8.01, *infra*.

13. Use when the defendant is charged with the actual transportation of the victim and the charge does not involve a sexual offense to which mistake of age is a defense.

14. Use when the defendant is charged with the attempted transportation and the "victim" is an undercover officer.

Committee Comments

Although the matter has not been decided in the Eighth Circuit, every circuit to address the issue has determined that the government need not prove the defendant's knowledge of the victim's minority, rather the victim's minor status is a fact which the prosecution must prove and

for which the defendant is responsible. *See United States v. Jones*, 471 F.3d 535, 538-40 (4th Cir. 2006); *United States v. Griffith*, 284 F.3d 338, 349-51 (2nd Cir. 2002); *United States v. Taylor*, 239 F.3d 994, 996-97 (9th Cir. 2001); *United States v. Scisum*, 32 F.3d 1479, 1485-86 (10th Cir. 1994); *United States v. Hamilton*, 456 F.2d 171, 173 (3rd Cir. 1972). In *Gilmour v. Rogerson*, 117 F.3d 368 (8th Cir. 1997), a habeas corpus proceeding, the Eighth Circuit held that a defendant charged with the Iowa offense of sexual exploitation of a minor was not entitled to a mistake-of-age defense based on the reasonable belief that the sexually exploited victim was, in fact, an adult.

The Eighth Circuit has held that a defendant may be convicted of violating 18 U.S.C. § 2423(b) if he or she travels in interstate commerce for the purpose of engaging in criminal sexual conduct with a person believed to be a minor regardless of whether such person is actually a minor. *United States v. Hicks*, 457 F.3d. 838, 841 (8th Cir. 2006).

Final Instructions: Elements of Offenses

6.21.841A. CONTROLLED SUBSTANCES - POSSESSION WITH INTENT TO DISTRIBUTE (21 U.S.C. § 841(a)(1))

The crime of possession of (describe substance, e.g., cocaine) with intent to distribute, as charged in [Count _____ of] the Indictment, has three elements, which are:

One, the defendant was in possession of (describe substance, e.g., cocaine);[1]

Two, the defendant [knew that he was] [intended to be] in possession of [a controlled substance] [(describe substance, e.g., cocaine)];[2] and

Three, the defendant intended to distribute[3] some or all[4] of the (describe substance, e.g., cocaine) to another person.

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. For jury instructions involving enhanced drug offenses under *Apprendi v. New Jersey*, *see* 6.21.841A1 - 6.21.846A1.

2. The defendant need not know what the controlled substance is if he knows he has possession of some controlled substance. *United States v. Sheppard*, 219 F.3d 766 (8th Cir. 2000). The alternative language which best fits the case should be used.

3. In *United States v. Shurn*, 849 F.2d 1090 (8th Cir. 1988), the court approved the following instruction on "intent to distribute":

> I instruct you that possession of a large quantity of heroin supports an inference of an intent to distribute.
>
> Thus, in determining whether the defendant possessed heroin with the specific intent to distribute it, you should consider whether the defendant possessed a large quantity of heroin. If you believe that he did, then you may infer that he had the specific intent to distribute.

849 F.2d at 1095 n.6.

When such an instruction is used, care must be used that the instruction not be phrased in a manner which indicates the jury must make an inference. Likewise, "specific" should be omitted as modifying intent. The Committee recommends that such an instruction be rephrased as suggested in Instruction 4.13, *supra*.

"Distribute" may be defined if the meaning is unclear in the context of the case. The statute also makes it unlawful to manufacture, dispense or possess with intent to manufacture, distribute or dispense. If one of these alternatives has been charged, this element should be changed accordingly.

Final Instructions: Elements of Offenses

4. It is uncertain whether, in section 841(a)(1) possession with intent to distribute cases, drugs intended only for personal use are included in the drug quantity. In *United States v. Williams*, 247 F.3d 353, 357 (2d Cir. 2001), the court held that such amounts are not included. The Eighth Circuit has not ruled on the precise issue; however, in *United States v. Fraser*, 243 F.3d 473, 476 (8th Cir. 2001), it concluded that in determining relevant conduct under the guidelines for a section 841(a)(1) offense, drugs possessed for solely personal use should not be included. The phrase "some or all" therefore should be used with care.

Committee Comments

See 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 64.01-.18 (5th ed. 2000); *United States v. Hudson*, 717 F.2d 1211, 1212-13 (8th Cir. 1983); *United States v. Brischetto*, 538 F.2d 208, 210 (8th Cir. 1976).

Any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000); *United States v. Sheppard*, 219 F.3d 766 (8th Cir. 2000). Under the section 841(b) sentencing provisions, some of the facts that may raise the statutory maximum are the quantity of drugs involved in the offense, or whether death or serious bodily injury results from use of the drugs involved. For jury instructions involving such enhanced drug offenses, *see* 6.21.841A1 - 6.21.846A1. In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court declined to extend *Apprendi* to facts increasing the statutory minimum sentence, reaffirming its earlier decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Therefore, such facts need not be submitted to the jury.

The element of "possession" ordinarily does not need to be defined. *Johnson v. United States*, 506 F.2d 640, 643 (8th Cir. 1974). Where the government is relying on a joint possession or constructive possession theory, however, a definitional instruction may be required. *See* Instruction 8.02, *infra*; *see also* 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 16.05 (5th ed. 2000); *United States v. Haynes*, 653 F.2d 332, 333 (8th Cir. 1981); *United States v. Weisser*, 737 F.2d 729, 732 (8th Cir. 1984).

"Intent to distribute" typically is established through circumstantial evidence. *United States v. Shurn*, 849 F.2d 1090, 1093, 1095 (8th Cir. 1988) and cases cited therein. In particular, possession of a large quantity of a controlled substance can be sufficient evidence of an intent to distribute. *United States v. Lopez*, 42 F.3d 463, 467-68 (8th Cir. 1994). Other indicia of intent to distribute include "[drug] purity and presence of firearms, cash, packaging material, or other distribution paraphernalia." *Id.*

It is uncertain whether, in section 841(a)(1) possession with intent to distribute cases, drugs intended only for personal use are included in the drug quantity. In *United States v. Williams*, 247 F.3d 353, 357 (2d Cir. 2001), the court held that such amounts are not included. The Eighth Circuit has not ruled on the precise issue; however, in *United States v. Fraser*, 243 F.3d 473, 476 (8th Cir. 2001), it concluded that in determining relevant conduct under the

guidelines for a §841(a)(1) offense, drugs possessed for solely personal use should not be included. The phrase "some or all" therefore should be used with care.

In an appropriate case, a lesser-included offense instruction under 21 U.S.C. § 844 must be given. *See United States v. Brischetto*, 538 F.2d 208 (8th Cir. 1976); *see, e.g., United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977) in which the court held that joint purchasers and possessors of a controlled substance who intend to share it between themselves may not be found guilty of distribution or possession with intent to distribute, but only of simple possession. *See* Instruction 3.10, *supra*, for a form of lesser-included offense instruction.

When distribution by a physician is charged, there must be a finding that the defendant dispensed the drug other than for a legitimate medical purpose and not in the usual course of medical practice. *United States v. Green*, 511 F.2d 1062, 1069-70 (7th Cir. 1975). In such a case, the defendant may be entitled to a "good faith" instruction. *Green*, 511 F.2d at 1071-72. *See* Instructions 9.05 and 9.08, *infra*.

The question whether something is a "controlled substance" under 21 U.S.C. § 802(6) or a "narcotic drug" within the meaning of section 802(16) is a question of law. *United States v. Porter*, 544 F.2d 936, 940 (8th Cir. 1976).

Greater and lesser-included offense - short version

6.21.841A.1. (short) CONTROLLED SUBSTANCES - POSSESSION WITH INTENT TO DISTRIBUTE (21 U.S.C. § 841(a)(1)) (*Apprendi*-Affected Possession)

The crime of possession of (describe substance (and amount), e.g., [a controlled substance] [name of controlled substance] [500 grams or more of a mixture or substance containing methamphetamine) with intent to distribute, as charged in [Count _____ of] the Indictment, has four elements, which are:

One, the defendant possessed [a controlled substance] [(describe substance, e.g., a mixture or substance containing methamphetamine)];

Two, the defendant [knew that he] [intended to] possess[ed] [a controlled substance] [(describe substance, e.g., a mixture or substance containing methamphetamine)];

Three, the defendant intended to distribute[1] [the controlled substance] [(describe substance, e.g., some or all of the mixture or substance containing methamphetamine)][2]; and

Four, (describe aggravating element,[3] e.g., [the amount the defendant possessed with intent to distribute was 500 grams or more of a mixture or substance containing methamphetamine] [the amount involved in the offense was 500 grams or more of a mixture or substance containing methamphetamine], [or if that is not proved, that (describe lesser-included but still aggravated crime, e.g. [the amount the defendant possessed with intent to distribute was 50 grams or more but less than 500 grams of a mixture or substance containing methamphetamine] [the amount involved in the offense was 50 grams or more but less than 500 grams of a mixture or substance containing methamphetamine]]).

If you find these four elements unanimously and beyond a reasonable doubt, [and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [as defined in Instruction No. ___]], then you must find the defendant guilty of the crime of (describe crime). Record your determination on the Verdict Form which will be submitted to you with these instructions.

Final Instructions: Elements of Offenses

If you do not find the defendant guilty of this crime [under Count ___], go on to consider whether the defendant possessed with intent to distribute some amount of (describe controlled substance). If you find the first three elements set forth above unanimously and beyond a reasonable doubt, [and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [as defined in Instruction No. ___]], you must find the defendant guilty of the crime of possession with intent to distribute (describe controlled substance, e.g., a mixture or substance containing methamphetamine). Otherwise, you must find the defendant not guilty. Record your determination on the Verdict Form.

(Instruction 3.09, *supra*, which describes the Government's burden of proof, has already been incorporated in this instruction and should not be repeated.)

Notes on Use

1. In *United States v. Shurn*, 849 F.2d 1090 (8th Cir. 1988), the court approved the following instruction on "intent to distribute."

> I instruct you that possession of a large quantity of heroin supports an inference of an intent to distribute.
>
> Thus, in determining whether the defendant possessed heroin with the specific intent to distribute it, you should consider whether the defendant possessed a large quantity of heroin. If you believe that he did, then you may infer that he had the specific intent to distribute.

849 F.2d at 1095 n.6.

When such an instruction is used, care must be used that the instruction not be phrased in a manner which indicates the jury must make an inference. Likewise, "specific" should be omitted as modifying intent. The Committee recommends that such an instruction be rephrased as suggested in Instruction 4.13, *supra*.

"Distribute" may be defined if the meaning is unclear in the context of the case. The statute also makes it unlawful to manufacture, dispense or possess with intent to manufacture, distribute or dispense. If one of these alternatives has been charged, this element should be changed accordingly.

2. It is uncertain whether, in section 841(a)(1) possession with intent to distribute cases, drugs intended only for personal use are included in the drug quantity. In *United States v. Williams*, 247 F.3d 353, 357 (2d Cir. 2001), the court held that such amounts are not included. The Eighth Circuit has not ruled on the precise issue; however, in *United States v. Fraser*, 243 F.3d 473, 476 (8th Cir. 2001), it concluded that in determining relevant conduct under the

guidelines for a section 841(a)(1) offense, drugs possessed for solely personal use should not be included. The phrase "some or all" therefore should be used with care.

3. Any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000); *United States v. Sheppard*, 219 F.3d 766 (8th Cir. 2000). Under the section 841(b) sentencing provisions, some of the facts that may raise the statutory maximum are the quantity of drugs involved in the offense, whether death or serious bodily injury results from use of the drugs involved, or whether the defendant has a prior felony drug conviction. In *United States v. Sheppard*, 219 F.3d at 768-69, the panel suggested that the district court's submission of drug quantity to the jury in a special interrogatory rather than as an element of the offense was harmless error. However, in *United States v. Harris*, 310 F.3d 1105 (8th Cir. 2002), the Court, without mentioning *Sheppard*, explicitly held that it was not an *Apprendi* error to submit the issue of drug quantity to the jury by use of a special interrogatory. The Committee believes, therefore, that submission of drug quantity either as a formal element, as is done in 6.21.841A.1 (short) and 6.21.841A.1 (long) or by special interrogatory is permissible. *See* 6.21.841A.1(b) for a verdict form with special interrogatories.

In *Apprendi*, 530 U.S. at 488, the majority left open the possibility that it might revisit the issue of whether a defendant's prior conviction(s) must be submitted to the jury and found beyond a reasonable doubt before an enhanced punishment based on prior convictions is appropriate. Unless and until the Court does so, prior convictions used to enhance a sentence need not be submitted to the jury and proven beyond a reasonable doubt. *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998); *United States v. Peltier*, 276 F.3d 1003, 1006 (8th Cir. 2002); *United States v. Abernathy*, 277 F.3d 1048, 1050 (8th Cir. 2002). In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court declined to extend *Apprendi* to facts increasing the statutory minimum sentence, reaffirming its earlier decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Therefore, such facts need not be submitted to the jury.

Suggested wording for the aggravating facts listed in the above paragraph are:

a) the crime involved (describe substance and amount) or more. [This alternative is to be used where the amount of drugs increasing the maximum sentence is not in dispute. Where the offense involves two or more controlled substances, and the Indictment alleges quantities of each substance sufficient to raise the maximum sentence, an additional element should be submitted to the jury for a finding on each controlled substance.]

b) a death resulted from use of the (describe substance). [In *United States v. McIntosh*, 236 F.3d 968, 972 (8th Cir. 2001), the Eighth Circuit held that the "death resulting" charge is a strict liability one - the court may not impose "a foreseeability or proximate cause requirement." *Accord United States v. Soler*, 275 F.3d 146 (1st Cir. 2002)].

Final Instructions: Elements of Offenses

Committee Comments

See Committee Comments to 6.21.841A.

Greater and lesser-included offense - long version

6.21.841A.1. (long) CONTROLLED SUBSTANCES - POSSESSION WITH INTENT TO DISTRIBUTE (21 U.S.C. § 841(a)(1)) (*Apprendi*-Affected Possession)

The crime of possession of (describe substance (and amount), e.g., [a controlled substance] [name of controlled substance] [500 grams or more of a mixture or substance containing methamphetamine) with intent to distribute, as charged in [Count _____ of] the Indictment, has four elements, which are:

One, the defendant possessed [a controlled substance] (describe substance, e.g., a mixture or substance containing methamphetamine);

Two, the defendant [knew that he] [intended to] possess[ed] [a controlled substance] [(describe substance, e.g., a mixture or substance containing methamphetamine)];

Three, the defendant intended to distribute[1] [the controlled substance] [(describe substance, e.g., some or all of the mixture or substance containing methamphetamine)][2]; and

Four, (describe aggravating element,[3] e.g. [the amount the defendant possessed with intent to distribute was 500 grams or more of a mixture or substance containing methamphetamine] [the amount involved in the offense was 500 grams or more of a mixture or substance containing methamphetamine]).

If you find these four elements unanimously and beyond a reasonable doubt, [and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [as defined in Instruction No. ____]], then you must find the defendant guilty of the crime of (describe crime). Record your determination on the Verdict Form which will be submitted to you with these instructions.

[If you do not find the defendant guilty of this crime [under Count ___], go on to consider whether (describe lesser aggravating element, e.g. [the amount the defendant possessed with intent to distribute was 50 grams or more but less than 500 grams of a mixture or substance containing methamphetamine] [the crime involved 50 grams or more but less than 500 grams of a mixture or substance containing methamphetamine].

Final Instructions: Elements of Offenses

If you find unanimously and beyond a reasonable doubt:

The first three elements set forth above; and

Fourth, that (describe lesser aggravating element, e.g. [the defendant possessed with intent to distribute 50 grams or more but less than 500 grams of a mixture or substance containing methamphetamine] [the crime involved 50 grams or more but less than 500 grams of a mixture or substance containing methamphetamine]
[and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [as defined in Instruction No. ___]], then you must find the defendant guilty of (describe crime). Record your determination on the Verdict Form.]

If you do not find the defendant guilty of this crime [under Count ___], go on to consider whether the defendant possessed with intent to distribute some amount of (describe controlled substance).

If you find the first three elements set forth above unanimously and beyond a reasonable doubt, [and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [as defined in Instruction No. ___]] you must find the defendant guilty of the crime of (describe crime). Otherwise, you must find the defendant not guilty. Record your determination on the Verdict Form.

(Instruction 3.09, *supra*, which describes the Government's burden of proof, has already been incorporated in this instruction and should not be repeated.)

Notes on Use

1. In *United States v. Shurn*, 849 F.2d 1090 (8th Cir. 1988), the court approved the following instruction on "intent to distribute."

> I instruct you that possession of a large quantity of heroin supports an inference of an intent to distribute.
>
> Thus, in determining whether the defendant possessed heroin with the specific intent to distribute it, you should consider whether the defendant possessed a large quantity of heroin. If you believe that he did, then you may infer that he had the specific intent to distribute.

849 F.2d at 1095 n.6.

When such an instruction is used, care must be used that the instruction not be phrased in a manner which indicates the jury must make an inference. Likewise, "specific" should be omitted as modifying intent. The Committee recommends that such an instruction be rephrased as suggested in Instruction 4.13, *supra*.

"Distribute" may be defined if the meaning is unclear in the context of the case. The statute also makes it unlawful to manufacture, dispense or possess with intent to manufacture, distribute or dispense. If one of these alternatives has been charged, this element should be changed accordingly.

2. It is uncertain whether, in section 841(a)(1) possession with intent to distribute cases, drugs intended only for personal use are included in the drug quantity. In *United States v. Williams*, 247 F.3d 353, 357 (2d Cir. 2001), the court held that such amounts are not included. The Eighth Circuit has not ruled on the precise issue; however, in *United States v. Fraser*, 243 F.3d 473, 476 (8th Cir. 2001), it concluded that in determining relevant conduct under the guidelines for a section 841(a)(1) offense, drugs possessed for solely personal use should not be included. The phrase "some or all" therefore should be used with care.

3. Any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000); *United States v. Sheppard*, 219 F.3d 766 (8th Cir. 2000). Under the section 841(b) sentencing provisions, some of the facts that may raise the statutory maximum are the quantity of drugs involved in the offense, whether death or serious bodily injury results from use of the drugs involved, or whether the defendant has a prior felony drug conviction. In *United States v. Sheppard*, 219 F.3d at 768-69, the panel suggested that the district court's submission of drug quantity to the jury in a special interrogatory rather than as an element of the offense was harmless error. However, in *United States v. Harris*, 310 F.3d 1105, 1110 (8th Cir. 2002), the Court, without mentioning *Sheppard*, explicitly held that it was not an *Apprendi* error to submit the issue of drug quantity to the jury by use of a special interrogatory. The Committee believes, therefore, that submission of drug quantity either as a formal element, as is done in 6.21.841A.1 (short) and 6.21.841A.1 (long) or by special interrogatory is permissible. *See* 6.21.841A.1(b) for a verdict form with special interrogatories.

In *Apprendi*, 530 U.S. at 488, the majority left open the possibility that it might revisit the issue of whether a defendant's prior conviction(s) must be submitted to the jury and found beyond a reasonable doubt before an enhanced punishment based on prior convictions is appropriate. Unless and until the Court does so, prior convictions used to enhance a sentence need not be submitted to the jury and proven beyond a reasonable doubt. *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998); *United States v. Peltier*, 276 F.3d 1003, 1006 (8th Cir. 2002); *United States v. Abernathy*, 277 F.3d 1048, 1050 (8th Cir. 2002). In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court declined to extend *Apprendi* to facts increasing the statutory minimum sentence, reaffirming its earlier decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Therefore, such facts need not be submitted to the jury.

Suggested wording for the aggravating facts listed in the above paragraph are:

a) the crime involved (describe substance and amount) or more. [This alternative is to be used where the amount of drugs increasing the maximum sentence is not in dispute. Where the offense involves two or more controlled substances, and the Indictment alleges quantities of each substance sufficient to raise the maximum sentence, an additional element should be submitted to the jury for a finding on each controlled substance.]

b) a death resulted from use of the (describe substance). [In *United States v. McIntosh*, 236 F.3d 968, 972 (8th Cir. 2001), the Eighth Circuit held that the "death resulting" charge is a strict liability one - the court may not impose "a foreseeability or proximate cause requirement." *Accord United States v. Soler*, 275 F.3d 146 (1st Cir. 2002)].

Committee Comments

See Committee Comments to 6.21.841A.

6.21.841A.1(a). VERDICT FORM; WITH LESSER-INCLUDED OFFENSE

VERDICT

We, the jury, find Defendant (name) _____of the crime of (insert brief
[guilty/not guilty]
description, e.g., possession with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine) [as charged in Count _____ of the Indictment] [under Instruction No. _____].

_____
Foreperson

_____
(Date)

If you unanimously find Defendant (name) guilty of the above crime, have your foreperson write "guilty" in the above blank space, sign and date this verdict form. Do not consider the following verdict form.

If you unanimously find the Defendant (name) not guilty of the above charge, have your foreperson write "not guilty" in the above blank space. You then must consider whether the defendant is guilty of (specify lesser-included offense) on the following verdict form.

If you are unable to reach a unanimous decision on the above charge, leave the space blank and decide whether the defendant is guilty of (specify lesser-included offense, e.g., possession with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine) as follows:

[LESSER-INCLUDED OFFENSE]

[We, the jury, find Defendant (name) _____ of the crime of (insert brief
[guilty/not guilty]

description, e.g., possession with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine) [as charged in Count _____ of the Indictment] [under Instruction No. _____].

_____
Foreperson

_____
(Date)

If you unanimously find Defendant (name) guilty of the above crime, have your foreperson write "guilty" in the above blank space, sign and date this verdict form. Do not consider the following verdict form.

If you unanimously find Defendant (name) not guilty of the above charge, have your foreperson write "not guilty" in the above blank space. You then must consider whether the defendant is guilty of (specify lesser-included offense) on the following verdict form.

If you are unable to reach a unanimous decision on the above charge, leave the space blank and decide whether the defendant is guilty of (specify lesser-included offense) as follows:]

LESSER-INCLUDED OFFENSE

We, the jury, find Defendant (name) _____ of the crime of (insert brief
[guilty/not guilty]

description, e.g., possession with intent to distribute a mixture or substance containing methamphetamine)) [as charged in Count _____ of the Indictment] [under Instruction No. __].

_____
Foreperson

_____
(Date)

6.21.841A.1(b). SPECIAL VERDICT FORM
(Interrogatories to Follow Finding of Guilt)

VERDICT

We, the jury, find Defendant (name) _____ of possession of a controlled
(guilty/not guilty)

substance with intent to distribute [as charged in Count _____ of the Indictment] [under Instruction No. _____].

If you find the defendant "guilty," you must answer the following:

The quantity of (describe substance, e.g. [a mixture or substance containing a detectable amount of] [name controlled substance]) the defendant possessed with intent to distribute was:

a. _____ (describe substance and the highest applicable quantity range, e.g. 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine);

b. _____ (describe substance and next lower quantity range, e.g. 500 grams or more but less than 5 kilograms of a mixture or substance containing a detectable amount of cocaine.)

c. _____ (describe substance and lowest quantity range, e.g., less than 500 grams of a mixture or substance containing cocaine).

Check the drug quantity which the jury unanimously agrees was involved in the offense. If you are unable to agree, check [b][c](the entry for the lowest drug quantity).

_____
Foreperson

_____
(Date)

Final Instructions: Elements of Offenses

6.21.841B. CONTROLLED SUBSTANCES - DISTRIBUTION (21 U.S.C. § 841(a)(1))

The crime of distributing (describe substance, e.g.,heroin), as charged in [Count _____] of the Indictment, has two elements, which are:

One, the defendant intentionally transferred[1] (describe substance, e.g., heroin)[2] to (name of transferee, e.g., Special Agent Jones); and

Two, at the time of the transfer, the defendant knew that it was [a controlled substance] [(describe substance, e.g., heroin)].[3]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The statute uses the term "distribute." The Committee is of the opinion that in many cases "transfer" may be more understandable. "Distribute," of course, may be used in the instruction.

2. For jury instructions involving enhanced drug offenses under *Apprendi v. New Jersey*, *see* 6.21.841A1 - 6.21.846A1.

3. The defendant need not know what the controlled substance is if he knows he has possession of some controlled substance. *United States v. Sheppard*, 219 F.3d 766 (8th Cir. 2000). The alternative language which best fits the case should be used.

Committee Comments

See also United States v. Jardan, 552 F.2d 216, 219 (8th Cir. 1977) (government must show that transfer was intentional).

See Committee Comments, Instruction 6.21.841A, *supra*, particularly the discussion of *Apprendi v. New Jersey*.

6.21.843. CONTROLLED SUBSTANCES - USE OF A COMMUNICATIONS FACILITY (21 U.S.C. § 843(b))

The crime of using a communication facility to [commit] [facilitate the commission of] another felony controlled-substance offense has two elements, which are:

One, the defendant knowingly used (specify the communication facility alleged, e.g., mail, telephone, or wire)[1]; and

Two, the defendant did so with the intent to [commit] [facilitate] [help to commit] the felony controlled-substance offense described in Instruction No. __ (insert number of instruction for the felony controlled-substance offense).[2]

You are instructed that (insert name of predicate felony, e.g., possession with intent to distribute, conspiracy to distribute, attempt to manufacture, etc.) (insert name of controlled substance) is a felony controlled-substance offense.

[To ["facilitate"] [“help to commit”] the commission of a felony controlled-substance offense means to make committing the crime easier or less difficult, or to assist or aid.][3] [It does not matter whether the felony controlled-substance offense was successfully carried out.][4]

[It is not sufficient if a defendant’s use of the (specify the communication facility alleged, e.g., mail, telephone, or wire) only facilitates another person’s commission of a felony controlled-substance offense.][5]

(Insert paragraph describing Government’s burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. Ordinarily, it should not be necessary to distinguish between public or private facilities or set forth the complete definition of “communication facility.” The statute defines “communication facility” as “any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.” 21 U.S.C. § 843(b).

The statute contemplates “any and all” forms of communication facilities; therefore, this is a nonexhaustive list. *See* 21 U.S.C. § 843(b). This list of examples is not meant to exclude communication facilities that are made available with technological advances, such as communications through Skype, Facebook, Twitter, or FaceTime. In addition to wire-based e-mail (e.g., on the Internet), computers can now communicate via microwave, FM-frequency, infared, and other nonwire-based media. The court should determine whether the instrumentality

at issue in the case qualifies as a matter of law as a "communication facility," and, if it qualifies, the court should list each instrumentality that is supported by the evidence.

2. *See* Instructions 6.21.841A, 6.21.841A.1 (short) and (long), 6.21.841B, 6.21.846A, 6.21.846A.1, and 6.21.846B.

3. Ordinarily it should not be necessary to define "facilitate" or "help to commit." If necessary, the definition provided should suffice. *See United States v. Adler*, 879 F.2d 491, 495 (9th Cir. 1988); *United States v. Phillips*, 664 F.2d 971, 1032 (5th Cir. 1981), *superceded by rule on other grounds as stated in United States v. Huntress*, 956 F.2d 1309, 1314 (5th Cir. 1992); *Myers v. United States*, 457 U.S. 1136 (1982); and *Platshorn v. United States*, 459 U.S. 906 (1982).

4. Include this sentence if the defendant is only charged with facilitating or helping to commit the underlying felony controlled-substance offense. Do not include this sentence if the defendant is charged with committing the underlying offense.

5. In *Abuelhawa v. United States*, 556 U.S. 816 (2009), a unanimous Supreme Court reversed a drug buyer's section 843(b) convictions and rejected the argument that a person using a telephone to call his drug dealer to make a misdemeanor purchase of cocaine "facilitates" the dealer's felony drug distribution. The Supreme Court stated: "Where a transaction like a sale necessarily presupposes two parties with specific roles, it would be odd to speak of one party as facilitating the conduct of the other." *Id.* at 820. It discussed buyer-seller penalties and explained: "The traditional law is that where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature[.]" *Id.* at 820. It noted that in 1970, Congress made simple possession of a controlled substance a misdemeanor and "narrow[ed] the scope of the communications provision to cover only those who facilitate a drug felony." *Id.* at 822. Therefore, the Supreme Court reasoned, Congress could not have intended for a person who made two small drug purchases by using a telephone to be subject to a penalty that was 12 times more harsh than a person who made the same purchases without using the telephone. *Id.* at 822-24.

Committee Comments

See United States v. Johnson, No. 08-1581, 2011 WL 3279205 (8th Cir. Aug. 2, 2011) (unpublished).

Final Instructions: Elements of Offenses

6.21.846A. CONSPIRACY (21 U.S.C. § 846)

The crime of conspiracy as charged in [Count ___ of] the Indictment, has three elements, which are:

One, on or before (insert date), two [or more] persons reached an agreement or came to an understanding to (insert offense, e.g., distribute cocaine);

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect; and

Three, at the time the defendant joined in the agreement or understanding, [he] [she] knew the purpose of the agreement or understanding.

For you to find [a] defendant guilty of this crime, the Government must prove all of these elements beyond a reasonable doubt [as to that defendant]; otherwise, you must find [that] defendant not guilty.

Committee Comments

See Committee Comments and Notes on Use, Instructions 5.06A-I, *supra*. This instruction omits the overt act element of Instruction 5.06A of this Manual. Section 846 does not require proof of an overt act. *United States v. Shabani*, 513 U.S. 10 (1994).

Any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000); *United States v. Sheppard*, 219 F.3d 766 (8th Cir. 2000). Under the section 841(b) sentencing provisions, some of the facts that may raise the statutory maximum are the quantity of drugs involved in the offense, or whether death or serious bodily injury results from use of the drugs involved. For jury instructions involving such enhanced drug offenses, *see* 6.21.841A1 - 6.21.846A1. In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court declined to extend *Apprendi* to facts increasing the statutory minimum sentence, reaffirming its earlier decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Therefore, such facts need not be submitted to the jury.

In cases where the indictment conjunctively alleges multiple objects of a conspiracy, e.g., a conspiracy to distribute cocaine and marijuana, the Eighth Circuit has approved instructions advising the jury that they may convict upon proof that there was a conspiracy to distribute one or both of the controlled substances. *United States v. Davila*, 964 F.2d 778, 783 (8th Cir. 1992); *United States v. Lueth*, 807 F.2d 719, 732-34 (8th Cir. 1986). If the evidence is not clear as to which substance was involved in a conspiracy, the Eighth Circuit has recommended instructing

the jury to specify which controlled substance(s) the conspiracy involved because of disparate sentencing ranges for different controlled substances. *United States v. Owens*, 904 F.2d 411 (8th Cir. 1990); *cf. United States v. Page-Bey*, 960 F.2d 724, 727-28 (8th Cir. 1992), *and United States v. Watts*, 950 F.2d 508, 514-15 (8th Cir. 1991) (distinguishing *Owens*). *See* Committee Comments to Instruction 11.03, *infra*.

Final Instructions: Elements of Offenses

6.21.846A.1. CONSPIRACY (21 U.S.C. § 846) (*Apprendi*-Affected Conspiracy)

The crime of conspiracy as charged in [Count __ of] the Indictment, has four elements, which are:

One, on or about [insert date, e.g., between January 1, 1998, and October 1, 2000], two [or more] persons reached an agreement or came to an understanding to (describe offense, e.g., distribute a mixture or substance containing methamphetamine [and a mixture or substance containing cocaine][1]);

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect;

Three, at the time the defendant joined in the agreement or understanding, [he] [she] knew the purpose of the agreement or understanding; and

Four, describe aggravating element,[2] e.g [the agreement or understanding involved 500 grams or more of a mixture or substance containing methamphetamine[3] [and 5 kilograms or more of a mixture or substance containing cocaine]][4]).

If you find these four elements unanimously and beyond a reasonable doubt, [and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [as defined in Instruction No. _____]], then you must find the defendant guilty of the crime of conspiracy (describe offense, e.g. [to distribute 500 grams or more of a mixture or substance containing methamphetamine [and 5 kilograms or more of a mixture or substance containing cocaine]]). Record your determination on the Verdict Form which will be submitted to you with these instructions.

[If you do not find the defendant guilty of this crime [under Count __], go on to consider whether the defendant conspired (describe lesser offense, e.g. [to distribute 50 grams or more of a mixture or substance containing methamphetamine [and any amount of cocaine]]).

If you find unanimously and beyond a reasonable doubt:

The first three elements set forth above; and

Fourth, you find that (describe lesser offense, e.g. [the agreement or understanding involved 50 grams or more of a mixture or substance containing methamphetamine [and any amount of cocaine]]),

[and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [as defined in Instruction No. ___]], then you must find the defendant guilty of the crime of conspiracy to distribute (describe substance and amount, e.g., 50 grams or more of a mixture or substance containing methamphetamine [and any amount of cocaine]). Record your determination on the Verdict Form.]

If you do not find the defendant guilty of this crime [under Count ___], go on to consider whether the defendant conspired to distribute (describe substance, e.g., some amount of methamphetamine and cocaine). If you find the first three elements unanimously and beyond a reasonable doubt, [and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [as defined in Instruction No. ___]], you must find the defendant guilty of the crime of conspiracy to distribute (describe substance, e.g., methamphetamine and cocaine). Otherwise, you must find the defendant not guilty. Record your determination on the Verdict Form.

[The quantity of controlled substances involved in the agreement or understanding includes the controlled substances the defendant possessed for personal use[5] or distributed or agreed to distribute. The quantity also includes the controlled substances fellow conspirators distributed or agreed to distribute, if you find that those distributions or agreements to distribute were a necessary or natural consequence of the agreement or understanding and were reasonably foreseeable by the defendant.][6]

Notes on Use

1. In cases where the indictment conjunctively alleges multiple objects of a conspiracy, *e.g.*, a conspiracy to distribute cocaine and marijuana, the Eighth Circuit has approved instructions advising the jury that they may convict upon proof that there was a conspiracy to distribute one or both of the controlled substances. *United States v. Davila*, 964 F.2d 778, 783 (8th Cir. 1992); *United States v. Lueth*, 807 F.2d 719, 732-34 (8th Cir. 1986).

2. In *Apprendi*, 530 U.S. at 488, the majority left open the possibility that it might revisit the issue of whether a defendant's prior conviction(s) must be submitted to the jury and found

beyond a reasonable doubt before an enhanced punishment based on prior convictions is appropriate. Unless and until the Court does so, prior convictions used to enhance a sentence need not be submitted to the jury and proven beyond a reasonable doubt. *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998); *United States v. Peltier*, 276 F.3d 1003, 1006 (8th Cir. 2002); *United States v. Abernathy*, 277 F.3d 1048, 1050 (8th Cir. 2002).

3. Under the section 841(b) sentencing provisions, some of the facts that may raise the statutory maximum are the quantity of drugs involved in the offense, whether death or serious bodily injury results from use of the drugs involved, or whether the defendant has a prior felony drug conviction .

Suggested wording for the aggravating facts listed in the above paragraph are:

a) the crime involved (describe substance and amount) or more. [This alternative is to be used where the amount of drugs increasing the maximum sentence is not in dispute. Where the offense involves two or more controlled substances, and the Indictment alleges quantities of each substance sufficient to raise the maximum sentence, an additional element should be submitted to the jury for a finding on each controlled substance.]

b) a death resulted from use of the (describe substance). [In *United States v. McIntosh*, 236 F.3d 968, 972 (8th Cir. 2001), the Eighth Circuit held that the "death resulting" charge is a strict liability one - the court may not impose "a foreseeability or proximate cause requirement." *Accord United States v. Soler*, 275 F.3d 146 (1st Cir. 2002)].

4. Where the conspiracy involves two or more controlled substances, and the indictment alleges quantities of each substance sufficient to raise the maximum sentence, the jury should make a finding on each controlled substance. *See* the last sentence of 5.06F.

5. The amount of drugs attributable to a defendant in a conspiracy includes drugs purchased for personal use. *United States v. Jimenez-Villasenor*, 270 F.3d 554, 562 (8th Cir. 2001).

6. Whether *Apprendi* and sections 841(b) and 846 require a jury finding of reasonable foreseeability for each coconspirator has not yet been decided. In *United States v. Jones*, 965 F.2d 1507 (8th Cir. 1992), the court, without explicitly stating the basis for its decision, determined that before a district court may impose a mandatory minimum upon a defendant based upon the activities of other defendants, it must find that those activities were in furtherance of the conspiracy and were known to the defendant or reasonably foreseeable to him. *Id.*, at 1517. Other circuits have explicitly stated that section 846 requires such a foreseeability determination, and that the foreseeability determination is governed by the relevant conduct provisions of the Sentencing Guidelines. *See, e.g., United States v. Martinez*, 987 F.2d 920, 924-26 (2d Cir. 1993); *United States v. Irwin*, 2 F.3d 72, 77 (4th Cir. 1993); *United States v. Swiney*, 203 F.3d 397, 405-06 (6th Cir. 2000). Although these decisions occurred in the context of guideline sentencing by the court, because they are based on statutory construction of sections

846 and 841(b), they arguably establish foreseeability as an element of the offense. However, the Eighth Circuit in *United States v. McIntosh*, 236 F.3d 968, 974 (8th Cir. 2001), indicated that the issue is in doubt, noting that "[i]f the government seeks to enhance a conspiracy defendant's sentence . . . based solely on conduct of a coconspirator, a foreseeability analysis *may* be required in determining whether Congress intended, under § 846, that the defendant be held accountable for the conduct of a coconspirator" (emphasis in the original).

The Committee believes that until the issue is decided, the district court should instruct the jury on foreseeability, unless the defendant agrees to an *Apprendi* waiver.

Committee Comments

See Committee Comments and Notes on Use, Instructions 5.06A-I, *supra*. This instruction omits the overt act element of Instruction 5.06A of this Manual. Section 846 does not require proof of an overt act. *United States v. Shabani*, 513 U.S. 10 (1994).

The penalty for conspiracy under 21 U.S.C. § 846 is the same as for the substantive offense committed. Thus, the quantity of the drugs involved or other facts may affect the maximum punishment authorized for the offense. Any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury as an element of the offense, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000); *United States v. Sheppard*, 219 F.3d 766 (8th Cir. 2000). Under the section 841(b) sentencing provisions, some of the facts that may raise the statutory maximum are the quantity of drugs involved in the offense, or whether death or serious bodily injury results from use of the drugs involved . *See* Notes 2 and 3, *supra*. In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court declined to extend *Apprendi* to facts increasing the statutory minimum sentence, reaffirming its earlier decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Therefore, such facts need not be submitted to the jury.

In *United States v. Sheppard*, 219 F.3d 766 (8th Cir. 2000), the panel suggested that the district court's submission of drug quantity to the jury in a special interrogatory rather than treating it as an element of the offense was harmless error. However, in *United States v. Harris*, 310 F.3d 1105 (8th Cir. 2002), the Court, without mentioning *Sheppard*, explicitly held that it was not an *Apprendi* error to submit the issue of drug quantity to the jury by use of a special interrogatory. The Committee believes, therefore, that submission of drug quantity either as a formal element, as is done in 6.21.841A.1 (short) and 6.21.841A.1 (long) or by special interrogatory is permissible. *See* 11.03 for a verdict form with special interrogatories.

The verdict forms provided for 6.21.841A.1(a) and (b) offenses may be modified for use in conspiracy cases.

Final Instructions: Elements of Offenses

6.21.846B. ATTEMPT (21 U.S.C. § 846)

The crime of attempting to (describe conduct, e.g., distribute methamphetamine), as charged in [Count ____ of] the Indictment, has three elements, which are:

One, the defendant intended to (describe conduct, e.g., distribute methamphetamine to another person);

Two, the defendant knew the material he then intended to distribute was [a controlled substance] [(describe substance, e.g., methamphetamine)]; and

Three, the defendant voluntarily and intentionally carried out some act which was a substantial step toward (describe conduct, e.g., distribution of methamphetamine to another person).

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Committee Comments

Any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000); *United States v. Sheppard*, 219 F.3d 766 (8th Cir. 2000). Under the section 841(b) sentencing provisions, some of the facts that may raise the statutory maximum are the quantity of drugs involved in the offense, or whether death or serious bodily injury results from use of the drugs involved. For jury instructions involving such enhanced drug offenses, *see* 6.21.841A1 - 6.21.846A1. In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court declined to extend *Apprendi* to facts increasing the statutory minimum sentence, reaffirming its earlier decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Therefore, such facts need not be submitted to the jury.

See Instructions 6.21.841A, 6.21.841A.1, and 6.21.841B, *supra*, and Instruction 8.01, *infra*; *see also* 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 21.01-.04 (5th ed. 2000).

6.21.848A. CONTROLLED SUBSTANCES - CONTINUING CRIMINAL ENTERPRISE (21 U.S.C. § 848(c))

The crime of a continuing criminal enterprise as charged in Count _____ of the Indictment has five elements, which are:

One, the defendant committed the offense of (describe offense);

Two, the offense was part of a continuing series of three or more related[1] felony violations of the federal controlled substance laws;

Three, such offenses were undertaken by the defendant in concert with five or more other persons;

Four, the defendant acted as organizer, supervisor or manager of those five or more other persons;[2] and

Five, the defendant obtained a substantial amount of money or other property from the series of violations.

To act "in concert" means to act pursuant to a common design or plan. The defendant must have organized, supervised or managed, either personally or through others, five or more persons with whom [he] [she] was acting in concert while [he] [she] committed the series of offenses. However, it is not necessary that the defendant have managed all five at once or that the five other persons have acted together at any time or in the same place.

Furthermore, it is not necessary that the defendant have been the only person who organized, managed or supervised the five or more other persons or that [he] [she] have exercised the same amount of control over each of the five or that [he] [she] have had the highest rank of authority.

[All money or property which passed through the defendant's hands as a result of illegal drug dealings and not just profit may be considered by you in determining whether the amount was substantial.][3]

[An organizer is a person who puts together a number of people engaged in separate activities and arranges them in these activities in one operation or enterprise.] [A supervisor is a person who manages or directs or oversees the activities of others.][4]

Final Instructions: Elements of Offenses

The [Indictment charges] [Government contends] that the [violations charged in Counts _____ and _____] [the defendant's previous conviction[s] for (list convictions)] are part of the series of three or more violations. [You must unanimously agree on which three violations constitute the series of three or more violations in order to find that element No. Two has been proved.][5]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. If the court wants to define "continuing series of violations," the following may be appropriate:

> At least three violations of the federal controlled substances laws that were connected together as a series of related or ongoing activities as distinguished from isolated and disconnected acts.

2. The jury is not required to unanimously agree on the identities of the five persons. *United States v. Jelinek*, 57 F.3d 655 (8th Cir. 1995); *United States v. Rockelman*, 49 F.3d 418, 421 (8th Cir. 1995). Even though unanimity is not required, problems can arise if more than five persons are alleged to be supervised or managed by the defendant and, on appeal, it is determined that some of those persons were not properly included. *See United States v. Jerome*, 924 F.2d 170, 172-73 (9th Cir. 1991) (Kozenski, J., concurring) (conviction reversed where jury had "confusing array of persons presented" and insufficient instructions regarding who could properly be counted). This problem can be addressed by use of a special interrogatory. *United States v. Jelinek*.

3. Use if "income" needs to be so clarified under the issues raised at trial.

4. Ordinarily these terms do not need definition, but these definitions are provided should a particular need for them arise.

5. This instruction should be given on request where more than three violations have been alleged. If one or more of the violations is not a prior conviction or a charged offense, the instruction should be modified to describe that violation. The Eighth Circuit has indicated that it is preferable to list the felonies comprising the criminal enterprise in the CCE count of the indictment, although failure to do so would not necessarily be error. *United States v. Becton*, 751 F.2d 250, 257 (8th Cir. 1984).

Committee Comments

See United States v. Lewis, 759 F.2d 1316, 1331 (8th Cir. 1985); *United States v. Possick*, 849 F.2d 332, 335 (8th Cir. 1988).

The statute is written in disjunctive language, and the government need prove only that the defendant was an organizer, or a supervisor, or held some management role, not all three.

United States v. Possick, 849 F.2d at 335. The terms "organizer," "supervisor" and "manager" are given their plain meaning. *Id.*, 849 F.2d at 335. They should be applied in the ordinary sense as understood by the public or the business community. *United States v. Butler*, 885 F.2d 195 (4th Cir. 1989). Accordingly, these terms do not require specific definition. *United States v. Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989).

As summarized in *Possick*, a defendant need not be the "king pin" or ultimate authority in the organization, but need only occupy some managerial position, *United States v. Maull*, 806 F.2d 1340, 1343 (8th Cir. 1986); *United States v. Becton*, 751 F.2d 250, 255 (8th Cir. 1984), or perform a "central role." *United States v. Lewis*, 759 F.2d at 1331. The government need not establish that the defendant managed five people at once, that the five acted in concert with each other, that the defendant exercised the same kind of control over each of the five, or even that the defendant had personal contact with each of the five. *See, e.g.*, *Maull*, 806 F.2d at 1343; *United States v. Jones*, 801 F.2d 304, 308 (8th Cir. 1986); *Becton*, 751 F.2d at 254-55. In essence, the management element is established by demonstrating that the defendant exerted some type of influence over another individual as exemplified by that individual's compliance with the defendant's directions, instructions, or terms. *See United States v. Grubbs*, 829 F.2d 18, 19-20 (8th Cir. 1987) (per curiam); *United States v. Lueth*, 807 F.2d 719, 732 (8th Cir. 1986); *Jones*, 801 F.2d at 310. The control need not be exclusive or absolute. *United States v. Possick*, 849 F.2d at 336-37. Moreover, it is irrelevant that others may have superior control as long as the defendant occupies some managerial position. *United States v. Becton*, 751 F.2d at 255.

The "supervisor" element can be met by showing that the defendant put "together a number of people engaged in separate activities and arrange[s] them in their activities in one essentially orderly operation or enterprise." *United States v. Roley*, 893 F.2d 992, 994 (8th Cir. 1990) (citations omitted). "[A] person can organize persons without being able to control their actions." *Id.*

The five or more subordinates need not have worked in concert with each other. *United States v. Maull*, 806 F.2d at 1343; *United States v. Jones*, 801 F.2d at 308; *United States v. Becton*, 751 F.2d at 254-55. The defendant need not act in concert with five or more persons at the same time or in the same state or district. *United States v. Maull*, 806 F.2d at 1344. *See also United States v. Fry*, 413 F. Supp. 1269 (E.D. Mich. 1976), *aff'd*, 559 F.2d 1221 (6th Cir. 1977). Moreover, it is not necessary that the defendant know the name of each individual. *Possick*, 849 F.2d at 337; *see also Roley*, 893 F.2d at 995.

The income received by the defendant must have been substantial. "Substantial" means "of real worth and importance -- of considerable value; valuable." *United States v. Collier*, 358 F. Supp. 1351, 1355 (E.D. Mich. 1973), *aff'd*, 493 F.2d 327 (6th Cir. 1974). In *United States v. Jeffers*, 532 F.2d 1101, 1116-17 (7th Cir. 1976), *aff'd. in part, vacated, in part, on other grounds*, 432 U.S. 137 (1977), the court upheld an instruction stating that substantial income "does not necessarily mean net income . . . [but] could mean gross receipts or gross income." In *United States v. Thomas*, 632 F.2d 837, 847 (10th Cir. 1980), a jury instruction emphasizing cash flow

rather than net income was upheld. *See also United States v. Bolts*, 558 F.2d 316, 320 (5th Cir. 1977).

A "continuing series" of violations has been defined as three or more violations. *United States v. Samuelson*, 697 F.2d 255, 259 n.2 (8th Cir. 1983). *But see United States v. Baker*, 905 F.2d 1100, 1104 (7th Cir. 1990) ("continuing series" requirement is met by two substantive offenses). These violations must be "related," *United States v. Jones*, 801 F.2d 304, 307 (8th Cir. 1986), in the sense that they are "driven by a single impulse and operated by unintermittent force." *Maull*, 806 F.2d at 1342-43. Proof of a violation of the drug laws may count as a "violation" even though not the basis for a separate substantive count. *United States v. Michel*, 588 F.2d 986, 1000 n.15 (5th Cir. 1979), and cases cited therein. Current charges and previous convictions may constitute the requisite violations. *Garrett v. United States*, 471 U.S. 773 (1985). Although most circuits allow a section 846 conspiracy to count as one of the required three offenses, one circuit has refused to do so. *See Baker*, 905 F.2d at 1103 (citing seven circuits which do and the basis for its disagreement).

If more than three violations are charged, the jury must unanimously agree on which three acts constitute the continuing series of violations. *United States v. Echeverri*, 854 F.2d 638, 642-43 (3d Cir. 1988).

CCE is a separate offense from the predicate offenses and prosecution of one defendant for both the predicate offense and CCE does not violate the Double Jeopardy Clause. *Garrett v. United States*, 471 U.S. at 792-93. The Double Jeopardy Clause likewise does not bar cumulative punishment for CCE and the predicate substantive offenses. *Id.*, 473 U.S. at 793-95. However, where the predicate offense is a conspiracy under section 846, cumulative penalties are not allowed because the dangers posed by CCE and a conspiracy are similar. *Id.*; *Jeffers v. United States*, 432 U.S. 137 (1977) (plurality opinion); *United States v. Maull*, 806 F.2d 1340 (8th Cir. 1986); *United States v. Duke*, 940 F.2d 1113 (8th Cir. 1991)

Appellate courts are divided as to whether accomplice liability applies to CCE offenses. *See* this discussion in Instruction 5.01, *supra*.

6.21.848B. FELONY VIOLATIONS OF FEDERAL NARCOTIC LAWS (21 U.S.C. § 848(c)(1))

Offenses which are felony violations of the federal narcotic laws may be any or all of the following offenses:

[Conspiracy to distribute cocaine] [Conspiracy to possess cocaine with the intent to distribute] [Possession of cocaine with intent to distribute] [Distribution of cocaine] [Unlawful use of a communication facility in furtherance of a narcotics felony].[1]

(Follow with elements instruction for each offense alleged to have constituted one of the requisite felony violations or, if the violation was the subject of a separate count, a reference to the elements instruction for that count.)

Notes on Use

1. List only those offenses which are alleged to have been part of the series of violations and which are supported by the evidence. If an offense not on this list, but covered by 21 U.S.C. § 848, has been charged, it should be included. *See* additional discussion in Note 4, Instruction 6.21.848A, *supra*.

Committee Comments

See 21 U.S.C. § 848. Any felony offense found in 21 U.S.C. §§ 841-846 is covered. The instruction covers those most commonly used.

Final Instructions: Elements of Offenses

6.21.853. CRIMINAL FORFEITURE OF PROPERTY

Members of the jury, you have reached a verdict that the [defendant is] [defendants are] guilty of (insert charges), as charged in Count(s) (insert count numbers or titles). You now have one more task to perform.[1] I must ask you to render a special verdict concerning property the United States has alleged is subject to forfeiture by (name(s) of the defendant(s) convicted) to the United States. Forfeiture means the defendant loses any ownership or interest [he, she] has or claims to have in the property, as a part of the penalty for engaging in criminal activity. [You need not concern yourself with any other person's interest in the property. I will take care of any such claims. Your only concern is with defendant (name)'s interest in the property.]

The United States alleges that certain properties should be forfeited because they [were derived from proceeds of the defendant's drug offense(s)] [were used or intended to be used by the defendant to facilitate the commission of the drug offense(s).] The Count(s) (insert count numbers or titles) alleging property to be forfeited to the United States and [the particular property alleged to be related to a particular count] [the property alleged to be related to the count] [is, are] as follows:[2]

> (List each count for which there has been a conviction and the specific property alleged to be related to it and subject to forfeiture by the defendant or by a particular defendant.)

You must determine what property, if any, is subject to forfeiture. Property is subject to forfeiture if the United States has proved, by the greater weight of the evidence [either][3] that:

> [*One*, the property constituted or was derived from any proceeds the [particular] defendant obtained, directly or indirectly, as a result of the offense(s) of which [he, she] has been found guilty,] [*or*]
>
> [*Two*, the property was used or was intended to be used, in any manner or part, to commit or to facilitate the commission of an offense of which the defendant has been found guilty.]

[Property "derived" from the proceeds of drug violations includes any property obtained (directly or indirectly) using money or any other source of wealth gained as a result of having

participated in drug violations.[4] Property which "facilitates" the commission of drug violations includes property which makes the commission of the violations easier or is used to assist in the commission of the violation.[5]]

[You may, but are not required to, find that property is subject to forfeiture if the United States has proved by the greater weight of the evidence that:

a. such property was acquired by the defendant during the period the defendant was committing the offense(s) of which [he, she] has been found guilty or within a reasonable time after the commission of [that offense, those offenses], *and*

b. there was no likely source for such property other than the offense(s) for which the defendant has been found guilty.]

To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. The decision is made by considering all of the evidence on the subject and deciding which evidence you believe. Each party is entitled to the benefit of all evidence received, regardless of who offered the evidence. Greater weight of the evidence is a lesser standard than proof beyond a reasonable doubt.

[Property subject to forfeiture may include (specify property which the United States claims is subject to forfeiture), whether or not the property has been seized by the United States.]

All of my previous instructions [regarding (identify the applicable instructions by title or number, e.g., Credibility of Witnesses and Duty to Deliberate),] apply with respect to this special verdict.

A Special Verdict Form has been prepared for your use. With respect to each property, you are asked to determine unanimously whether it is to be forfeited to the United States.

You may answer by simply putting an "X" or a check mark in the space provided next to the words "yes" or "no." The foreperson must then sign and date the special verdict form.

SPECIAL VERDICT FORM [6]

We, the Jury, return the following Special Verdict as to the defendant's interest in each of the properties alleged in Count(s) (insert count number(s)) to be subject to forfeiture of the United States:

1. (Insert dollar amount in United States currency, real property or other tangible or intangible personal property as alleged in Indictment);

We, the jury, unanimously find this property is subject to forfeiture.

YES _____

NO _____

[Continue with these questions based upon the specific assets of the Indictment.]

This _____ day of _____, 20_____.

_____

Foreperson

Notes on Use

1. The Committee recommends that the guilt phase of the trial be partially bifurcated from the forfeiture phase; verdicts should first be accepted as to the guilt or innocence of individual defendants, and the jury should then be separately instructed as to forfeiture. In *United States v. Sandini*, 816 F.2d 869 (3d Cir. 1987), the court required that the guilt and forfeiture proceedings be bifurcated and that a defendant be given the opportunity to testify at the forfeiture hearing if he so requests. The court held that requiring the defendant to testify at his criminal trial about the forfeiture aspects of the case, or not testify at all, presented the defendant with a constitutionally impermissible "Hobson's choice."

Other courts have favored (but have not required) partially bifurcated proceedings. These courts have recommended separate arguments and instructions on forfeiture, but leave the issue of testimony in the forfeiture phase to the discretion of the trial court. *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983); *United States v. Jenkins*, 904 F.2d 549 (10th Cir. 1990); *United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988); *United States v. Elgersma*, 971 F.2d 690 (11th Cir. 1992) (*en banc*).

The Committee recommends the approach of the above courts. After guilty verdicts are received, the court may allow arguments and instruct the jury on forfeiture. Whether or not further testimony is allowed in the forfeiture phase will be left to the sound discretion of the trial court to be determined on a case-by-case basis.

2. If the property is held in the name of or owned by third parties, the following instruction may be given:

> [You will have noted that certain property is held in the name of a person or business entity other than the defendant's. You should simply disregard any such title or formal claim of ownership of such property if you find that such property either constituted or was derived from any proceeds the defendant obtained, directly or indirectly, as the result of his criminal activity or was used, or intended to be used, in any manner or part to commit or to facilitate the commission of such criminal activity.
>
> The defendant's interest in any such property becomes vested in the United States at the moment the property was acquired by way of the illegal acts prohibited in the statute. Any interest that another person may claim to have in such property will be taken into account later by this court in imposing a sentence and in disposing of the property. This is not for your consideration as jurors. Stated differently, your sole task is to decide whether this property, regardless in whose name it is now held, was derived from or was intended to facilitate the defendant's drug violations.]

3. The following two subsections of 21 U.S.C. § 853 are relevant to the proper burden of proof in a criminal forfeiture matter.

<u>Property Subject to Criminal Forfeiture</u>

(a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
>
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

Rebuttable Presumption

(d) There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by the greater weight of the evidence that--

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

Six circuit courts of appeal including the Eighth Circuit have found that forfeiture is merely part of the punishment for a crime in addition to any sentence that the defendant receives. Five of these circuits including the Eighth Circuit have definitively held that the proper burden of proof in a forfeiture matter is the preponderance of the evidence. *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994).

The Committee recommends following the clear pronouncement of the Eighth Circuit in *United States v. Bieri*, that the greater weight of the evidence is the proper burden of proof.

4. *United States v. Milicia*, 769 F. Supp. 877 (E.D. Pa. 1991).

5. *United States v. Premises Known as 3639--2nd St., N.E.*, 869 F.2d 1093, 1096 (8th Cir. 1989); *United States v. Schifferli*, 895 F.2d 987, 990 (4th Cir. 1990).

6. Rule 31(e) of the Federal Rules of Criminal Procedure requires that "special verdicts" be used in all criminal forfeiture matters.

Committee Comments

See 21 U.S.C. § 853(a) through (d).

Two recent Supreme Court decisions deal with certain types of innocent owners of forfeitable property and with the "proportionality" of forfeitures under the excessive fine clause of the Eighth Amendment of the U.S. Constitution. *See United States v. 92 Buena Vista Avenue, Rumson, N.J.*, 507 U.S. 111 (1993); *Austin v. United States*, 509 U.S. 602 (1993). Although these cases should be carefully considered because they will have an effect on post-trial hearings involving innocent owners (21 U.S.C. § 853 n.(1)-n.(7), and on post-trial hearings and findings to determine the proportionality of a particular forfeiture, the Committee believes they should not have an effect on any of the jury instructions in this section.

6.21.856A. ESTABLISHMENT OF MANUFACTURING OPERATIONS - Maintaining Any Place For Manufacturing (21 U.S.C. § 856(a)(1))

The crime of maintaining a place for the purpose of [manufacturing] [distributing] [using][1] a controlled substance, as charged in [Count __ of] the Indictment has two elements, which are:

One, the defendant knowingly [opened] [maintained][2] a[n] (describe place as charged in the Indictment); and

Two, the defendant did so for the purpose of[3] [manufacturing] [distributing] [using] a controlled substance (describe controlled substance[4] as charged in the Indictment).

A defendant [opens] [maintains] a place for the purpose of [manufacturing] [distributing] [using] (describe controlled substance as charged in Indictment) if the defendant maintains the place for the specific purpose of [manufacturing] [distributing] [using] the controlled substance. The specific purpose need not be the sole purpose for which the place is used, but must be one of the primary or principal uses to which the place is used.[5]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09 *supra*.)

Notes on Use

1. *See* 21 U.S.C. § 856(a)(1).

2. *See* 21 U.S.C. § 856(a)(1). The committee recommends that if the place is a residence, the jury be instructed that in order for the defendant to have maintained the residence, the defendant must have a substantial connection to the home. *See United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995).

3. The purpose element applies to the person charged with maintaining the place for illegal activity. It is not sufficient that others possess the requisite purpose. *United States v. Chen*, 913 F.3d at 189-90.

4. If the controlled substance cannot be precisely identified, the phrase "a controlled substance" may be used.

5. *United States v. Verners*, 53 F.3d at 296; *United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C. Cir. 1992); *United States v. Roberts*, 913 F.2d 211, 220 (5th Cir. 1990).

Final Instructions: Elements of Offenses

Committee Comments

See United States v. Chen, 913 F.2d 183, 186 (5th Cir. 1990); *United States v. Verners*, 53 F.3d 291, 295 (10th Cir. 1995); *United States v. Clavis*, 956 F.2d 1079, 1090, *modified on other grounds*, 977 F.2d 538 (11th Cir. 1992).

As part of the comprehensive drug legislation passed in October 1986, Congress enacted section 856 to strengthen federal efforts to "outlaw operation of houses or buildings, so-called 'crack houses,' where 'crack,' cocaine and other drugs are manufactured and used." H.R. 5484, 99th Cong., 2nd Sess., 132 Cong. Rec. S13779 (9/26/86). The drug-house statute is aimed, like the drug-kingpin statute, at persons who occupy a supervisory, managerial or entrepreneurial role in a drug enterprise, or who knowingly allow such an enterprise to use their premises to conduct its affairs. *United States v. Thomas*, 956 F.2d 165, 166 (7th Cir. 1992). The Eleventh Circuit has held that the statute contemplates continuity in pursuit of the alleged objective: manufacturing, distributing or using controlled substances. As such, it found that an isolated instance of drug use or distribution or manufacturing is not sufficient to constitute a violation of the statute. *United States v. Clavis*, 956 F.2d at 1090.

Proof of "dominion or control" is not necessary to establish "maintenance." *United States v. Basinger*, 60 F.3d 1400, 1405 (9th Cir. 1995); *United States v. Clavis*, 956 F.2d at 1091. However, proof of a defendant's "dominion and control" over a place may be sufficient to show that the defendant was maintaining a place. *See United States v. Howell*, 31 F.3d 740, 741 (8th Cir. 1994) (evidence that the defendant had sprayed and cultivated field provided circumstantial evidence of constructive possession and control to sufficiently support a finding that the defendant maintained a place for the growing of marijuana). Acts evidencing maintenance include control, duration, acquisition of the site, renting or furnishing the site, repairing the site, supervising, protecting, supplying food to those at the site, and continuity. *United States v. Clavis*, 956 F.2d at 1091. *See also United States v. Cabbell*, 35 F.3d 1255, 1261 (8th Cir. 1994), *citing with approval*, *United States v. Clavis*, 956 F.2d at 1091. The Tenth Circuit has held that where the "place" in question is a residence, the defendant must have a "substantial connection" to the home and must be more than a "casual visitor" in order to satisfy the element. *United States v. Verners*, 53 F.3d at 295; *United States v. Williams*, 923 F.2d 1397, 1403 (10th Cir. 1990). When a defendant lives in the house, the element may be satisfied. *United States v. Onick*, 889 F.2d 1425, 1431 (5th Cir. 1989).

The offense has two mental elements, knowledge and purpose. *See United States v. Clavis*, 956 F.2d 1079, 1090 (11th Cir. 1992). The purpose element in subsection (a)(1) applies to the person who is charged with opening or maintaining the place for illegal activity. Therefore, it is not sufficient that other individuals, rather than the defendant, possessed the requisite purpose. *Id.*; *United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993); *United States v. Chen*, 913 F.2d at 189-90. The Seventh Circuit, drawing upon a business analogy, defined the term "for the purpose of" as whether the defendant acted as a supervisor, manager or entrepreneur in the drug enterprise, as opposed to someone who merely facilitated the crime. *United States v. Banks*, 987 F.2d at 466-67. Evidence that a place is being used to run a drug

enterprise may include investment in the tools of trade, e.g., scales, laboratory equipment, guns and ammunition; packaging materials, financial records, profits, and the presence of multiple employees or customers. *United States v. Verners*, 53 F.3d at 296.

While the defendant must have the specific purpose, it need not be the sole purpose for which the place is opened or maintained. *United States v. Verners*, 53 F.3d at 296. The Fifth Circuit held in *United States v. Roberts*, 913 F.2d 211, 220 (5th Cir. 1990), that a finding that the statute limited convictions to a sole purpose requirement would eviscerate the statute. On the other hand, the manufacturing, distributing or using of drugs must be more than a mere collateral purpose of the residence. A casual drug user does not violate the law because he does not maintain his house for the purpose of using drugs but rather for the purpose of residence; the consumption of drugs is merely incidental to that purpose. *United States v. Verners*, 53 F.3d at 296; *United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C. Cir. 1992). The manufacturing, distribution or use of drugs must be one of the primary or principal uses to which the place is put. *Id*.

The Fifth Circuit has held that a deliberate ignorance instruction is inappropriate and cannot be given as to a section 856(a)(1) violation, for one cannot be deliberately ignorant and still have the purpose of engaging in illegal drug activities. The instruction was inappropriate for an offense which requires a specific purpose by the defendant. *United States v. Chen*, 913 F.2d at 190.

Final Instructions: Elements of Offenses

6.21.856B. ESTABLISHMENT OF MANUFACTURING OPERATIONS - Managing or Controlling a Manufacturing Place For Compensation (21 U.S.C. § 856(a)(2))

The crime of [managing] [controlling][1] an establishment of manufacturing operations, as charged in [Count __ of] the Indictment has three elements, which are:

One, the defendant [managed] [controlled] (describe location as charged in Indictment);

Two, the defendant did so as [owner] [lessee] [agent] [employee] [mortgagee]; and

Three, the defendant knowingly and intentionally [rented] [leased] [made available for use with or without compensation] (describe location as charged in Indictment) for the purpose of[2] unlawfully [manufacturing] [storing] [distributing] [using] (describe controlled substance as charged in Indictment).

A defendant [managed] [controlled] (describe location as charged in Indictment) for the purpose of unlawfully [manufacturing] [storing] [distributing] [using] (describe controlled substance as charged in Indictment) if a significant purpose for the location is the [manufacturing] [storing] [distributing] [using] of a controlled substance. [[Manufacturing] [Storing] [Distributing] [Using] need not be the sole or primary purpose for which the place is used.][3]

(Inset paragraph describing Government's burden of proof; *see* Instruction 3.09 *supra*.)

Notes on Use

1. *See* 21 U.S.C. § 856(a)(2).

2. The purpose element may be satisfied if the individuals using the location are engaged in the illegal activity. *See United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993); *United States v. Chen*, 913 F.2d 183, 189-90 (5th Cir. 1990).

3. *United States v. Meshack*, 225 F.3d 556, 571 (5th Cir. 2000). *See also United States v. Roberts*, 913 F.2d 211, 220 (5th Cir. 1990). Unlike subsection (a)(1), the specific requirement in subsection (a)(2) may be satisfied if the person or persons renting, leasing or using the property possesses the requisite purpose.

Committee Comments

See United States v. Chen, 913 F.2d 183, 186-87 (5th Cir. 1990).

The drug-house statute is aimed, like the drug-kingpin statute, at persons who occupy a supervisory, managerial or entrepreneurial role in a drug enterprise, or who knowingly allow

such an enterprise to use their premises to conduct its affairs. *United States v. Thomas*, 956 F.2d 165, 166 (7th Cir. 1992). The Eleventh Circuit has held that the statute contemplates continuity in pursuit of the alleged objective: manufacturing, distributing or using controlled substances. As such, it found that an isolated instance of drug use or distribution or manufacturing is not sufficient to constitute a violation of the statute. *United States v. Clavis*, 956 F.2d at 1090.

Subsection (a)(2) does not require the person who makes the place available to others for drug activity to possess the purpose of engaging in illegal activity. The purpose in issue is that of the person renting or otherwise using the place. *United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993); *United States v. Chen*, 913 F.2d at 189-90. The defendant may be liable if he manages or controls a building that others use for an illicit purpose, and he either knows of the illegal activity or remains deliberately ignorant of it. Therefore, under subsection (a)(2), a deliberate ignorance instruction may be submitted if supported by the evidence. *Id.*

The Fifth Circuit held in *United States v. Roberts*, 913 F.2d 211, 220 (5th Cir. 1990), that a finding that the statute limited convictions to a sole purpose requirement would eviscerate the statute.

6.26.5861. FIREARMS--POSSESSION OF UNREGISTERED FIREARMS (26 U.S.C. § 5861(d))

The crime of [possession[1] of] [receiving] an unregistered firearm, as charged in Count _____ of the Indictment, has four elements, which are:

One, the defendant knew[2] [he] [she] had the firearm in [his] [her] possession;

Two, the defendant knew[2] the firearm was [use definitions from 26 U.S.C. § 5845(a),[3] e.g., a shotgun having a barrel or barrels less than 18 inches in length, etc.][4];

Three, the firearm [was capable of operating as designed] [could readily be put in operating condition];[5] and

Four, the firearm was not registered to the defendant in the National Firearms Registration and Transfer Record.[6]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The element of possession in firearms cases under section 5861(d) is satisfied if the defendant has knowledge of presence and control. Ownership is not controlling on the issue of guilt. *Zrust*, 835 F.2d at 193. *See* Instruction 8.02, *infra*, for an instruction on actual or constructive possession.

2. Title 26, U.S.C. § 5861 requires proof that a defendant knew of the characteristics of the weapon that made it a "firearm." *Staples v. United States*, 511 U.S. 600, 619 (1994). The holding in *Staples* is a "narrow one." *Id.* It focuses on concern that Congress did not intend to make outlaws of gun owners who were "wholly ignorant of the offending characteristics of their weapons." *Id.* Post-*Staples*, the Eighth Circuit has held that where the characteristics of the weapon itself render it "quasi-suspect," the government need only prove that the defendant possessed the weapon and observed its characteristics. *United States v. Barr*, 32 F.3d 1320, 1324 (8th Cir. 1994). *Barr* involved a sawed-off shotgun with readily visible modifications to both the barrel and the stock.

3. "Firearm" may require definition for the jury. The eight categories of firearms are defined in 26 U.S.C. § 5845(a). In light of the decisions in *United States v. Kurt*, 988 F.2d 73, 75-76 (9th Cir. 1993); *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992), and *United States v. Rock Island Armory, Inc.*, 773 F. Supp. 117 (C.D. Ill. 1991), machine gun possession arguably should be charged under 18 U.S.C. § 922(o) rather than 26 U.S.C. § 5861(d). However, the most recent court of appeals to consider the issue explicitly rejected the argument that 18 U.S.C. § 922(o) did not implicitly repeal and make unconstitutional 26 U.S.C. §§ 5845 & 5861. *United States v. Ardoin*, 19 F.3d 177, 180 (5th Cir. 1994) (expressly rejecting *Dalton* and *Rock Island*

Armory and adopting the analysis of the Fourth Circuit in *United States v. Jones*, 976 F.2d 176 (4th Cir. 1992)).

4. Further definition may be required as set forth in 26 U.S.C. § 5845(b)-(h)

5. The government must prove that the firearm can be operated or readily assembled to operating condition. *United States v. Priest*, 594 F.2d 1383 (10th Cir. 1979). *United States v. Seven Miscellaneous Firearms*, 503 F. Supp. 565 (D.D.C. 1980) (forfeiture case). This third element of the pattern instruction will not be required in cases involving destructive devices as it is not necessary that the device function as intended. *United States v. Ragusa*, 664 F.2d at 700.

6. Whether the firearm should have been registered is a jury question. *Bryan v. United States*, 373 F.2d 403, 407 (5th Cir. 1967). The *capability* of the weapon to be registered is not an element of the crime. *United States v. Kurt*, 988 F.2d at 76.

Committee Comments

See generally Staples v. United States, 511 U.S. 600 (1994); *United States v. Barr*, 32 F.3d 1320 (8th Cir. 1994); *United States v. Matra*, 841 F.2d 837 (8th Cir. 1988), and *United States v. Zrust*, 835 F.2d 192 (8th Cir. 1987). *See* 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 39 (5th ed. 2000).

Destructive devices are considered firearms within the meaning of the statute. 26 U.S.C. § 5845(a).

Items deemed destructive devices have been as diverse as ten sticks of dynamite, a length of slow fuse and a blasting cap combined with an alarm clock and a 6-volt battery, *United States v. Harflinger*, 436 F.2d 928 (8th Cir. 1970), and six trash bags each holding a 5-gallon container of gasoline connected by overlapping paper towels with a trigger consisting of matchbooks fashioned to cigarettes adjacent to a bottle of flammable liquid. *United States v. Ragusa*, 664 F.2d 696, 697-98 (8th Cir. 1981).

The individual components must be designed or intended for use as a destructive device to meet the requirements of 26 U.S.C. § 5845(f)(3). *See United States v. Hamrick*, 43 F.3d 877 (4th Cir. 1995) (citing additional examples of destructive devices and affirming by an equally divided court that an improvised, dysfunctional incendiary letter bomb was a destructive device supporting an enhanced penalty under 18 U.S.C. § 924(c) as well as being a destructive device under 26 U.S.C. §§ 5845(f) & 5861).

When the individual components are commercial explosives, proof of the intended use of the components to assemble a destructive device is required in the Eighth Circuit. *Langel v. United States*, 451 F.2d 957, 962 (8th Cir. 1971). *Accord United States v. Morningstar*, 456 F.2d 278 (4th Cir. 1972); *United States v. Greer*, 588 F.2d 1151 (6th Cir. 1979); *Burchfield v. United States*, 544 F.2d 922, 924 (7th Cir. 1976); *United States v. Oba*, 448 F.2d 892, 894 (9th Cir. 1972). In a later Ninth Circuit case, *United States v. Fredman*, 833 F.2d 837 (9th Cir. 1987), the court reversed a conviction as the government failed to prove beyond a reasonable doubt that the components were intended for use as a weapon. The same result was reached by the First Circuit

when the government failed to prove the dynamite was intended for use as a bomb. *United States v. Curtis*, 520 F.2d 1300 (1st Cir. 1975).

The Second Circuit does not require proof of the intended use of the components. In *United States v. Posnjak*, 457 F.2d 1110 (2d Cir. 1972), the court held that commercial dynamite with unattached fuse and caps was not a destructive device regardless of the intent of the transferor.

Final Instructions: Elements of Offenses

6.26.7201. TAX EVASION (26 U.S.C. § 7201)

The crime of tax evasion as charged in [Count[s] ___ of] the Indictment has three elements, which are:

One, the defendant owed substantial income tax in addition to that which [he] [she] reported on his return;

Two, the defendant attempted to evade[1] and defeat that additional tax; and

Three, the defendant acted willfully.

To "attempt to evade or defeat" a tax involves two things: first, an intent to evade or defeat the tax; and second, some act willfully done in furtherance of such intent. So, the word "attempt" contemplates that the defendant knew and understood that, during the calendar year charged, [he] [she] had some income which was taxable, and which he was required by law to report; but that [he] [she] nevertheless attempted to evade or defeat all or a substantial portion of the tax on that income, by willfully failing to report all [his] [her] known income which [he] [she] knew [he] [she] was required by law to state in [his] [her] return for such year; or in some other way or manner.

To "evade and defeat" a tax means to escape paying a tax by means other than lawful avoidance.

Various schemes, subterfuges, and devices may be resorted to, in an attempt to evade or defeat a tax. [The one alleged in the Indictment is that of filing false and fraudulent returns with the intent to evade or defeat the tax.][2] The statute makes it a crime willfully to attempt, in any way or manner, to evade or defeat any income tax imposed by law.[3]

An attempt to evade an income tax for one year is a separate offense from the attempt to evade the tax for a different year.[4]

Even though the Indictment alleges a specific amount of tax due for each of the calendar years, the proof need not show the precise amount of the additional tax due.[5] The Government is only required to establish, beyond a reasonable doubt, that the defendant attempted to evade a substantial income tax, whether greater or less than the amount charged in the Indictment.[6]

Final Instructions: Elements of Offenses

[The fact that an individual's name[7] is signed to a return means that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant had signed [his] [her] tax return, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the return.[8]]

To act "willfully" means to voluntarily and intentionally violate a known legal duty.[9]

(Insert paragraph describing Government's burden of proof, *see* Instruction 3.09, *supra*.)

Notes on Use

1. "Evade" should be defined to clarify that it means more than lawful avoidance of a tax, *Distinctive Theatres of Columbus v. Looker*, 165 F. Supp. 410, 411 (S.D. Ohio 1958), and to avoid confusion with the requirement of willfulness, *United States v. Bishop*, 412 U.S. 346, 360 n.8 (1973).

2. Insert the method charged in the indictment. If more than one method has been charged, the jury may be instructed that it need find only one matter false, however its finding as to which matter must be unanimous. There must be sufficient evidence to support each method charged in the instructions. *United States v. Kneen*, 879 F.2d 345 (8th Cir. 1989).

3. *Sansone v. United States*, 380 U.S. 343, 351 (1965); 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 67.03 (5th ed. 2000).

4. *United States v. Smith*, 335 F.2d 898, 900-01 (7th Cir. 1964).

5. *See United States v. Calderon*, 348 U.S. 160, 167 (1954); *Swallow v. United States*, 307 F.2d 81, 83 (10th Cir. 1962).

6. *See United States v. Johnson*, 319 U.S. 503, 517-18 (1943); *United States v. Gardner*, 611 F.2d 770, 775-76 (9th Cir. 1980).

7. Section 6064, United States Code, Title 26 refers to individuals. Corporate and partnership returns are covered by sections 6062 and 6063 of Title 26. The appropriate language should be used. *See also* Instruction 4.13, *supra*.

8. Volume 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 67.22 (5th ed. 2000); *United States v. Wainwright*, 413 F.2d 796, 802 n.3 (10th Cir. 1969); *United States v. Brink*, 648 F.2d 1140 (8th Cir. 1981); *United States v. Cashio*, 420 F.2d 1132, 1135 (5th Cir. 1969).

This instruction should only be used when a signed return is involved. Evasion may be accomplished without the filing or signing of a return.

9. *See United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Jerde*, 841 F.2d 818, 821 (8th Cir. 1988) and Instruction 7.02 of this Manual.

Committee Comments

See 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 67.03, 67.04, 67.08, 67.22, 67.24 (5th ed. 2000); *Sansone v. United States*, 380 U.S. 343, 351 (1965); *United States v. Johnson*, 319 U.S. 503, 517-18 (1943); *United States v. Frederickson*, 846 F.2d 517 (8th Cir. 1988).

Various schemes or devises may constitute tax evasion. Most commonly, the filing of a false and fraudulent return understating income is sufficient to satisfy the requirement of an attempt to evade. *Sansone v. United States*, 380 U.S. at 351; *United States v. Schafer*, 580 F.2d 774 (5th Cir. 1978).

Whether the tax evaded was "substantial" is a jury question. *Canaday v. United States*, 354 F.2d 849, 851 n.2 (8th Cir. 1966). That case defined "substantial" as follows:

> The word "substantial,", as applicable here, is necessarily a relative term and not susceptible of an exact meaning. This concept is implicit in *United States v. Nunan*, 236 F.2d 576, 585 (2d Cir. 1956), where the court, in pertinent part, stated:
>
> > * * * The showing by the government must warrant a finding that the amount of the tax evaded is substantial. (Citing cases.) But this is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration. * * * But a few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution, depending on the circumstances of the particular case. Otherwise the rich and powerful could evade the income tax with impunity.

345 F.2d at 851-52. Generally "substantial" is not defined in the jury instructions.

While a defendant must intend to evade or defeat the tax, this need not be his sole motive. For example, the defendant may also desire to suppress information as to acts which are unrelated to tax evasion, including other criminal acts. *Spies v. United States*, 317 U.S. 492 (1943).

The Supreme Court has recognized certain facts and circumstances as indicating an intent to evade taxes:

> By way of illustration and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead

> or to conceal. If the tax evasion motive plays any part in such conduct, the offense may be made out even though the conduct may also serve other purposes such as the concealment of other crimes.

Spies v. United States, 317 U.S. at 499. "Willfulness" may also be shown by a consistent pattern of under-reporting, *United States v. DiBenedetto*, 542 F.2d 490 (8th Cir. 1976).

Taxable income includes illegally acquired funds as well as legally acquired funds. *James v. United States*, 366 U.S. 213 (1961) (embezzled funds taxable); *United States v. Fogg*, 652 F.2d 551, 555-56 (5th Cir. 1981) (commercial bribes and kickbacks taxable); *Hartman v. United States*, 245 F.2d 349, 352-53 (8th Cir. 1957); *United States v. Meyer*, 808 F.2d 1304 (8th Cir. 1987) (diverted corporate funds taxable). In a proper case, where there is evidence of illegal income, the jury may be so instructed. *See* 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 67.21 (5th ed. 2000). *United States v. Renfro*, 600 F.2d 55 (6th Cir. 1979).

Gifts are not taxable items of income. If the defendant contends that certain payments are gifts, the jury may be instructed as follows:

> It is for you, the jury, to decide whether certain funds are taxable or nontaxable to the defendant. In determining whether a payment of money or property to the defendant is a nontaxable gift, you should look to the intent of the parties at the time the payment was made, particularly the intent of the person making the payment. Such payments are gifts if they proceed from a detached and disinterested generosity, out of affection, respect, admiration, charity, or like impulses. In making this determination, however, you must look at all the facts and circumstances in this case. The characterization given to a certain payment by either the defendant or the person making the payment is not conclusive. Rather you, the members of the jury, must make an objective inquiry as to whether a certain payment is a gift. In this instruction a "payment" includes any form of payment whether it be in cash, goods, or services, made directly to the defendant or on his behalf. You should look at the terms and substance of any request made by the defendant for the payment.

United States v. Terrell, 754 F.2d 1139, 1149 n.3 (5th Cir. 1985); *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 285-86 (1960). In *United States v. Shelton*, 588 F.2d 1242 (9th Cir. 1978), it was held proper to instruct the jury that whether the item was a gift was dependable on the transferor's intent.

Other nontaxable items such as loans, insurance proceeds, inheritances, etc. may also be identified and defined in the instructions as appropriate to the case.

Good faith is a theory of defense in tax evasion. Where the defendant has presented evidence of good faith, he is entitled to a jury instruction. *See* Instruction 9.08, *infra*. *See also United States v. Kouba*, 822 F.2d 768, 771 (8th Cir. 1987); *United States v. Meyer*, 808 F.2d 1304 (8th Cir. 1987). Advice of counsel is a form of a good faith theory of defense. *See* Instruction 9.08 *infra*.

In *United States v. Parshall*, 757 F.2d 211 (8th Cir. 1985) the court held it was not error to instruct the jury that "disagreement with the law or governmental policies does not constitute good faith misunderstanding of the requirements of the law."

One method of tax evasion, known as a *Spies* evasion, consists of failure to file a return coupled with an affirmative act of evasion. *See United States v. Goodyear*, 649 F.2d 226 (4th Cir. 1981). If this type of evasion is charged, the jury may be instructed on failure to file in violation of Section 7203 as a lesser-included offense.

6.26.7202. FAILURE TO COLLECT, ACCOUNT TRUTHFULLY FOR, OR PAY OVER EMPLOYMENT TAXES (26 U.S.C. § 7202)

The crime of failure to [collect][,] [or] [account truthfully for] [or] [pay over] employment taxes,[1] as charged in [Count[s] _____ of] the Indictment, has three essential elements, which are:

One, the defendant had a duty to [collect][,] [or] [account truthfully for] [or] [pay over] an employment tax;

Two, the defendant knew [he] [she] had a duty to [collect][,] [or] [account truthfully for] [or] [pay over] an employment tax; and

Three, the defendant willfully failed to [collect][,] [or] [account truthfully for] [or] [pay over] an employment tax.

To act "willfully" means to voluntarily and intentionally violate a known legal duty.

"Employment tax" means an income tax, a Social Security tax, and a Medicare (or hospital insurance) tax equal to a percentage of the wages earned by an employee.[2]

To have a "duty" with respect to employment taxes means the defendant was a person responsible for [collecting][,] [or] [accounting truthfully for] [or] [paying over] employment taxes.[3] A person with such responsibility is a person who has significant, although not necessarily exclusive or final, control or authority over the employer's finances or disbursement of the employer's funds.[4] There may be more than one such responsible person associated with an employer.[5] Moreover, such a person includes a person who has delegated [his] [her] control or authority with respect to employment taxes to another person.[6]

[The term "employer" means a person or corporation for whom an individual performed a service, of whatever nature, and the person or corporation who controlled the payment of compensation.][7] [The term "employee" means a person performing a service, of whatever nature, for the payment of compensation. "Employee" can include an officer of a corporation.][8]

Every employer, through one or more responsible persons, is required to collect employment taxes from the wages of its employees.[9] The employment taxes must be deposited

with an authorized financial institution or the Federal Reserve Bank at certain intervals that depend on the amounts withheld.[10]

Every employer, through one or more responsible persons, is required to account truthfully for employment taxes.[11] In particular, within one month of the close of each calendar quarter, every employer is required to file with the Internal Revenue Service a Form 941, Employer's Federal Quarterly Tax Return, accounting truthfully for the employer's collection of employment taxes for that quarter.[12]

Every employer, through one or more responsible persons, is required to pay over to the Internal Revenue Service the employment taxes that the employer has collected. The employment taxes are to be paid over on or before the date the Form 941 is due.[13]

[Even though [Count[s] _____ of] the Indictment allege[s] a specific amount of employment taxes due for a particular calendar quarter, the proof need not show the precise amount of tax due for that quarter.]

(Insert paragraph describing Government's burden of proof, *see* Instruction 3.09, *supra*.)

Notes on Use

1. The instruction has been tailored for employment tax cases. The instruction should be modified for cases charging the failure to collect, account truthfully for, or pay over other taxes, such as excise taxes.

2. *See* 26 U.S.C. § 3102(a) (requiring employer to collect employment taxes from employee wages at the time of compensation); 26 U.S.C. § 3102(b) (establishing liability of employer for withheld employment taxes); 26 U.S.C. § 3402 (imposing duty on employer to withhold income taxes from wages at the time of compensation).

3. The government need not prove that the defendant was responsible for all three duties. It is sufficient if the government proves that the defendant was responsible for one of the three duties. *See United States v. Evangelista*, 122 F.3d 112, 121 (2d Cir. 1997); *see also United States v. Thayer*, 201 F.3d 214, 220 (3d Cir. 1999). Likewise, the government need only prove that the defendant willfully failed to comply with one of the three duties for which he or she was responsible. The instruction should be modified to conform to the particular charges alleged against the defendant. If two or more theories are submitted to the jury, they should be instructed that they may convict the defendant if they find unanimously and beyond a reasonable doubt that at least one of the theories was proven by the government. *See, e.g., United States v. Vickerage*, 921 F.2d 143, 147 (8th Cir. 1990) (finding no error where court instructed jury it had to unanimously agree on which of two offenses the defendant conspired to commit). For an example of an unanimity instruction, *see* Instruction 6.18.1341 n.2, *supra*.

4. *United States v. Armstrong*, 206 Fed. App'x 618, 620 (8th Cir. 2006); *Olsen v. United States*, 952 F.2d 236, 243 (8th Cir. 1991); *Donelan Phelps & Co. v. United States*, 876 F.2d 1373, 1376 (8th Cir. 1989). A "responsible person" may include but is not necessarily limited to an officer, director, shareholder or employee. *Donelan Phelps & Co.*, 876 F.2d at 1376. Responsible person status can be determined by looking at a wide range of factors. For example, an individual is more likely to be considered a responsible person if he or she (1) is an officer or member of the board of directors, (2) owns shares or possesses an entrepreneurial stake in the company, (3) is active in the management of day-to-day affairs of the company, (4) has the ability to hire and fire employees, (5) makes decisions regarding which, when and in what order outstanding debts or taxes will be paid, (6) exercises control over daily bank accounts and disbursement records, and (7) has check-signing authority. *See, e.g., United States v. Bisbee*, 245 F.3d 1001, 1008 (8th Cir. 2001); *Kenagy v. United States*, 942 F.2d 459, 464-65 (8th Cir. 1991); *Kelley v. Lethert*, 362 F.2d 629, 634 (8th Cir. 1966); *Jean v. United States*, 396 F.3d 449, 454 (1st Cir. 2005).

5. *See Olsen v. United States*, 952 F.2d 236, 243 (8th Cir. 1991).

6. *See Keller v. United States*, 46 F.3d 851, 854 (8th Cir. 1995).

7. "Employer" is defined at 26 U.S.C. § 3401(d).

8. "Employee" is defined at 26 U.S.C. § 3401(c).

9. Even in those cases where the defendant is charged with willfully violating only one or two duties, the committee recommends that explanatory definitions be read for all three duties to provide context and background. If desired, language could be added at the beginning of each explanatory paragraph to clarify which duty or duties the defendant is charged with violating: "The Government [does not allege] [alleges] that the defendant violated the duty to [collect][,] [or] [truthfully account for] [or] [pay over] employment taxes. Every employer, through one or more responsible persons, is required to . . ."

10. *See* 26 U.S.C. § 6302; 26 C.F.R. § 31.6302-1 (establishing the requirements for employers' deposits of withheld employment taxes).

11. The instruction should be modified for those cases in which the defendant's alleged failure to comply with his or her duty to account truthfully for employment taxes is based in whole or in part on something other than a failure to file Form 941. For example, the government may allege that a defendant has failed to account truthfully for employment taxes by failing to keep internal accounting records or by failing to prepare and file wage and tax statements (Forms W-2 and W-3). *See, e.g., Donelan Phelps & Co.*, 876 F.2d at 1374. Moreover, for those cases in which the defendant was not required to file a Form 941, such as those involving certain agricultural employers (who are required to file Form 943, Employer's Annual Federal Tax Return for Agricultural Employees) and those involving employers who have an employment tax liability of $1,000 or less for a given year (who may be permitted to file Form 944, Employer's Annual Federal Tax Return), the instruction should be modified accordingly.

12. *Elmore v. United States*, 843 F.2d 1128, 1131 n.6 (8th Cir. 1988).

13. *United States v. Ervasti*, 201 F.3d 1029, 1033 (8th Cir. 2000); *Emshwiller v. United States*, 565 F.2d 1042, 1044 (8th Cir. 1977).

Committee Comments

Employment taxes are also known as "trust fund taxes." *United States v. Bisbee*, 245 F.3d 1001, 1004 (8th Cir. 2001). The Social Security and Medicare (or hospital insurance) portions are known as Federal Insurance Contribution Act (FICA) taxes. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 205 (2001).

If there is an issue whether the individuals whose taxes are at issue were independent contractors rather than employees, the jury may be instructed on the various factors used by the Internal Revenue Service to determine independent contractor status. *See, e.g.*, *Saiki v. United States*, 306 F.2d 642, 648-49 (8th Cir. 1962); *Wolfe v. United States*, 570 F.2d 278, 280 (8th Cir. 1978); *see also* 26 C.F.R. § 31.3121(d)-1(c)(2) and IRS Revenue Ruling 87-41, *cited in United States v. Porter*, 569 F. Supp. 2d 862, 869-70 (S.D. Iowa 2008).

The requisite element of willfulness under section 7202 is the same as in other tax offenses under Title 26. *See* Instruction 6.26.7201, *supra*. It must be shown that a defendant voluntarily and intentionally acted in violation of a known legal duty. *Cheek v. United States*, 498 U.S. 192 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973). A willful violation of the duty to pay over employment taxes may be found where the defendant used the withheld employment taxes for personal purposes or for business purposes in an effort to avoid a financial crisis. *United States v. Carlson*, 498 F.3d 761, 762, 766 (8th Cir. 2007). Moreover, evidence that the defendant had altered records has been held admissible for the purpose of showing motive, intent, and willfulness in a case brought under 26 U.S.C. § 7202. *United States v. Scharf*, 558 F.2d 498, 501 (8th Cir. 1977).

If requested and supported by the evidence, the jury should be given the deliberate ignorance instruction, Instruction 7.04, *infra*.

For a discussion of instructions asserting a good faith defense in tax cases, *see* Committee Comments, Instruction 9.08, *infra*; *see also* Committee Comments, Instruction 6.26.7201, *supra*.

Final Instructions: Elements of Offenses

6.26.7203. FAILURE TO FILE TAX RETURN (26 U.S.C. § 7203)

The crime of failure to file a tax return as charged in [Count(s) ___ of] the Indictment has three elements, which are:

One, the defendant was required to file a federal income tax return for (insert taxable year(s) charged);

Two, the defendant knew that [he] [she] was required to file such a tax return; and

Three, the defendant willfully failed to file the required tax return on or before (insert time required by law).

To act "willfully" means to voluntarily and intentionally violate a known legal duty.[1]

[A single person [under] [over] sixty-five years old was required to file a federal income tax return for the year(s) (insert years charged), if [he] [she] had gross income in excess of (insert amount)].[2]

[A married individual was required to file a federal income tax return for the year(s) (insert years charged), if [he] [she] had a separate gross income in excess of (insert amount)[3] and a total gross income, when combined with that of [his] [her] spouse, in excess of (insert amount)[4] where [either] [both] [is] [are] [over] [under] sixty-five years old.]

Gross income includes the following: [Compensation for services, including fees, commissions and similar items] [Gross income derived from business] [Gains derived from dealings in property] [Interest] [Rents] [Royalties] [Dividends] [Alimony and separate maintenance payments] [Annuities] [Income from life insurance and endowment contracts] [Pensions] [Income from discharge of indebtedness] [Distributive share of partnership gross income] [Income in respect of a decedent] [Income from an interest in an estate or trust].[5]

The fact that a person may be entitled to deductions from income in sufficient amount so that no tax is due does not affect that person's obligation to file.

The Government is not required to show that a tax was due and owing or that the defendant intended to evade or defeat the payment of taxes, only that [he] [she] willfully failed to file a return.

Final Instructions: Elements of Offenses

If you find beyond a reasonable doubt that the defendant had the required gross income in (insert year, e.g., 1985), then, the defendant was required to file a tax return on or before (insert date, e.g., April 15, 1986).[6]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. *See United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Jerde*, 841 F.2d 818, 821 (8th Cir. 1988) and Instruction 7.02, *infra*.

2., 3., 4. Where more than one year is charged and the gross income amount requiring a return be filed differs in amount, it will be necessary to set forth the appropriate gross income for each of the years in issue. Note also that gross income requirement may vary from year to year depending on the amount allowed as an exemption, the age of the defendant, and, in the case of a married defendant, the age of the spouse. 26 U.S.C. § 6012.

5. The instruction should be simplified by eliminating sources of income not shown by the evidence.

6. A return made on the basis of the calendar year must be made on or before the 15th day of April, following the close of the calendar year. When April 15 falls on a Saturday, Sunday, or legal holiday, returns are due on the first day following April 15 which is not a Saturday, Sunday, or legal holiday. 26 U.S.C. §§ 6072, 6081, 7503.

Returns made on the basis of a fiscal year are generally required to be filed on or before the 15th day of the fourth month following the close of the fiscal year. 26 U.S.C. § 6072(a). Calendar year corporate returns are due on or before the 15th day of March following the close of the calendar year; fiscal year corporate returns are due on or before the 15th day of the third month following the close of the fiscal year. 26 U.S.C. § 6072(b).

Note that the statutory due dates should be adjusted so as to account for any extensions of time for filing a return.

Committee Comments

See 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 67.11, 67.12, 67.20 (5th ed. 2000).

See also Committee Comments, Instruction 6.26.7201, *supra*.

For a discussion of instructions asserting a good faith defense in tax cases, *see* Committee Comments, Instruction 9.08, *infra*.

If a defendant in a failure to file case is allowed to introduce legal and other materials in support of his good faith defense, the following limiting instruction may be appropriate:

> The defendant has introduced evidence of advice he heard given by speakers at meetings, tape recorded lectures, essays, pamphlets, court opinions, and other material that he testified he relied on in concluding that he was not a person required to file income tax returns for the years _____ and _____. This evidence has been admitted solely for the purpose of aiding you in determining whether or not the defendant's failure to timely file tax returns for _____ and _____ was knowing and willful and you should not consider it for any other purpose. You are not to consider this evidence as containing any law that you are to apply in reaching your verdicts, because all of the law applicable to this case is set forth in these instructions.

United States v. Miller, 634 F.2d 1134, 1135 (8th Cir. 1980).

If the issue arises, the jury may be properly instructed that the government need not prove bad purpose or evil motive. *United States v. Jerde*, 841 F.2d 818 (8th Cir. 1988).

Final Instructions: Elements of Offenses

6.26.7206. FALSE INCOME TAX RETURN (26 U.S.C. § 7206(1))

The crime of willfully making and subscribing to a false (describe document, e.g., income tax return) as charged in [Count[s] _____ of] the Indictment, has five elements, which are:

One, the defendant made and signed (describe document, e.g., an individual income tax return, Form 1040,)[1] for the year in question, that was false as to (describe material matters, e.g., income);[2]

Two, the return contained a written declaration that it was signed under the penalties of perjury;

Three, the defendant did not believe the return to be true and correct as to (describe material matter, e.g., income);[3]

Four, the defendant acted willfully; and

Five, the false matter in the (describe document, e.g., income tax return) was material.[4]

The tax return in question must be false as to (describe material matter, e.g., income)[5] that is (e.g., that the defendant must have received income in addition to that reported on [his] [her] return, regardless of the amount).[6] However, the Government is not required to prove that the defendant owed an additional tax for the years in issue. Whether the Government has or has not suffered a monetary loss as a result of the alleged return is not an element of this offense.[7]

The fact that an individual's name[8] is signed to a return means that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant had signed [his] [her] tax return, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the return.[9]

To act "willfully" means to voluntarily and intentionally violate a known legal duty.[10]

[False matter in a (describe document, e.g., income tax return) is “material” if the matter was capable of influencing the Internal Revenue Service.]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Final Instructions: Elements of Offenses

Notes on Use

1. Insert description of return filed. This statute also applies to statements and other documents. If one of these is charged, the instruction should be changed accordingly.

2. Insert material matter charged as false. More than one material matter may be charged. If that has been done, the jury may be instructed that it need only find one matter false. *See Silverstein v. United States*, 377 F.2d 269, 270 n.3 (1st Cir. 1967). Such a finding must be unanimous as to that matter. *United States v. Duncan*, 850 F.2d 1104, 1110-13 (6th Cir. 1988).

3. Insert material matter charged as false. More than one material matter may be charged. If that has been done, the jury may be instructed that it need only find one matter false. *See Silverstein v. United States*, 377 F.2d 269, 270 n.3 (1st Cir. 1967). Such a finding must be unanimous as to that matter. *United States v. Duncan*, 850 F.2d 1104, 1110-13 (6th Cir. 1988).

4. The Committee has added materiality as an element for the jury in light of *United States v. Gaudin*, 515 U.S. 506 (1995).

5. Insert material matter charged as false. More than one material matter may be charged. If that has been done, the jury may be instructed that it need only find one matter false. *See Silverstein v. United States*, 377 F.2d 269, 270 n.3 (1st Cir. 1967). Such a finding must be unanimous as to that matter. *United States v. Duncan*, 850 F.2d 1104, 1110-13 (6th Cir. 1988).

6. Insert definition or explanation of material matter charged as false. (If the amount of income is false, the amount of understatement is irrelevant. *United States v. Hedman*, 630 F.2d 1184, 1196 (7th Cir. 1980).)

7. *United States v. Ballard*, 535 F.2d 400, 404 (8th Cir. 1976); *United States v. Miller*, 545 F.2d 1204, 1211 n.8 (9th Cir. 1976).

8. Section 6064, United States Code, Title 26 refers to individuals. Corporate and partnership returns are covered by sections 6062 and 6063 of Title 26. The appropriate language should be used. *See also* Instruction 4.13, *supra*.

9. *See* 2B Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 67.22 (5th ed. 2000); *United States v. Wainwright*, 413 F.2d 796, 802 n.3 (10th Cir. 1969); *United States v. Brink*, 648 F.2d 1140 (8th Cir. 1981); *United States v. Cashio*, 420 F.2d 1132, 1135 (5th Cir. 1969). *See also* Committee Comments, Instruction 4.13, *supra*, regarding specific inferences.

10. *See United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Jerde*, 841 F.2d 818, 821 (8th Cir. 1988) and Instruction 7.02, *infra*.

Committee Comments

See United States v. Bishop, 412 U.S. 346, 350, 359 (1973); *United States v. Engle*, 458 F.2d 1017, 1020 (8th Cir. 1972); and *United States v. Oggoian*, 678 F.2d 671, 673 (7th Cir. 1982).

Final Instructions: Elements of Offenses

To prove a violation of this statute, the government must establish the following elements: (l) that the defendant made and subscribed a return that was false as to a material matter; (2) the return contained a written declaration that it was made under the penalties of perjury; (3) that the defendant did not believe the return to be true and correct as to every material matter; and (4) that the defendant acted willfully. *United States v. Bishop*, 412 U.S. 346 (1972); *see also United States v. Engle*, 458 F.2d 1017, 1020 (8th Cir. 1972).

Both "making," i.e., filing, and "signing" must be charged. The gist of the offense is the false statements in the return. The signing and filing of the return provides the jurisdictional element. *United States v. Duncan*, 850 F.2d 1104, 1111-12 (6th Cir. 1988). *See also United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1453-54 (9th Cir. 1986).

In this circuit materiality has been a question of law for the court, rather than a question of fact for the jury. *United States v. Holecek*, 739 F.2d 331, 337 (8th Cir. 1984). Presumably, materiality is now a question of fact for the jury to decide under *United States v. Gaudin*, 515 U.S. 506 (1995). The test of materiality in a false return case is "whether a particular item must be reported in order that the taxpayer estimate and compute his tax correctly." *United States v. Warden*, 545 F.2d 32, 37 (7th Cir. 1976) (quoting *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969)).

Matters held to be material include false statements relating to gross income, *United States v. Engle*, 458 F.2d at 1019-20; *United States v. Hedman*, 630 F.2d 1184, 1196 (7th Cir. 1980); personal deductions, *United States v. Warden*, 545 F.2d 32, 37 (7th Cir. 1976); and business loss deductions, *United States v. Bliss*, 735 F.2d 294, 301 (8th Cir. 1984).

Under the statute the taxpayer is the one who "makes" a return even if he has hired an accountant to prepare the return. *United States v. Badwan*, 624 F.2d 1228, 1232 (4th Cir. 1980). If this is an issue, the jury may be so instructed.

There is a rebuttable statutory presumption that if an individual's name is signed on a return, then the return was actually signed by that person. 26 U.S.C. § 6064. This presumption applies in criminal cases. *United States v. Cashio*, 420 F.2d 1132, 1135 (5th Cir. 1969). *See also* Committee Comments, Instruction 4.13, *supra*, regarding statutory presumptions. Sections 6062 and 6063 of Title 26 cover signatures to corporate and partnership returns.

The defendant's conduct must have been willful. The term "willfully" as used in the criminal sections of the Internal Revenue Code is a "voluntary, intentional violation of a known legal duty." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). The Court went on to state that a willful act is defined as one done "voluntarily and intentionally with specific intent to do something which the law forbids."

Willfulness is a question of fact that is to be determined by a consideration of all the facts and circumstances shown by the evidence. *Id.*; *United States v. Miller*, 634 F.2d 1134, 1135 (8th Cir. 1980). An intent to evade income taxes is not an element of section 7206(l). *United States v. Engle*, 458 F.2d at 1019.

Various circumstances may indicate willfulness. For example, a defendant's pattern of under reporting large amounts of income may give rise to an inference of willfulness. *United States v. Vannelli*, 595 F.2d 402 (8th Cir. 1979); *United States v. DiBenedetto*, 542 F.2d 490, 493 (8th Cir. 1976). Willfulness may also be inferred from the repeated omission of certain items of income. *United States v. Tager*, 479 F.2d 120, 122 (10th Cir. 1973). Failure to supply an accountant or return preparer with accurate and complete information has also been held to be indicative of willfulness. *United States v. Samara*, 643 F.2d 701, 703 (10th Cir. 1981); *United States v. Garavaglia*, 566 F.2d 1056 (6th Cir. 1977). Extensive use of currency and cashier's checks may also be indicative of willfulness. *Smith v. United States*, 348 U.S. 147, 159 (1954); *United States v. Holovachka*, 314 F.2d 345, 358 (7th Cir. 1963); *Schuermann v. United States*, 174 F.2d 397, 398 (8th Cir. 1949).

Good faith is a theory of defense in false return cases. Where the defendant has presented evidence of good faith, he is entitled to a jury instruction. *See* Instruction 9.08, *infra*; *United States v. Kouba*, 822 F.2d 768, 771 (8th Cir. 1987). Advice of counsel is a form of a good faith theory of defense. *See* Instruction 9.08, *infra*.

6.42.1320. SOLICITING OR RECEIVING KICKBACKS IN CONNECTION WITH MEDICARE OR FEDERAL HEALTH CARE PROGRAM PAYMENTS (42 U.S.C. § 1320a-7b(b)(1)(A))[1]

The crime of [soliciting] [receiving] kickbacks in connection with [Medicare] [(federal health care program)][2] payments, as charged in [Count ___ of] the Indictment, has [three] [four] elements, which are:

One, the defendant knowingly and willfully [solicited] [received] (specify the remuneration alleged);[3]

Two, the (specify the remuneration alleged) was [solicited] [paid] primarily in order to [induce] [and] [or] [in exchange for] the referral of a patient insured by [Medicare] [(federal health care program)];[3] and

Three, the patient's services were covered, in whole or in part, by [Medicare] [(federal health care program)]; [and]

[*Four*, [Medicare] [(federal health care program)] is a federal health care program.][4]

[A defendant acts willfully if he knew his conduct was wrongful or unlawful.][5]

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

Notes on Use

1. The Patient Protection and Affordable Health Care Act (the Health Care Reform Act) of 2010 made significant changes to the Anti-Kickback Statute, particularly to the scienter requirement. The Act added the following (Section 1320a-7(h)): "With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section." For violations occurring after the effective date of the Act, this instruction will need to be amended to include this language.

2. The statute applies to any federal health care program, which should be referenced by name.

3. Elements One and Two may be modified depending on whether the charge is under 42 U.S.C. § 1320a-7b(1)(a) or (B) or 7b(2)(A) or (B). Section 1320a-7b(1)(A), which prohibits patient referrals for items or services for which payment may be made, in whole or in part, under a federal health care program, is the statute addressed by the instruction as written. Section 1320a-7b(1)(B) prohibits soliciting or receiving remuneration (including any kickback, bribe, or rebate), directly or indirectly, overtly or covertly, in cash or in kind, in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made, in whole or in part, under a federal

health care program. Section 1320a-7b(2)(A) or (B) prohibits offering or paying "any remuneration (including kickback, bribe, or rebate), directly or indirectly, overtly or covertly, in cash or in kind, to any person to induce" referrals or purchases, leases, or orders for any good, facility, service, or item, for which payment is made, in whole or in part, under a federal health care program.

4. The statute requires that the referral be for services or items for which payment may be made "in whole or in part under a federal health care program." Either the court or the jury may make the finding that the program is a federal health care program.

5. *See United States v. Jain*, 93 F.3d 436, 439-41 (8th Cir. 1996). A *mens rea* instruction more rigorous than the traditional rule was held appropriate based on the fact that "the literal language of the statute might otherwise encompass some types of innocent conduct." *Id.* at 440. "[T]he elements 'knowingly and willfully' were added to the statute in 1980 to reflect congressional concern 'that criminal penalties may be imposed under current law to an individual whose conduct, while improper, was inadvertent.'" *Id.* at 440. Because "[o]nly conduct that is inevitably nefarious, that is, 'obviously 'evil' or inherently 'bad,'' "warrants the traditional presumption that anyone consciously engaging in it has fair warning of a criminal violation," (citing *Ratzlaf v. United States*, 510 U.S. 135, 146-48 (1994)), the Eighth Circuit "agree[d] with the district court's decision to instruct the jury that the government must meet a heightened *mens rea* burden." *Id.* at 440.

The specific instruction adopted in *Ratzlaf* and the criminal tax cases was held inappropriate in Medicare anti-kickback cases based on the plain language of the statute and respect for the traditional principle that ignorance of the law is no defense. The court stated, "[A] heightened *mens rea* standard should only require proof that [the defendant] knew that his conduct was wrongful, rather than proof that he knew it violated 'a known legal duty.' Therefore, the district court's definition of 'willfully' correctly construed the 1980 amendment to § 1320a-7b." *Id.* at 441.

7.00. FINAL INSTRUCTIONS: CONSIDERATION OF MENTAL STATE

Introductory Comment

The instructions in this section relate to the jury's consideration of the defendant's mental state. The Committee recommends that the elements instructions address the exact mental state required by the statute. If this is done there is usually no need to further instruct the jury on the meaning of general terms such as "specific intent," "knowingly" and "willfully" except as noted in the Committee Comments in this section.

Final Instructions: Consideration of Mental State

7.01. SPECIFIC INTENT

(No instruction recommended.)

Committee Comments

The Committee is unaware of any federal statute which actually uses the phrase "specific intent" and accordingly recommends that it not be used in any instruction. Where a mental state is an element of an offense, that mental state must be contained in the elements instruction. *See Liparota v. United States*, 471 U.S. 419, 433 n.16 (1985). The verbal formulation "specific intent" need not be contained in the indictment nor submitted to the jury, as long as the required mental state is adequately conveyed to the jury. *United States v. Dougherty*, 763 F.2d 970, 973-74 (8th Cir. 1985); *United States v. May*, 625 F.2d 186, 189-90 (8th Cir. 1980); *United States v. Galyen*, 798 F.2d 331, 333 (8th Cir. 1986). *United States v. Bailey*, 444 U.S. 394 (1980). The elements instructions in Section 6, *supra*, were drafted with this purpose in mind.

Final Instructions: Consideration of Mental State

7.02. WILLFULLY *

* No instruction recommended except in criminal tax cases, odometer fraud cases, health care anti-kickback statute cases, certain securities cases, and failure to pay child support cases.

Committee Comments

The Committee recommends that the word "willfully" not be used in jury instructions in most cases. Where "willfully" does not appear in the statute, it should not be used in the indictment or the instructions. Where the word "willfully" does appear in the statute, in most cases it can be replaced with the words "voluntarily and intentionally" in the instruction and no further definition is needed. *See United States v. Redfearn*, 906 F.2d 352 (8th Cir. 1990); *United States v. Bettelyoun*, 16 F.3d 850, 853 (8th Cir. 1994). The elements instructions in Section 6, *supra*, follow this format.

"Willfully" has been given a particular meaning in criminal tax statutes. In tax prosecutions "willfully" may be used in the indictment and in the instructions and should be defined as follows: "An act is done 'willfully' if done voluntarily and intentionally with the purposed of violating a known legal duty." *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Jerde*, 841 F.2d 818, 821 (8th Cir. 1988). The Supreme Court has discussed the various meanings of the term "willfulness" in the criminal tax statutes in *United States v. Bishop*, 412 U.S. 346 (1973); *Cheek v. United States*, 498 U.S. 192 (1991) ("willfully" in a tax evasion case means both that the defendant knew of his duty to pay the tax and that he voluntarily and intentionally violated that duty). This circuit has extended this definition of willfully to odometer fraud cases under 15 U.S.C. § 1990c. *United States v. Studna*, 713 F.2d 416, 418 (8th Cir. 1983). There may be other statutes in which "willfully" has this definition.

In *Ratzlaf v. United States*, 510 U.S. 135 (1994), the Court held that for the purposes of the anti-structuring statutes at 31 U.S.C. §§ 5313(a), 5322(a) & 5324(3) – which establish criminal penalties for anyone who "willfully violated" any of the provisions in the subchapter – the term "willfully" required *both* knowledge of the reporting requirements *and* a specific purpose to disobey the law.[1]

In *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996), the Eighth Circuit interpreted the term "willfully" in the health care anti-kickback statute, at 42 U.S.C. § 1320a-7b, to require proof that the defendant knew his conduct was "wrongful," (a heightened *mens rea* burden), *see Jain*, 93 F.3d at 441. The trial court in *Jain* instructed the jury that "the word 'willfully' means unjustifiably and wrongfully, known to be such by Defendant Swaran Jain." *Jain*, 93 F.3d at 440. Note, however, that the Patient Protection and Affordable Health Care Act, passed in 2010,

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[1]Congress amended 31 U.S.C. § 5322(a) to eliminate the applicability of the provision's mens rea requirement to offenses committed under section 5324, thereby superceding by statute the narrow holding in *Ratzlaf*.

added to § 1320a-7b that a person "need not have actual knowledge of this section or specific intent to commit a violation of this section." *See* Notes on Use to 6.42.1320.

In *United States v. O'Hagan*, 521 U.S. 642 (1997), the Court, discussing criminal liability under 10b-5 of the Securities and Exchange Act, 18 U.S.C. § 78ff(a), noted that criminal liability required that the government prove that a person engaging in "insider" trading "willfully" violated the substantive provision in question and that the statute specifically prohibited imprisonment of a defendant who "proves he had no knowledge of such rule or regulation." *Id.* at 664. This discussion, though brief, suggests that the Court may require proof that the defendant "intentionally violated a known legal duty."

Title 18 U.S.C. § 228 prohibits any willful failure to pay legal child support obligations. The legislative history of this act states that the language of the statute "willfully fails to pay" has been borrowed from the tax statutes that make willful failure to pay taxes a federal crime, and includes a requirement that the proof necessary to show a violation of the failure to pay child support statute is the element of an intentional violation of a known legal duty. *United States v. Williams*, 121 F.3d 615, 620-21 (11th Cir. 1997).

Final Instructions: Consideration of Mental State

7.03. KNOWINGLY

(No instruction recommended.)

Committee Comments

Although a definition of "knowingly" was provided in this section in the 1985 edition of this Manual, the Committee believes that in most cases the word "knowingly" does not need to be defined. *United States v. Smith*, 635 F.2d 716, 719-20 (8th Cir. 1980); *United States v. Gary*, 341 F.3d 829, 834 (8th Cir. 2003). An instruction is required only where necessary for a fair determination of the defendant's guilt or innocence. *United States v. Brown*, 33 F.3d 1014, 1017 (8th Cir. 1994).

If a definition is requested and deemed necessary, the Committee recommends the following:

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

A similar instruction was approved in *United States v. Dockter*, 58 F.3d 1284 (8th Cir. 1995).

In most statutes, the word "knowingly" does not require proof that the defendant knew he was violating the law. In *Bryan v. United States*, 524 U.S. 184 (1998), the Court explained:

> [T]he term "knowingly" does not necessarily have any reference to a culpable state of mind or to knowledge of the law. As Justice Jackson correctly observed, "the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law."

See, e.g., United States v. Udofot, 711 F.2d 831, 835-37 (8th Cir. 1983) [18 U.S.C. § 922(e)]; *United States v. Enochs*, 857 F.2d 491, 493 (8th Cir. 1988) [18 U.S.C. § 511(a)]. *See also United States v. Hutzell*, 217 F.3d 966, 968 (8th Cir. 2000) (statute providing penalties for those who "knowingly" violate separate statute prohibiting possession of a firearm by one who has been convicted of misdemeanor crime of domestic violence requires government to prove only that the defendant knew of facts constituting the offense, not that he knew it was illegal for him to posses a gun; statute does not require knowledge of the law nor an intent to violate it); *United States v. Sinskey*, 119 F.3d 712, 715-16 (8th Cir. 1997) (to establish that the defendant "knowingly violated" Clean Water Act (CWA) discharge limitations or condition or limitation contained in implementing permit, as basis for criminal liability, government was not required to prove that the defendant knew that his acts violated either CWA or permit, but merely that he was aware of conduct that resulted in permit's violation); *United States v. Farrell*, 69 F.3d 891, 893 (8th Cir. 1995) (to prove knowing violation of Firearms Owner's Protection Act (FOPA) provision which prohibits transfer of possession of machine guns, as required for imposition of statutory penalty, government need only prove knowing and intentional conduct, not knowledge

of the law). Nor does "knowingly" require knowledge of federal involvement. *United States v. Yermian*, 468 U.S. 63, 75 (1984) (18 U.S.C. § 1001).

In *Staples v. United States*, 511 U.S. 600 (1994), the Court, interpreting the National Firearms Act, 26 U.S.C. § 5861(d), which does not expressly contain any *mens rea* requirement in the provision criminalizing possession of a firearm that was not properly registered, held that the defendant had to "know" that his weapon possessed automatic firing capability to come within the Act. The Court emphasized a presumption in favor of a scienter requirement to statutory crimes which criminalize otherwise innocent conduct, in the absence of a clear legislative intent to the contrary. *But see United States v. Barr*, 32 F.3d 1320 (8th Cir. 1994), in which the Eighth Circuit held that, with respect to possession of weapons of quasi-suspect character, such as sawed-off shotguns, "a specific jury finding of [the defendant's] knowledge of the weapon's incriminating characteristics is unnecessary." *Id*. at 1324. The government need only prove that the defendant possessed the weapon, and had observed its characteristics. *Id. Accord United States v. Otto*, 64 F.3d 367, 370 (8th Cir. 1995).

Also, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the Court held that the term "knowingly" applies to the requirement that the individual who is transporting sexually explicit material must know that it depicts minors in order to convict under 18 U.S.C. § 2252. The Court again expressed its preference for a scienter requirement for statutes which criminalize otherwise innocent or constitutionally protected conduct.

In some statutes, however, "knowingly" has been construed to require knowledge that the defendant was breaking the law. In *United States v. Marvin*, 687 F.2d 1221 (8th Cir. 1982) and *Liparota v. United States*, 471 U.S. 419 (1985), the word "knowingly" in 7 U.S.C. § 2024(b) was interpreted as including knowledge that the defendant was violating the law. The statute reads in relevant part:

> [W]hoever knowingly uses, transfers, acquires . . . possesses [food] coupons . . . in any manner not authorized by this chapter. . .

Both courts further held the jury should have been instructed that the government had to prove that "the defendant knowingly did an act which the law forbids" but not that he knew the precise law or regulation forbidding food stamp trafficking. 687 F.2d at 1227; 471 U.S. at 434.

Where the offense requires that the defendant have some particular knowledge, that knowledge should be included in the elements of instruction. The elements of instruction in Section 6, *supra*, were drafted with this purpose in mind.

Final Instructions: Consideration of Mental State

7.04. DELIBERATE IGNORANCE/WILLFUL BLINDNESS

You may find that the defendant [(name)][1] acted knowingly if you find beyond a reasonable doubt that the defendant [(name)] believed there was a high probability that (state fact as to which knowledge is in question (e.g., that "drugs were contained in his suitcase")) and that [he] [she] took deliberate actions to avoid learning of that fact. Knowledge may be inferred if the defendant [(name)] deliberately closed [his] [her] eyes to what would otherwise have been obvious to [him] [her]. A willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. You may not find the defendant acted "knowingly" if you find he/she was merely negligent, careless or mistaken as to (state fact as to which knowledge is in question (e.g., that "drugs were contained in his suitcase")).

[You may not find that the defendant [(name)] acted knowingly [if you find that the defendant [(name)] actually believed that (state the proposition in the negative (e.g., that "no drugs were contained in his suitcase")).][2]]

Notes on Use

1. If there is more than one defendant and the instruction does not apply to all defendants, insert the name[s] of the defendant[s] to whom the instruction applies.

2. This clause should be included in an instruction if requested and supported by the evidence. *United States v. Esquer-Gamez*, 550 F.2d 1231, 1235-36 (9th Cir. 1977). Although no Eighth Circuit case states this rule, the Committee believes it to be good law and good practice. *See United States v. Bailey*, 955 F.2d 28, 29 (8th Cir. 1992). This clause was used and upheld in *United States v. Cunningham*, 83 F.3d 218, 221 (8th Cir. 1996) (in holding there was no error in giving the instruction, the court noted that the instruction was patterned after the Eighth Circuit Model Criminal Jury Instruction, which was based upon prior Eighth Circuit opinions).

Committee Comments

The concept of willful blindness is a limited exception to the requirement of actual knowledge. As stated in *Global-Tech Appliances v. SEB S.A.*, ___ U.S. ___, ___, 131 S. Ct. 2060 (2011), there are

> two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and

> negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. [Citations omitted.]

A willful blindness (deliberate ignorance) instruction should not be given when the evidence points solely to either actual knowledge or no knowledge of the facts in question. However, the instruction has been held "particularly appropriate" when a defendant "denies any knowledge of a criminal scheme despite strong evidence to the contrary." *United States v. Hayes*, 574 F.3d 460, 475 (8th Cir. 2009); *United States v. Whitehill*, 532 F.3d 746, 751 (8th Cir. 2007), *cert. denied*, ___ U.S. ___, 129 S. Ct. 610 (2008). As stated in *United States v. Chavez-Alvarez*, 594 F.3d 1062, 1067 (8th Cir. 2010), a jury may find willful blindness only if the defendant was aware of facts that put him on notice that criminal activity was probably afoot and he deliberately failed to make further inquiries, intending to remain ignorant (holding the government could prove defendants intentionally joined the conspiracy by proving that if defendants were not actually aware they were assisting in drug distribution, their ignorance was based entirely on a conscious decision to avoid learning the truth).

The instruction is appropriate where there is evidence of actual knowledge if there is sufficient evidence to support an inference of deliberate ignorance, *United States v. Lewis*, 557 F.3d 601, 613 (8th Cir. 2009), or where the defendant asserts a lack of guilty knowledge but the evidence supports an inference of deliberate ignorance, *United States v. Whitehill*, 532 F.3d at 751. Ignorance is deliberate if the defendant was presented with facts putting him on notice criminal activity was particularly likely and yet intentionally failed to investigate. *Id.* Stated differently, the instruction is proper where the evidence "support[s] the inference that the defendant was aware of a high probability of the existence of the fact in question *and* purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution." *United States v. Aleman*, 548 F.3d 1158, 1166 (8th Cir. 2008) (quoting *United States v. Barnhart*, 979 F.2d 647, 651 (8th Cir. 1992)), *cert. denied sub nom. Martinez-Menera v. United States*, ___ U.S. ___, 129 S. Ct. 2756 (2009). "If reasonable inferences support a finding the failure to investigate is equivalent to 'burying one's head in the sand,' the jury may consider willful blindness as a basis for knowledge." *Whitehill*, 532 F.3d at 751.

The Eighth Circuit has held that a jury cannot be led to convict a defendant improperly on a negligence standard where the instruction states the jury must not conclude the defendant had knowledge of criminal activity if he was simply careless or negligent. *Whitehill*, 532 F.3d at 752.

Where the defendant is under a specific duty to discover facts and the facts tendered to him are suspicious, as for example, in a securities fraud prosecution, an instruction that "reckless deliberate indifference to or disregard for truth or falsity" is equivalent to knowledge, may be proper in place of the reference to "conscious purpose to avoid learning the truth." *United States v. Weiner*, 578 F.2d 757, 787 (9th Cir. 1978).

Final Instructions: Consideration of Mental State

7.05. PROOF OF INTENT OR KNOWLEDGE

[Intent or knowledge may be proved like anything else. You may consider any statements made and acts done[1] by the defendant, and all the facts and circumstances in evidence which may aid in a determination of the defendant's knowledge or intent.]

[You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.]

Notes on Use

1. If the defendant has not testified, this language may need modification to make it clear that the instruction is referring to acts done or statements made in connection with the offense and not failure to testify in court. *See* Committee Comments, Instruction 4.01, *supra*.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 17.07 (5th ed. 2000); *United States v. Lawson*, 483 F.2d 535, 536 (8th Cir. 1973).

A more expanded version of both bracketed paragraphs of this instruction has been repeatedly approved by this circuit. *See United States v. Lawson*, 483 F.2d at 536-38 and cases cited therein approving instructions based on 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 17.07 (5th ed. 2000). *See also United States v. Martin*, 772 F.2d 1442, 1445 (8th Cir. 1985), in which this circuit approved the giving of the expanded instruction and expressly declined to overrule or reconsider prior opinions approving it and further held that the second paragraph was distinguishable from the presumption held unconstitutional in *Sandstrom v. Montana*, 442 U.S. 510 (1979). 772 F.2d at 1445-46. Likewise the Tenth Circuit has expressly recommended the use of both paragraphs of 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS, Criminal § 17.07 (5th ed. 2000), when instructing on this concept. *United States v. Bohlmann*, 625 F.2d 751, 753 (6th Cir. 1980).

8.00. FINAL INSTRUCTIONS: DEFINITIONS

Introductory Comment

In this section the Committee has included definitions of general terms found in many criminal statutes. More definitions are provided in the Instructions, Committee Comments, and Notes on Use in Sections 5, 6 and 7.

Final Instructions: Definitions

8.01. ATTEMPT [1]

The crime charged in [Count _____ of] the Indictment is an attempt to (describe attempted act, e.g., sell counterfeit currency.) A person may be found guilty of an attempt if [he] [she] intended to (describe attempted act, i.e., sell counterfeit currency) and voluntarily and intentionally carried out some act which was a substantial step[2] toward that (describe attempted act, i.e., sale).

Notes on Use

1. This definition should follow the elements instruction for the substantive crime.

2. An instruction defining "substantial step" may be given. This circuit has held the following definition to "adequately and correctly articulate the law":

> A substantial step, as used in the previous instruction, must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime. In order for behavior to be punishable as an attempt, it need not be incompatible with innocence, yet it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute. Crimes such as attempt to manufacture methamphetamine require a defendant to engage in numerous preliminary steps which brand the enterprise as criminal.

United States v. Wagner, 884 F.2d 1090 (8th Cir. 1989).

Committee Comments

See 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 21.03 (5th ed. 2000).

There is no general statute which makes "attempt" a federal crime, and thus it may be prosecuted only where a specific statute makes attempting to do an act a crime. *United States v. Manley*, 632 F.2d 978 (2d Cir. 1981); *United States v. York*, 578 F.2d 1036 (5th Cir. 1978). In this Manual, Instructions 6.18.472, 6.18.751, 6.18.1113, 6.18.1341, 6.18.1344, 6.18.1512, 6.18.1708, 6.18.1951, 6.18.2113, 6.18.2112, and 6.21.841A and C are all based on statutes which include certain attempted acts as offenses.

This circuit has adopted the definition of "attempt" set forth in section 5.01 of the A.L.I. Model Penal Code (Proposed Official Draft 1962) as requiring (l) an intent to engage in criminal conduct, and (2) conduct constituting a "substantial" step toward commission of the intended offense which strongly corroborates the actor's criminal intent. *See United States v. Joyce*, 693 F.2d 838, 841 (8th Cir. 1982). At the same time, this circuit rejected a verbal formulation dividing acts of preparation from acts of attempt as not useful and for this reason language to the

effect that "mere acts of preparation will not suffice," is not included. *See United States v. Joyce*. An attempt need not be successful to be culpable. *United States v. Joyce*.

"Factual impossibility," which refers to those situations in which a circumstance or condition, unknown to the defendant, makes the consummation of his intended criminal conduct impossible, is not a defense to an attempt. *United States v. Frazier*, 560 F.2d 884, 888 (8th Cir. 1977), noting that the "oft-recited example" is the would-be thief who attempts to pick a pocket. The attempt is still a crime even if the pocket turns out to be empty.

On the other hand "legal impossibility" is a defense to attempt but arises only in very limited circumstances. *Frazier*, defining "legal impossibility" as follows:

> "Legal impossibility" refers to those situations in which the intended acts, even if successfully carried out, would not amount to a crime. Thus, attempt is not unlawful where success is not a crime, and this is true even though the defendant believes his scheme to be criminal.

560 F.2d at 888. Many cases cannot be reconciled with the above principles. *See United States v. Berrigan*, 482 F.2d 171, 188-89 (3d Cir. 1973) and other examples enumerated in the *Berrigan* opinion at pp. 185-86.

8.02. POSSESSION: ACTUAL, CONSTRUCTIVE, SOLE, JOINT

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

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

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

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

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

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS, Criminal § 16.05 (5th ed. 2000); *United States v. Smith*, 104 F.3d 145, 148 n.2 (8th Cir. 1997); *United States v. Ali*, 63 F.3d 710 (8th Cir. 1995); *United States v. Johnson*, 857 F.2d 500, 501-02 n.2 (8th Cir. 1988); *United States v. Montgomery*, 819 F.2d 847, 851 (8th Cir. 1987); *Sewell v. United States*, 406 F.2d 1289, 1293 n.3 (8th Cir. 1969). *See also United States v. Henneberry*, 719 F.2d 941, 945 (8th Cir. 1983) (definition of constructive possession).

9.00. FINAL INSTRUCTIONS: DEFENSES AND THEORIES OF DEFENSE

Introductory Comment

The instructions in this section cover matters raised by the defense. Instructions -9.04 cover matters which are commonly referred to as "affirmative defenses." It should be noted that the defendant must carry the burden of proof only as to the defenses of coercion (Instruction 9.02), insanity (Instruction 9.03) and withdrawal from conspiracy (Instruction 5.06H). As to the defenses dealt with in Instructions 9.01 and 9.04, a defendant has only the burden of introducing sufficient evidence to raise the issue; once that has occurred, the government has the burden of disproving the defense beyond a reasonable doubt.

When any affirmative defense covered by Instruction 9.01 (entrapment) or 9.04 (self defense, etc.) is in issue, a requirement that the government disprove the defense, phrased in the negative, should be added to the verdict directing (elements) instruction, as provided for in the final paragraph of Instruction 3.09, *supra*, followed separately by the appropriate definition instruction from this Section 9. When the affirmative defense of coercion or duress (9.02), or insanity (9.03) is in issue, the final paragraph of the elements instruction should be modified as provided for in Note 3, Instruction 3.09, *supra*, and followed separately by Instruction 9.02 or 9.03. *See United States v. Norton*, 846 F.2d 521, 524-25 (8th Cir. 1988), holding that the affirmative defense should be included in the verdict directing (elements) instruction.

In some situations a defendant may be entitled to a "theory of defense" instruction, which is a different concept from an "affirmative defense." An "affirmative defense" introduces an additional element into the case which must be proved by the defendant, in the case of insanity, coercion or withdrawal from conspiracy, or disproved by the government, in the case of entrapment or self-defense. A "theory of defense," on the other hand, is a denial of one of the original elements of the offense. Since a theory of defense instruction would necessarily be drafted in terms of the particular facts and issues of each case, no attempt has been made to draft a general model instruction. Cases covering theory of defense instructions are discussed in Committee Comments, Instruction 9.05, to give guidance in drafting such an instruction. Specific theory of defense instructions which may be requested in certain circumstances are covered in Instructions 9.06, Intoxication; 9.07, Alibi; and 9.08, Good Faith.

Final Instructions: Defenses and Theories of Defense

9.01. ENTRAPMENT[1]

One of the issues in this case is whether the defendant was entrapped. The Government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped by showing **either**: (1) the defendant was willing to commit (insert description of crime charged) before [he] [she] was approached or contacted by law enforcement agents[2] or someone acting for the Government; **or** (2) the Government, or someone acting for the Government, did not persuade or talk the defendant into committing (insert description of crime charged). If you find that the Government proved at least one of these two things beyond a reasonable doubt, then you must reject the defendant's claim of entrapment. If you find that the Government failed to prove at least one of these two things beyond a reasonable doubt, then you must find the defendant not guilty.

The law allows the Government to use undercover agents, deception, and other methods to present a person already willing to commit a crime with the opportunity to commit a crime, but the law does not allow the Government to persuade an unwilling person to commit a crime. Simply giving someone a favorable opportunity to commit a crime is not the same as persuading [him] [her].

Notes on Use

1. When this instruction is submitted, the government's burden of proof that the defendant was not entrapped must be included in the elements instruction. *See* Instruction 3.09, *supra*. This instruction should immediately follow.

2. The Committee recommends that the law enforcement officer or agent who had contact with the defendant or who is shown by evidence to be responsible for inducing the defendant to commit a criminal act, designing the criminal act, etc., be identified by name and that his capacity as governmental agent, informant, etc., be described. If "agency," rather than the conduct of an admitted agent, is an issue, a supplement to this instruction may be required.

Committee Comments

This instruction has been revised to conform to *Jacobson v. United States*, 503 U.S. 540, 547 n.1 (1992), which clarified the issue of "timing." *Jacobson* held that the government must prove that the defendant was disposed to commit the criminal act prior to first being approached by governmental agents. *Id.*, n.2; *United States v. Loftus*, 992 F.2d 793 (8th Cir. 1993).

For general discussions of the law of entrapment, *see United States v. Norton*, 846 F.2d 521 (8th Cir. 1988), and *United States v. Dion*, 762 F.2d 674 (8th Cir. 1985). "The purpose behind the entrapment defense is to prevent law enforcement officers from manufacturing crime." *United States v. Hinton*, 908 F.2d 355, 358 (8th Cir. 1990). The focus of the entrapment defense, however, is on the intent or predisposition of the defendant to commit the crime, rather than upon the conduct of the government's agents. *Hampton v. United States*, 425 U.S. 484, 488 (1976). Even after *Jacobson*, a defendant's ready response to an opportunity to commit an offense may show (1) that there was no "inducement," as well as (2) that the defendant was independently predisposed to commit the offense. *See, e.g., United States v. LaChapelle*, 969 F.2d 632 (8th Cir. 1992).

"Entrapment is an affirmative defense which consists of two elements: government action to induce or otherwise cause the defendant to commit the crime, and the defendant's lack of predisposition to commit the crime." *United States v. Pfeffer*, 901 F.2d 654, 656 (8th Cir. 1990) (citing *United States v. Foster*, 815 F.2d 1200, 1201 (8th Cir. 1987)). A defendant is entitled to an entrapment instruction when there is "sufficient evidence from which a reasonable jury could find entrapment." *United States v. Felix*, 867 F.2d 1068, 1074 (8th Cir. 1989) (quoting *Mathews v. United States*, 485 U.S. 58, 61 (1988)); *see also United States v. Kutrip*, 670 F.2d 870, 877 (8th Cir. 1982). *Cf. United States v. Osborne*, 935 F.2d 32, 38 (4th Cir. 1991) (seldom, if ever, appropriate to decide prior to trial that the defendant is not entitled to an entrapment instruction). (For a list of evidentiary factors that may assist in determining whether an entrapment instruction is appropriate, *see United States v. Dion*, 762 F.2d at 687-88.) The government is not required to prove predisposition unless there is evidence of government inducement to commit the offense. To show inducement, there must be evidence of government conduct creating "a substantial risk that an undisposed person . . . would commit the offense." *United States v. Loftus*, 992 F.2d at 798; *United States v. Stanton*, 973 F.2d 608, 609 (8th Cir. 1992).

When entrapment is an issue to be resolved, it is ordinarily for the jury. *United States v. Hinton*, 908 F.2d at 357; *United States v. Pfeffer*, 901 F.2d at 656; *United States v. Williams*, 873 F.2d 1102, 1104 (8th Cir. 1989). A finding of entrapment as a matter of law, followed by judgment of acquittal, is appropriate when the evidence clearly shows (1) that the government induced the defendant to engage in the criminal conduct, and (2) that the defendant lacked the necessary predisposition to perform the criminal conduct. *United States v. Crump*, 934 F.2d 947, 956 (8th Cir. 1991); *United States v. Hinton*, 908 F.2d at 357; *see also United States v. Pfeffer*, 901 F.2d at 656. The court of appeals stated in *Crump*, 934 F.2d at 956, that the government's failure to establish the defendant's predisposition will result in reversal of a conviction only when the evidence clearly indicates:

> "[t]hat a government agent originated the criminal design; that the agent implanted in the mind of an innocent person the disposition to commit the offense; and that the defendant then committed the criminal act at the urging of the government." *United States v. Beissel*, 901 F.2d 1467, 1469 (8th Cir. 1990) (quoting *United States v. Resnick*, 745 F.2d 1179, 1186 (8th Cir. 1984)).

"The issue of whether an informant should be considered a government agent is generally an issue of fact for the jury." *United States v. York*, 830 F.2d 885, 889 (8th Cir. 1987) (citing *United States v. Hoppe*, 645 F.2d 630, 633 (8th Cir. 1981)). The entrapment defense does not extend to inducement by private citizens unless they are acting as agents of the government. *United States v. Leroux*, 738 F.2d 943, 947 (8th Cir. 1984). For a discussion of issues associated with activities of "private agents," standing to raise the entrapment defense, and "indirect entrapment," *see United States v. Neal*, 990 F.2d 355 (8th Cir. 1993); Marcus, *The Entrapment Defense*, §§ 802 and 803 (1989).

Mathews v. United States, 485 U.S. 58 (1988), holds that a defendant who denies the commission of the crime may nevertheless assert and have the jury instructed on the inconsistent defense of entrapment. However, for the defendant to be entitled to an instruction under these circumstances, there must be sufficient evidence from which a jury could find entrapment. *United States v. Felix*, 867 F.2d at 1074 n.11.

"Outrageous government conduct" in procuring the commission of an offense which would amount to a violation of due process, is frequently discussed, but infrequently (if ever) established. *See Gunderson v. Schlueter*, 904 F.2d 407, 410 n.8 (8th Cir, 1990); *United States v. Ford*, 918 F.2d 1343, 1349 (8th Cir. 1990), and *United States v. Musslyn*, 865 F.2d 945 (8th Cir. 1989). A claim of "outrageous conduct" is addressed to the court; no jury submission on the issue is required. *United States v. Dougherty*, 810 F.2d 763, 770 (8th Cir. 1987); *United States v. Quinn*, 543 F.2d 640 (8th Cir. 1976). The Eighth Circuit has acknowledged that "sentencing entrapment" may arise where outrageous official conduct has overcome the predisposition of a defendant to commit only low-quantity, low-value (thus lower offense level) crimes by inducing such a person to commit greater crimes subject to greater punishment under the Sentencing Guidelines. *United States v. Nelson*, 988 F.2d 798, 809 (8th Cir. 1993); *United States v. Stein*, 973 F.2d 600, 602 (8th Cir. 1992). These cases only recognize the possibility of "sentencing entrapment;" the opinions did not find it to exist. As a sentencing issue, "sentencing entrapment" would not be submitted to the jury.

A related issue may arise when the government agent engages in the conduct which forms the only basis for federal jurisdiction. *See United States v. Coates*, 949 F.2d 104 (4th Cir. 1991). Such issues are usually for the court and not a matter for jury instructions.

"Entrapment by estoppel" is a defense based on advice from a government official that certain conduct is legal. The defendant has the burden to establish that he was misled by the statements of a government official into believing his conduct was lawful. *United States v. Austin*, 915 F.2d 363 (8th Cir. 1990). The issue of "entrapment by estoppel" is a jury issue; however, Model Instruction 9.01 does *not* describe the defense. *Cf.*, the proposed (but not approved) instruction, in *United States v. LaChapelle*, 969 F.2d at 637.

Final Instructions: Defenses and Theories of Defense

9.02. COERCION OR DURESS [1]

If the defendant [committed] [participated in] the crime of (describe offense) only because [he] [she] reasonably feared that immediate, serious bodily harm would be inflicted upon [him] [her] [another person], if [he] [she] did not [commit] [participate in] the crime, and if the defendant had no reasonable opportunity to avoid that harm, then [he] [she] was coerced.

Notes on Use

1. When this instruction is submitted, the jury must be advised that the defendant has the burden of proof on it. *See* Instruction 3.09, Note 3, *supra*. This instruction should immediately follow.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 19.02 (5th ed. 2000).

Coercion and duress are used interchangeably. *United States v. Michelson*, 559 F.2d 567 n.3 (9th Cir. 1977). In *United States v. Bailey*, 444 U.S. 394, 409 (1980), the Court distinguished duress from necessity:

> Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of *duress* covered the situation where the *coercion* had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. (Emphasis added.)

Duress and coercion are treated as synonymous in Ninth Cir. Crim. Jury Instr. 6.4.1 (1997). Duress, coercion and compulsion are treated as synonymous in 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 19.02 (5th ed. 2000). Coercion and intimidation are treated as synonymous in Eleventh Circuit Pattern Jury Instructions: Criminal (Special) § 15 (1997).

The definition of coercion is set forth in *United States v. May*, 727 F.2d 764, 765 (8th Cir. 1984) (quoting *Shannon v. United States*, 76 F.2d 490, 493 (10th Cir. 1935)):

> Coercion which will excuse the commission of a criminal act must be immediate and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion and is not entitled to an instruction submitting that question to the jury.

See also United States v. Blankenship, 67 F.3d 673, 677-78 (8th Cir. 1995); *United States v. Campbell*, 609 F.2d 922, 924 (8th Cir. 1979; *United States v. Saettele*, 585 F.2d 307, 309 (8th Cir. 1978).

The defendant has the initial burden of introducing facts sufficient to trigger consideration of the coercion defense and must prove it by a preponderance of the evidence. *Dixon v. United States*, 548 U.S. 1 (2006).

This defense cannot be invoked if the defendant had a full opportunity to avoid the criminal act without danger of immediate death or serious bodily injury. *United States v. Saettele*, 585 F.2d at 309 n.2; *United States v. Logan*, 49 F.3d 352 (8th Cir. 1995). Similarly, the defense must fail if there was a reasonable, legal alternative which would not violate the law and which would also avoid the threatened harm. *United States v. Uthe*, 686 F.2d 636, 637 (8th Cir. 1982).

In escape from custody situations, in order to be entitled to a duress instruction an escapee must offer evidence "justifying his continued absence from custody as well as his initial departure, and . . . an indispensable element of such offer is testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity has lost its coercive force." *United States v. Bailey*, 444 U.S. 394, 412-13 n.9 (1980). The defendant must have submitted himself to proper authorities after obtaining safety.

Coercion typically is not a defense to murder. *See R.I. Recreation Center v. Aetna Casualty & Surety Co.*, 177 F.2d 603, 605 (1st Cir. 1949).

As with the use of defensive force, the defense of coercion or duress can exist not only when the defendant is personally threatened with the harm, but also when the harm threatened is to a third person. *See LaFave & Scott, Criminal Law*, 374-75, 385-88 (1972).

Final Instructions: Defenses and Theories of Defense

9.03. INSANITY (18 U.S.C. § 20)

A defendant was insane if, at the time of the alleged criminal conduct, as a result of a severe mental disease or defect, [he] [she] was unable to appreciate the nature and quality or the wrongfulness of [his] [her] acts.[1]

Notes on Use

1. This instruction should be used with and follow the burden of proof instruction contained in Note 3, Instruction 3.09, *supra*.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 19.03 (5th ed. 2000).

The present instruction has been drafted to conform to the relevant provisions of the Comprehensive Crime Control Act of 1984, Public Law 98-473, §§ 401 *et seq.*, 18 U.S.C. § 20. As regards the defense of insanity, the Act has four features of particular importance here:

(a) The burden of proof with respect to the defense is placed *upon the defendant*. *See* section 402(b). This reverses the situation which existed in the past. *See, e.g., United States v. Gilliss*, 645 F.2d 1269, 1280 (8th Cir. 1981).

(b) The quantum of proof necessary to sustain the defense is "clear and convincing" evidence. *See* section 402(b); *United States v. Amos*, 803 F.2d 419, 420-22 (8th Cir. 1986).

(c) The substantive test for insanity is changed, at least as concerns the law previously adopted in the Eighth Circuit. *See, e.g., United States v. Frazier*, 458 F.2d 911, 917 (8th Cir. 1972); *United States v. Lewellyn*, 723 F.2d 615 (8th Cir. 1983). In essence, the statute has now eliminated the "irresistible impulse" alternative. *See* section 402(a). The language employed in the present instruction is a verbatim recitation of that employed by the statute.

(d) If the jury accepts the defense, the necessary finding is "not guilty by reason of insanity," rather than simply "not guilty." *See* section 403(a) (amendment of 18 U.S.C. § 4242(b)). Thus, in a case where the defense is raised, the jury will have a choice between three verdicts: (a) guilty; (b) not guilty; and (c) not guilty by reason of insanity.

Additionally, although not relevant for instructional purposes, the Committee notes the amendment to Rule 704 of the Federal Rules of Evidence, which will prohibit an expert witness from stating "an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." *See* section 406. *But see United States v. Bartlett*, 856 F.2d 1071 (8th Cir. 1988) (Insanity Defense Reform Act allows defense to present expert evidence that a mental disease or defect, including

diminished responsibility, at the time of the alleged crime rendered the defendant incapable of forming the requisite intent. The case suggests that the instructions specifically or as a whole should permit the defendant to argue this as a theory of defense. *See* Instruction 9.05, *infra*.)

A bracketed instruction which appears in earlier printings of this edition, advising the jury that a defendant found not guilty by reason of insanity will be committed, has been removed since the decision on which it was based has been vacated. *United States v. Neavill*, 868 F.2d 1000 (8th Cir.), *vacated*, 877 F.2d 1394 (8th Cir. *en banc* 1989).

Final Instructions: Defenses and Theories of Defense

9.04. SELF DEFENSE - DEFENSE OF THIRD PERSON [1]

If a person reasonably believes that force is necessary to protect [himself] [herself] [another person] from what [he] [she] reasonably believes to be unlawful physical harm about to be inflicted by another and uses such force, then [he] [she] acted in [self defense] [defense of __].

[However, self defense which involves using force likely to cause death or great bodily harm is justified only if the person reasonably believes that such force is necessary to protect [himself] [herself] [the third person] from what [he] [she] reasonably believes to be a substantial risk of death or great bodily harm.][2]

Notes on Use

1. When this instruction is submitted, the government's burden of proof that the defendant was not acting in self defense must be included in the elements instruction. *See* Instruction 3.09, *supra*. This instruction should immediately follow.

2. Use only if an issue in the case.

Committee Comments

See United States v. Walker, 817 F.2d 461, 463 (8th Cir. 1987); 2A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 45.19 (5th ed. 2000).

A defendant asserting self defense is admitting the commission of the offense charged, but is offering a justification for his actions. The defendant may also raise other, inconsistent defenses. *United States v. Fay*, 668 F.2d 375, 378 (8th Cir. 1981).

Although a defendant asserting self defense is not required to have retreated before resorting to force, *United States v. Peterson*, 483 F.2d 1222, 1236 (D.C. Cir. 1973), the availability of retreat may be a factor for the jury to consider in evaluating whether unreasonable force was used. *United States v. Goodface*, 835 F.2d 1233, 1235-36 (8th Cir. 1987); *United States v. Loman*, 551 F.2d 164, 168 (7th Cir. 1977). An aggressor need not have been armed in order for a defendant to raise a self defense issue, although whether an aggressor was armed may be relevant in determining the degree of force a defendant was entitled to use. *United States v. Fay*, 668 F.2d at 378.

The right to use self defense is not necessarily restricted to "pure" assault situations. For example, one would presumably be entitled to use self defense to prevent himself from being kidnaped. Even though kidnaping certainly would, in a general, theoretical sense, involve "unlawful physical harm," the instruction might well need to be modified in that situation to state more accurately the harm being defended against.

Final Instructions: Defenses and Theories of Defense

9.05. THEORY OF DEFENSE

[No model instruction provided.][1]

Notes on Use

1. As stated in the Introductory Comment to Section 9.00, *supra*, no general model instruction is provided because each such instruction must be drafted in accord with the particular issues of the case. Some particular instructions follow in Instructions 9.06, 9.07 and 9.08, *infra*.

Committee Comments

See Introductory Comment, Section 9.00, *supra*.

A criminal defendant is entitled to have the jury instructed on a defense theory if a timely submission is made of an instruction that correctly states the law and is supported by the evidence. *United States v. Mercer*, 853 F.2d 630, 633 (8th Cir. 1988); *United States v. Jerde*, 841 F.2d 818, 820 (8th Cir. 1988); *United States v. Montgomery*, 819 F.2d 847, 851 (8th Cir. 1987); *United States v. Johnson*, 767 F.2d 1259, 1267 (8th Cir. 1985); *United States v. Lisko*, 747 F.2d 1234, 1237-38 (8th Cir. 1984); *United States v. Brake*, 596 F.2d 337, 339 (8th Cir. 1979); *United States v. Brown*, 540 F.2d 364, 380 (8th Cir. 1976).

It has been held reversible error not to give a properly requested instruction, which is supported by the evidence, contains a correct statement of law and is not otherwise covered in the instructions. *United States v. Manning*, 618 F.2d 45, 47-48 (8th Cir. 1980) (failure to instruct that mere presence or proximity to an unregistered weapon is an insufficient basis for conviction); *United States v. Prieskorn*, 658 F.2d 631, 636 (8th Cir. 1981) (failure to instruct that the relationship between buyer and seller of drugs does not alone establish a conspiracy, but *note* Judge Henley's dissent, p.637); *United States v. Vole*, 435 F.2d 774, 776-77 (7th Cir. 1970) (failure to give a requested instruction that the defendant was framed).

It is equally axiomatic, however, that a defendant is not entitled to a particularly worded instruction setting out his position where the instructions given by the trial judge correctly cover the substance of the requested instruction. *United States v. Brake*, 596 F.2d at 339; *United States v. Lisko*, 747 F.2d at 1237-38. *See also United States v. Mercer*, 853 F.2d at 633, holding that the defendant's proposed instruction (which had been required by the Fifth Circuit in *United States v. Lewis*, 592 F.2d 1282, 1285 (5th Cir. 1979)) was cumulative and hence failure to give it was not error. Even if the tendered instruction is proper and in form suitable for use by the court, the court retains discretion in framing the instruction. *United States v. Brown*, 540 F.2d at 380-81.

Moreover, instructions that do not meet all of the above criteria may be properly refused. Thus instructions that do not contain a proper statement of the law are properly refused. *United States v. Johnson*, 767 F.2d 1259, 1266-69 (8th Cir. 1985) (proposed instruction did not properly state the law as to when property can "lose" its "stolen" character); *United States v. Montgomery*,

819 F.2d 847, 851-52 (8th Cir. 1987) (proposed instruction did not properly cover the elements of constructive possession). *United States v. McQuarry*, 726 F.2d 401, 402 (8th Cir. 1984) (proposed instruction that failure to flee was evidence of innocence was not the law). *See also United States v. Clark*, 701 F.2d 68, 70 (8th Cir. 1983).

The trial court can properly refuse an instruction which merely rephrases the jury's obligation to find all of the elements beyond a reasonable doubt. *United States v. Rabbitt*, 583 F.2d 1014, 1024 (8th Cir. 1978); *United States v. Shigemura*, 682 F.2d 699, 703-05 (8th Cir. 1982).

Instructions not based on the evidence can be properly refused. *United States v. Montgomery*, 819 F.2d at 851-52 (no evidence at trial that witness made the statements on which proffered instruction was based); *United States v. Peltier*, 585 F.2d 314, 328-29 (8th Cir. 1978) (no evidence at trial that government induced witnesses to testify falsely). There must be some evidence to support the defense, even if it is "weak, inconsistent or dubious." *United States v. Casperson*, 773 F.2d 216, 223 n.12 (8th Cir. 1985). However a defense need not be submitted to a jury unless it can be said that a reasonable person "might conclude" the evidence supports the defendant's position. *United States v. Kabat*, 797 F.2d 580, 590-91 (8th Cir. 1986).

It is further essential that the instructions be in a form suitable for use by the court. *United States v. Nance*, 502 F.2d 615, 619 (8th Cir. 1974). There must be an appropriate statement of law for the jury to apply to the facts. Instructions which depart from this have been uniformly rejected. Thus instructions which are merely argumentative may be properly refused. *United States v. Meyer*, 808 F.2d 1304, 1307 (8th Cir. 1987); *United States v. Finestone*, 816 F.2d 583, 590 (11th Cir. 1987); *United States v. Bolts*, 558 F.2d 316, 323 (5th Cir. 1977).

Instructions which are long and verbose and contain detailed descriptions of the purported evidence and inferences drawn therefrom by defense counsel have been properly refused. *United States v. Lisko*, 747 F.2d at 1237-38; *United States v. Nance*, 502 F.2d at 619-22. A narrative recitation of the defendant's version of the facts is likewise unacceptable:

> A trial judge may refuse an instruction if its language gives undue emphasis to defendant's version of the facts rather than being “a statement of appropriate principles of [the] law for the jury to apply to the facts,” (*United States v. Nevitt*, 563 F.2d 406, 409 (9th Cir. 1977)) or if it would tend to influence the jury towards accepting the defendant's version of the facts. *United States v. Hall*, 552 F.2d 273, 275 (9th Cir. 1977).

United States v. Davis, 597 F.2d 1237, 1240 (9th Cir. 1979). Likewise the court may refuse an instruction which only comments on evidence favorable to the defendant without presenting a legally cognizable defense. *United States v. Silverman*, 745 F.2d 1386, 1399-1400 (11th Cir. 1984).

It has also been held that certain obvious concepts cannot be elevated to a "theory of defense." *United States v. Peltier*, 585 F.2d at 328 (if government induced witnesses to testify falsely, this is affirmative evidence of weakness of government's case--rejected); *Laughlin v.*

United States, 474 F.2d 444, 455 (D.C. Cir. 1972) (if the jury believes defense testimony denying guilt, it should acquit--rejected). *Peltier* quoted *Laughlin* as follows:

> What is required before the theory of the case rule comes into play is a more involved theory involving 'law' or fact, or both, that is not so obvious to any jury.

585 F.2d at 328.

There is no duty to give a theory of defense instruction that has not been requested, *United States v. Hamilton*, 420 F.2d 1096, 1098-99 (7th Cir. 1970), and failure to give an instruction without a request is ordinarily not plain error. *United States v. Peltier*, 585 F.2d at 329-30.

For the elements of a necessity/justification defense generally, *see United States v. Andrade-Rodriguez*, 531 F.3d 721, 723 (8th Cir. 2008) (citing *United States v. Luker*, 395 F.3d 830, 832 (8th Cir. 2005)).

Final Instructions: Defenses and Theories of Defense

9.06. INTOXICATION; DRUG USE

One of the issues in this case is whether the defendant was [intoxicated] [taking drugs] at the time the acts charged in the Indictment were committed.

Being under the influence of [alcohol] [a drug], [even one taken for medical purposes,] provides a legal excuse for the commission of a crime only if the effect of the [alcohol] [drug] makes it impossible for the defendant to have (insert mental state required by statute.) Evidence that the defendant acted while under the influence of [alcohol] [drug or drugs] may be considered by you, together with all the other evidence, in determining whether or not [he] [she] did in fact have (insert mental state required by statute.)

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 19.05 (5th ed. 2000).

See also Committee Comments, Instructions 9.00, 9.05, *supra*; *United States v. Fay*, 668 F.2d 375, 377 (8th Cir. 1981).

"Intoxication" is a theory of defense which may be submitted to the jury upon a proper request if there is a foundation in the evidence and if the crime charged is one which has traditionally fallen in the "specific intent" category. *United States v. Fay* (reversible error not to give instruction).

Voluntary intoxication might serve to negate the required mental element in a crime involving what has historically been termed "specific intent." This is the view the Eighth Circuit has taken for many years. *See, e.g.*, *United States v. Fay* (assault with a deadly weapon under 18 U.S.C. §§ 1153 and 113(c) is a specific intent offense, as to which voluntary intoxication can be a defense; assault resulting in serious bodily harm, under 18 U.S.C. §§ 153 and 113(b), is not); *United States v. Hanson*, 618 F.2d 1261 (8th Cir. 1980) (assault on a federal officer in violation of 18 U.S.C. § 111 is a "general intent" offense and voluntary intoxication is no defense); *United States v. Bald Eagle*, 849 F.2d 361 (8th Cir. 1988) (voluntary manslaughter is a crime of general intent); *United States v. Johnston*, 543 F.2d 55 (8th Cir. 1976) (bank robbery, under 18 U.S.C. § 2113(a), is a "general intent" offense, and intoxication is irrelevant). *United States v. Lavallie*, 666 F.2d 1217 (8th Cir. 1981) (rape is a general intent offense and intoxication is not a defense).

The definition and use of the terms "specific" and "general" intent in jury instructions has been abandoned in this manual, however these concepts must be addressed by the court to determine if an intoxication instruction would be applicable. It would be necessary to examine the case law under a particular statute to determine whether the crime has been held to be one involving a "specific intent."

Final Instructions: Defenses and Theories of Defense

9.07. ALIBI

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

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 19.07 (5th ed. 2000).

See also Committee Comments, Instruction 9.05, *supra*.

"Alibi" is a theory of defense which may be submitted to the jury upon a proper request if there is a foundation in the evidence, and when the defendant's presence at the scene of the crime is necessary for conviction. *United States v. Webster*, 769 F.2d 487, 490 (8th Cir. 1985).

Where the defendant's presence at the scene is not necessary, as for example in conspiracy or aiding and abetting cases, this instruction should not be given. *United States v. Anderson*, 654 F.2d 1264, 1270-71 (8th Cir. 1981). Likewise this instruction should not be given where there is no foundation in the evidence or if it has not been requested.

Final Instructions: Defenses and Theories of Defense

9.08A. GOOD FAITH (Fraud Cases)

One of the issues in this case is whether the defendant acted in "good faith." "Good faith" is a complete defense to the crime of [mail] [wire] [bank] [health care] [securities] fraud if the defendant did not act with [the intent to defraud] [the intent to obtain money or property by means of false or fraudulent pretenses, representations, or promises], which is an element of the charge.[1] The essence of the good-faith defense is that one who acts with honest intentions cannot be convicted of a crime requiring fraudulent intent.[2]

The phrase "good faith" includes, among other things, an opinion or belief honestly held, even if the opinion is in error or the belief is mistaken.[3] However, even though a defendant honestly held a certain opinion or belief (such as a belief that a business venture would ultimately succeed, that investors would make a profit, or that investors would not lose money), a defendant does not act in good faith if he or she also knowingly made false or fraudulent representations or promises, or otherwise acted with the intent to defraud or deceive another.[4] Proof of fraudulent intent requires more than proof that a defendant only made a mistake in judgment or management, or was careless.[5]

The Government has the burden of proving beyond a reasonable doubt that the defendant acted with the [the intent to defraud] [the intent to obtain money or property by means of false or fraudulent pretenses, representations, or promises].[6] Evidence that the defendant acted in "good faith" may be considered by you, together with all the other evidence, in determining whether or not the defendant acted with [the intent to defraud] [the intent to obtain money or property by means of false or fraudulent pretenses, representations, or promises].[7]

Notes on Use

1. *See* Instruction 6.18.1341 which defines "intent to defraud" in the context of mail fraud.

2. *See United States v. Brown*, 478 F.3d 926, 928 (8th Cir. 2007) (quoting *United States v. Sherer*, 653 F.2d 334, 338 (8th Cir. 1981)); *see also United States v. Ammons*, 464 F.2d 414, 417 (8th Cir. 1972).

3. *See United States v. DeRosier*, 501 F.3d 888, 893 n.5 (8th Cir. 2007) (quoting *Ammons*, 464 F.2d at 417).

4. *See United States v. Behr*, 33 F.3d 1033, 1035 n.7 (8th Cir. 1994); *United States v. Cheatham*, 899 F.2d 747, 751 (8th Cir. 1990).

5. *See United States v. DeRosier*, 501 F.3d 888, 893 n.5 (8th Cir. 2007) (quoting *Ammons*, 464 F.2d at 417).

6. *See United States v. Cegelka*, 853 F.2d 627, 628 (8th Cir. 1988).

7. *See Brown*, 478 F.3d at 928.

Committee Comments

"The essence of a good-faith defense is that one who acts with honest intentions cannot be convicted of a crime requiring fraudulent intent." *United States v. Brown*, 478 F.3d 926, 928 (8th Cir. 2007) (quoting *United States v. Sherer*, 653 F.2d 334, 338 (8th Cir.1981)).

A good-faith instruction is not necessary when a defendant denies the conduct which is charged as fraudulent and the issue is essentially one of credibility. *Scherer*, 653 F.2d at 337-38.

The court should follow the same principles in deciding whether to give a particular good-faith instruction as it follows in deciding whether to give a theory-of-defense instruction in general. As the Eighth Circuit Court of Appeals held in *United States v. Brake*:

> There is no question that a defendant in a criminal case is entitled to have the jury know what he contends, and that ordinarily he is entitled to a "theory of defense" or a "position" instruction if he makes a timely request for such an instruction, if the request is supported by evidence, and if it sets out a correct declaration of law. *United States v. Hill*, 589 F.2d 1344 (8th Cir. 1979); *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978); *United States v. Nance*, 502 F.2d 615 (8th Cir. 1974).
>
> However, a defendant is not entitled to a particularly worded instruction setting out his position where the instructions actually given by the trial judge adequately and correctly cover the substance of the requested instruction. *United States v. Brown*, 540 F.2d 364, 380 (8th Cir. 1976). And, of course, the instructions of the trial court must be considered as a whole.

596 F.2d 337, 339 (8th Cir. 1979); *see also United States v. Cegelka*, 853 F.2d 627, 628-29 (8th Cir. 1988); *United States v. Jerde*, 841 F.2d 818, 823 (8th Cir. 1988); *United States v. Casperson*, 773 F.2d 216, 223 (8th Cir. 1985).

Since a good-faith instruction is essentially a converse of the intent-to-defraud instruction, courts have held that adequate instructions on intent to defraud are sufficient to present the issue to the jury, regardless of whether the defendant requested a good-faith instruction. *See, e.g.*, *Brown*, 478 F.3d at 928; *Scherer*, 653 F.2d at 338; *but see Casperson*, 773 F.2d at 222 (holding that the failure to give any good-faith instruction in that case was reversible error).

Final Instructions: Defenses and Theories of Defense

This instruction is based in large part on the general good-faith instruction for mail-fraud cases that was approved in this circuit in *United States v. Ammons*, as follows:

> Fraudulent intent is not presumed or assumed; it is personal and not imputed. One is chargeable with his own personal intent, not the intent of some other person. Bad faith is an essential element of fraudulent intent. Good faith constitutes a complete defense to one charged with an offense of which fraudulent intent is an essential element. One who acts with honest intention is not chargeable with fraudulent intent. Evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent. In order to establish fraudulent intent on the part of a person, it must be established that such person knowingly and intentionally attempted to deceive another. One who knowingly and intentionally deceives another is chargeable with fraudulent intent notwithstanding the manner and form in which the deception was attempted.

464 F.2d 414, 417 (8th Cir. 1972); *see also Casperson*, 773 F.2d at 223 ("The *Ammons* instruction they proffered has previously been approved by this court and is an acceptable statement of the applicable law.").

A good-faith instruction must make it clear to the jury that good faith would be an absolute defense to the crime. *United States v. Nance*, 502 F.2d 615, 620 (8th Cir. 1974). Both *Nance* and *Ammons* suggest but do not require that a good-faith instruction incorporate the specific factors on which the appellant relied to show he or she acted in good faith. *Ammons*, 464 F.2d at 417; *Nance*, 502 F.2d at 620. An example of such an instruction was approved in *United States v. Kimmel*, 777 F.2d 290, 292-93 n.l (5th Cir. 1985). However, *Ammons* makes clear that "[t]he jury need not be instructed on every inference that it might draw bearing on the issue of good faith." 464 F.2d at 417. The court in *Nance* found a proposed good-faith instruction inadequate where it contained a long and detailed description of the purported evidence and contained inferences drawn therefrom by defense counsel. 502 F.2d at 619.

A good-faith instruction is not required where it is not supported by the evidence. *Sherer*, 653 F.2d at 337 (defendant doctor claimed to have actually treated patient, not that bills were the result of mistake or inadvertence).

It should be noted that "good faith" is only a defense where the defendant's mental state is one of the elements of the offense. *See United States v. Gonzalez-Chavez*, 122 F.3d 15, 17 (8th Cir. 1997) (rejecting the good-faith defense in a case alleging illegal reentry under 18 U.S.C. § 1326 because specific intent is not an element of the crime).

Final Instructions: Defenses and Theories of Defense

9.08B. GOOD FAITH (Tax Cases)

One of the issues in this case is whether the defendant acted in "good faith." "Good faith" is a complete defense to the crime of [attempting to evade and defeat any tax] [failing to [collect] [account truthfully for] [or] [pay over] an employment tax] [failing to file the required tax return on or before the time required by law] [making and subscribing to a false tax return], if the defendant did not act willfully, which is an element of the charge.[1] The essence of the good-faith defense is that one who acts with honest intentions cannot be convicted of a crime requiring proof that the defendant acted willfully, that is, voluntarily and intentionally violating a known legal duty.[2]

The phrase "good faith" includes, among other things, an opinion or belief honestly held, even if the opinion is in error or the belief is mistaken, and the intent to perform all lawful obligations.[3] Proof of willfulness requires more than proof that a defendant only misunderstood the requirements of the law, made a mistake in judgment, or was careless.[4] [For example, if a person in good faith believes that an income tax return, as prepared by [him] [her], truthfully reports the taxable income and allowable deductions of the taxpayer under the Internal Revenue laws, that person cannot be guilty of willfully making and subscribing to a false tax return.[5]] [For example, if a person in good faith believes that [he] [she] is not required to file an income tax return, then that person cannot be guilty of willfully failing to file a tax return.[6]]

Mere disagreement with the law in and of itself, however, does not constitute a good-faith misunderstanding of the requirements of the law. That is because it is the duty of all persons to obey the law whether or not they agree with it.[7] A person's belief that the tax laws violate [his] [her] constitutional rights does not constitute a good-faith misunderstanding of the requirements of the law. Also, a person's disagreement with the Government's monetary system and policies does not constitute a good-faith misunderstanding of the requirements of the law.[8]

It is for you to decide whether the defendant acted in good faith -- that is, whether [he] [she] sincerely misunderstood the requirements of the law -- or whether the defendant knew the requirements of the law and chose not to comply with those requirements.[9] The Government has the burden of proving beyond a reasonable doubt that the defendant acted willfully.[10] Evidence

that the defendant acted in "good faith" may be considered by you, together with all the other evidence, in determining whether or not [he] [she] acted willfully.[11]

Notes on Use

1. *See* Instructions 6.26.7201, 6.26.7202, 6.26.7203, and 6.26.7206, which define the phrase "[t]o act 'willfully'" as "to voluntarily and intentionally violate a known legal duty." No separate definition of "willfully" is recommended because the definition has been incorporated in the instruction itself.

2. *See United States v. Renner*, 648 F.3d 680, 687 (8th Cir. 2011).

3. *See United States v. DeRosier*, 501 F.3d 888, 893 n.5 (8th Cir. 2007) (quoting *United States v. Ammons*, 464 F.2d 414, 417 (8th Cir. 1972)).

4. *United States v. Kouba*, 822 F.2d 768, 771 (8th Cir. 1987).

5. *Id.*

6. *See United States v. Jerde*, 841 F.2d 818, 822 (8th Cir. 1988).

7. *See Cheek v. United States*, 498 U.S. 192, 202-03 (1991); *United States v. Miller*, 634 F.2d 1134, 1135 (8th Cir. 1980).

8. *Id.*

9. *Id.*

10. *See United States v. Cegelka*, 853 F.2d 627, 628 (8th Cir. 1988); *see also Bryan v. United States*, 524 U.S. 184, 195 n.17 (1998).

11. *See United States v. Beale*, 574 F.3d 512, 518 (8th Cir. 2009).

Committee Comments

"Good faith" is a theory of defense in tax evasion, failure to file a tax return, employment tax, and false return cases. Where the defendant has presented evidence of good faith, he or she is entitled to a good-faith jury instruction. *See* Instruction 9.08A, *infra*; *United States v. Kouba*, 822 F.2d 768, 771 (8th Cir. 1987).

Tax cases in which good-faith instructions have been found proper include *Kouba*, 822 F.2d at 771 and *United States v. Jerde*, 841 F.2d 818, 822 (8th Cir. 1988).

For additional points, *see* Committee Comments to Instruction 9.08A, *infra*.

Final Instructions: Defenses and Theories of Defense

9.09. ADVICE OF COUNSEL

One of the issues in this case is whether the defendant in good faith followed the advice of [his] [her] counsel, that is, [his] [her] attorney. [Advice of counsel is not a defense to the crime.[1]] Advice of counsel is a circumstance that may be considered by you in determining whether the defendant acted in good faith and lacked (insert mental state required by statute, e.g., intent to defraud or willfulness).

The defendant does not act (insert mental state required by statute, e.g., with intent to defraud or willfully) if (1) before taking action with regard to the alleged offense, the defendant in good faith consulted an attorney whom the defendant considered competent; (2) the defendant's consultation with the attorney was for the purpose of securing advice on the lawfulness of the defendant's possible future conduct; (3) the defendant made a full and accurate report to that attorney of all material facts known to the defendant; and (4) the defendant then acted strictly in accordance with the advice the attorney gave the defendant.[2]

Whether the defendant in good faith followed the advice of counsel by meeting all four of the above prerequisites is for you to determine.[3]

Notes on Use

1. Advice of counsel is not a defense, but rather is a more specific form of the good-faith defense and is only a circumstance that may be considered in determining whether the defendant acted in good faith and lacked specific intent to violate the law. *See United States v. Poludniak*, 657 F.2d 948, 958-59 (8th Cir. 1981). As the Supreme Court has held, "no man can willfully and knowingly violate the law, and excuse himself from the consequences thereof by pleading that he followed the advice of counsel." *Williamson v. United States*, 207 U.S. 425, 453 (1908) (citing *Poludniak*, 657 F.2d at 959).

2. The advice-of-counsel instruction should not be given in cases that do not require specific intent or willfulness as an element. *See, e.g., United States v. Powell*, 513 F.2d 1249 (8th Cir. 1975) (holding the defendant is not entitled to a reliance on advice-of-counsel instruction in case that charged unlawful firearms dealing under 18 U.S.C. § 922(a)(1) because specific intent or knowledge of the defendant that he or she is violating the law is not an essential element of that crime).

3. In appropriate cases, where the prerequisites are met, the jury may be instructed as to good-faith reliance on advice of an accountant or tax return preparer. *United States v. Renner*, 648 F.3d 680, 687 (8th Cir. 2011); *United States v. Meyer*, 808 F.2d 1304, 1306 (8th Cir. 1987). In such cases, the instruction should be revised accordingly.

Committee Comments

A defendant who cannot meet the prerequisites for an advice-of-counsel instruction, such as a defendant who cannot show that he or she fully informed his counsel of his actions and then relied upon counsel's advice that his or her actions were legal, is not entitled to an advice-of-counsel instruction. *See, e.g.*, *United States v. Petters*, 663 F.3d 375, 384-85 (8th Cir. 2011) (citing *United States v. Rice*, 449 F.3d 887, 896-97 (8th Cir. 2006)) ("[A] defendant is not immunized from criminal prosecution merely because he consulted an attorney in connection with a particular transaction."). Stated another way, the defendant must come forward with a showing of facts that support the advice-of-counsel defense before the court should give the instruction. *Rice*, 449 F.3d at 897 (citing *United States v. Parker*, 364 F.3d 934, 945-46 (8th Cir. 2004))*; see also United States v. Washburn*, 444 F.3d 1007, 1013 (8th Cir. 2006). In *Rice*, a case charging false statements in violation of 18 U.S.C. § 1001 and conversion of property to the Farm Services Agency in violation of 18 U.S.C. § 658, the Eighth Circuit found there was no error where the district court declined to give a reliance on advice of counsel defense because the defendant had failed to establish the factual basis necessary to support the instruction. *Id.* The court held that "a defendant is not immunized from criminal prosecution merely because he consulted an attorney in connection with a particular transaction. Rather, to rely upon the advice of counsel in his defense, a defendant must show that he: (i) fully disclosed all material facts to his attorney before seeking advice; and (ii) actually relied on his counsel's advice in the good faith belief that his conduct was legal." *Id.*

10.00. SUPPLEMENTAL INSTRUCTIONS

Introductory Comment

This section addresses instructions which may be given after the jury has begun its deliberations.

Supplemental Instructions

10.01. RESPONSE TO QUESTIONS NECESSITATING SUPPLEMENTAL INSTRUCTIONS

MEMBERS OF THE JURY:

I have received a note signed by your foreperson which reads as follows:

"(Insert note.)"

(Insert response.)

[[This] [these] instruction[s] should be taken together with the instructions I previously gave to you. The instructions must be considered as a whole. [Remember that the defendant is presumed to be innocent and this presumption can be overcome only if the Government proves, beyond a reasonable doubt, each element of the crime charged.[1]]][2]

Notes on Use

1. This language is recommended if the burden of proof or presumption of innocence is not otherwise covered in the supplemental instruction.

2. This paragraph is recommended if supplemental instructions are given or original instructions are reread.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 20.07 (5th ed. 2000).

The response to a jury request for supplemental instructions is a matter within the sound discretion of the trial judge. *United States v. Skarda*, 845 F.2d 1508, 1512 (8th Cir. 1988); *United States v. Neiss*, 684 F.2d 570, 572 (8th Cir. 1982); *United States v. Piatt*, 679 F.2d 1228, 1231 (8th Cir. 1982). If a supplemental instruction is given, it must be responsive. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946); *United States v. Skarda*, 845 F.2d at 1512; *United States v. Neiss*, 684 F.2d at 572; *United States v. Piatt*, 679 F.2d at 1231. The discretion of the court goes to the decision to reply and, if a reply is given, whether that reply should refer back to or reread instructions already given or consist of new instructions. A response need not address more than the question specifically requested. *United States v. Piatt*, 679 F.2d at 1231. Thus, there is no requirement that all instructions be reread. *United States v. Piatt*, 679 F.2d at 1231; *United States v. Humphrey*, 696 F.2d 72, 75 (8th Cir. 1982). "[A] trial court is not required to speculate upon the purpose of the jury's inquiry during its deliberations[;] the court, if it chooses to reply, should answer the inquiry within the specific limits of the questions presented." *United States v. Neiss*, 684 F.2d at 572. *See also United States v. Arpan*, 887 F.2d 873 (8th Cir. *en banc* 1989).

Supplemental Instructions

Any supplemental instructions must be impartial. "A trial judge must be painstakingly impartial anytime he communicates with the jury during deliberations. He must insure that any supplemental instructions are accurate, clear, neutral and nonprejudicial." *United States v. Skarda*, 845 F.2d at 1512. Accuracy may sometimes require a response which correctly states the law rather than a yes or no answer which would not help the jury address the issues it is supposed to decide. *See United States v. Felak*, 831 F.2d 794, 798 (8th Cir. 1987). If the response is already contained in the jury instructions, a reference to the original charge is all that is necessary. *United States v. White*, 794 F.2d 367, 370 (8th Cir. 1986) (definition of conspiracy). *See also United States v. Hicks*, 619 F.2d 752, 758 (8th Cir. 1980) (jury told to consider instructions as a whole in response to inquiry about discrepancy in wording between indictment and instructions).

Generally an instruction setting out the elements of an offense or defining a term therein is considered neutral. If the jury requests a rereading of such an instruction, the court may properly limit its reinstruction to the issues requested, and is not required to also reread instructions setting out the defendant's theory. *United States v. Neiss*, 684 F.2d at 572; *United States v. Skarda*, 845 F.2d at 1512 (citing *Felak*, 831 F.2d at 798 and *Humphrey*, 696 F.2d at 75).

While not required, the better practice is to remind the jury to consider supplemental instructions in the context of all instructions. *Skarda*, 845 F.2d at 1512; *United States v. Piatt*, 679 F.2d at 1231. Likewise reinstruction on reasonable doubt and presumption of innocence, while not required, helps assure impartiality. *See, e.g.*, *Piatt*, 679 F.2d at 1231.

Where the court has granted a jury's request for specific evidence during deliberations, such as the replaying of a tape recording, it is likewise good practice to caution the jury to consider that evidence in the context of all the evidence. *United States v. Koessel*, 706 F.2d 271, 275 (8th Cir. 1983).

Supplemental Instructions

10.02. DUTY TO DELIBERATE ("*Allen*" Charge)

As stated in my instructions, it is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself; but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to re-examine your own views, and to change your opinion if you are convinced it is wrong. To bring twelve minds to a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that if in your individual judgment the evidence fails to establish guilt beyond a reasonable doubt, then the defendant should have your vote for a not guilty verdict. If all of you reach the same conclusion, then the verdict of the jury must be not guilty. Of course the opposite also applies. If in your individual judgment the evidence establishes guilt beyond a reasonable doubt, then your vote should be for a verdict of guilty and if all of you reach that conclusion then the verdict of the jury must be guilty. As I instructed you earlier, the burden is upon the Government to prove beyond a reasonable doubt every element of the crime[s] charged.

Finally, remember that you are not partisans; you are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. But I suggest that you carefully [re]consider all the evidence bearing upon the questions before you. You may take all the time that you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be disposed of at some later time.[1]

Supplemental Instructions

[Please go back now to finish your deliberations in a manner consistent with your good judgment as reasonable persons.][2]

Notes on Use

1. A more expanded version of this instruction, 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 20.08 (5th ed. 2000), has been approved by this Circuit. *See United States v. Smith*, 635 F.2d 716, 722-23 (8th Cir. 1980); *United States v. Singletary*, 562 F.2d 1058, 1060-61 (8th Cir. 1977); *United States v. Hecht*, 705 F.2d 976, 979 (8th Cir. 1983).

2. Use this sentence when this charge is being given after deliberations have begun.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 20.08 (5th ed. 2000).

It is preferable that an "*Allen*" type instruction be given as part of the regular final instructions, before the jurors begin their deliberations. *United States v. Webb*, 816 F.2d 1263, 1266 n.4 (8th Cir. 1987); *Potter v. United States*, 691 F.2d 1275, 1277 (8th Cir. 1982), and cases cited therein. *See* Instruction 3.12, *supra*.

If that has been done, and if the circumstances are appropriate, either the same instruction may be repeated later or this instruction 10.02 may be given if the jury announces difficulty in reaching a verdict. *United States v. Singletary*, 562 F.2d 1058, 1061 (8th Cir. 1977); *United States v. Cortez*, 935 F.2d 135, 140 (8th Cir. 1991). *See also* ABA Standards Relating to Trial by Jury § 5.4.

The language of this instruction covers the essential points of the traditional "*Allen*" charge, taken from the instruction approved in *United States v. Smith*, 635 F.2d 716, 722-23 (8th Cir. 1980). Judge Gibson noted in *Potter*, 691 F.2d at 1277 that "caution . . . dictates . . . that trial courts should avoid substantial departures from the formulations of the charge that have already received judicial approval." This instruction has been approved in *United States v. Thomas*, 946 F.2d 73 (8th Cir. 1991).

According to the holding in *Potter*, it would be permissible to give the present instruction as a supplemental charge upon deadlock, in lieu of repeating the paragraphs under the "Second" point in Instruction 3.12, *supra*.

As to when and in what circumstances a supplemental instruction may be appropriate, *see generally Potter v. United States*; *United States v. Smith*, 635 F.2d 716 (8th Cir. 1980). As the Eighth Circuit has repeatedly cautioned, supplemental charges of this nature should be utilized with "great care." *United States v. Young*, 702 F.2d 133 (8th Cir. 1983); *Potter v. United States*; *United States v. Smith*.

Supplemental Instructions

It is not necessarily reversible error for the trial court to give a supplemental instruction *sua sponte* and even without direct announcement by the jury of its difficulty. *United States v. Smith*. The safe practice, however, would be to give such an instruction only after the jury has directly communicated its difficulty or the length of time spent in deliberations, compared with the nature of the issues and length of trial, and makes it clear that difficulty does exist. A premature supplemental charge certainly could, in an appropriate case, be sufficient cause for reversal.

The trial court may make reasonable inquiries to determine if a jury is truly deadlocked, but may not ask the jury of the nature and extent of its division. *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Brasfield v. United States*, 272 U.S. 448 (1926); *United States v. Webb*, 816 F.2d at 1266. The fact that the court inadvertently learns the division of the jurors does not, by itself, prevent the giving of a supplemental charge. *United States v. Cook*, 663 F.2d 808 (8th Cir. 1981); *Anderson v. United States*, 262 F.2d 764, 773-74 (8th Cir. 1959). Such an instruction can be coercive, however, where the sole dissenting juror is aware that the court knows his identity. *United States v. Sae-Chua*, 725 F.2d 530 (9th Cir. 1984).

In this Circuit the defendant does not have a right to an instruction that the jury has the right to reach no decision. *United States v. Arpan*, 887 F.2d 873 (8th Cir. *en banc* 1989).

Supplemental Instructions

10.03. RETURN TO DELIBERATIONS AFTER POLLING

The poll of the jury shows that there is not a unanimous verdict. Please return to the jury room and continue your deliberations.

Committee Comments

See 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 20.09 (5th ed. 2000).

Under Rule 31(d) of the Federal Rules of Criminal Procedure, the court has the discretion, when a poll of the jury does not reveal unanimous concurrence in the verdict, to either discharge the jury or direct the jury to continue deliberations. *United States v. Williams*, 873 F.2d 1102 (8th Cir. 1989); *United States v. Johnson*, 720 F.2d 519, 521 (8th Cir. 1983). Concurrence means agreeing that the elements of the offense have been proved beyond a reasonable doubt. Reservations of a juror going to extraneous matters, such as the conduct of defense counsel, does not affect the unanimity or certainty of the verdict where the juror agrees that the elements have been proved beyond a reasonable doubt. *United States v. Antwine*, 873 F.2d 1144 (8th Cir. 1989).

If a jury is sent back for further deliberations it may be instructed on the requirement of unanimity. *See* Committee Comments, Instructions 3.12 and 10.02, *supra*.

Supplemental Instructions

10.04. PARTIAL VERDICT [1]

Members of the jury, if you have reached unanimous agreement as to [some of the defendants][2] [and/or] [some of the counts][3], you may return a verdict as to [those defendants] [and/or] [those counts], and then continue deliberating on the others.

If you do choose to return a verdict as to [some of the defendants] [and/or] [some of the counts] now, that verdict will be final. You will not be able to change your minds about it later on.

Notes on Use

1. This instruction should be used if the jurors ask about, attempt to return, or otherwise indicate that they have reached a partial verdict. It may also be appropriate after extended deliberations.

2. Omit this language when there is a single defendant.

3. Omit this language when there is a single count.

Committee Comments

Rule 31(b) of the Federal Rules of Criminal Procedure permits the return of a verdict at any time during the jury's deliberation as to any defendant or any count about which it has agreed. *See United States v. Haren*, 952 F.2d 190, 197 (8th Cir. 1991). The Eighth Circuit joins all other circuits which have addressed the issue in holding that the practice of taking a partial verdict in a single-defendant case is not per se invalid. *United States v. Benedict*, 95 F.3d 17, 19 (8th Cir. 1996).

This instruction is not mandatory, *see United States v. Dilapi*, 651 F.2d 140, 146-47 (2d Cir. 1981); Rule 31(b) only requires that the district court judge accept a partial verdict upon request, and refrain from instructing the jury that they may not return a partial verdict. *See United States v. Burke*, 700 F.2d 70, 80 (2d Cir. 1983). Because of prolonged jury deliberation, in its discretion a district court may give the partial verdict instruction, or instruct the jury in an evenhanded, non-coercive manner that it would prefer a unanimous verdict if accomplished without any juror yielding a conscientious conviction which he or she may have. *See United States v. Cortez*, 935 F.2d 135, 140-42 (8th Cir. 1991) (citing *Allen v. United States*, 164 U.S. 492(1896)). *See also* Instruction 10.02, *supra*.

11.00. VERDICT FORMS

Introductory Comment

This section includes sample verdict forms for a general verdict, a verdict on a lesser offense instruction, and a verdict followed by special findings. The verdict forms set forth in this section are not intended to be a comprehensive list of verdict forms.

Verdict Forms

11.01. GENERAL VERDICT

VERDICT

We, the jury, find Defendant (name) _____of the crime of (insert brief
[guilty/not guilty]

description, e.g., "bank robbery") [as charged in Count _____ of the Indictment] [under Instruction No. _____].[1]

_____
Foreperson

_____
(Date)

Notes on Use

1. *See* Instructions 3.09 and 3.12, *supra*. If the elements instruction does not refer to a count in the indictment, the verdict form should refer to the elements instruction.

Committee Comments

General verdicts are preferred in criminal cases; verdicts based on special interrogatories and answers have been held to be inappropriate. *Gray v. United States*, 174 F.2d 919 (8th Cir. 1949). A "step-by-step" approach to reaching a verdict in a criminal case has been described as creating the unacceptable possibility of judicial control of a verdict by the manner in which questions to the jury are framed. *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969). *Cf. United States v. Melvin*, 27 F.3d 710, 716 (1st Cir. 1994) (discussing when exceptions to rule against special interrogatories are appropriate under *Spock*). As a corollary to the concern over judicial control, a court may not "bifurcate" the elements of an offense so that a jury is precluded from considering all elements of the charged offense, thus being deprived of information that would be likely to affect the jury's assessment of whether a crime had been committed and proved. *United States v. Barker*, 1 F.3d 957 (9th Cir. 1993), amended at 20 F.3d 365 (9th Cir. 1994).

11.02. GENERAL VERDICT - WITH LESSER-INCLUDED OFFENSE

VERDICT

We, the jury, find Defendant (name) _____of the crime of (insert brief
guilty/not guilty

description, *e.g.*, "possession with intent to distribute _____") [as charged in Count _____ of the Indictment] [under Instruction No. _____].

_____
Foreperson

_____
(Date)

Note: If you unanimously find Defendant (name) guilty of the above crime, have your foreperson write "guilty" in the above blank space, sign and date this verdict form. Do not consider the following verdict form.

If you unanimously find Defendant (name) not guilty of the above charge, have your foreperson write "not guilty" in the above blank space. You then must consider whether the defendant is guilty of (specify lesser-included offense) on the following verdict form.

If you are unable to reach a unanimous decision on the above charge, leave the space blank and decide whether the defendant is guilty of (specify lesser-included offense) on the following verdict form.

[LESSER-INCLUDED OFFENSE][1]

We, the jury, find Defendant (name) _____ of the crime of (insert brief
[guilty/not guilty]

description, *e.g.*, "possession of _____") [as charged in Count _____ of the Indictment] [under Instruction No. _____].

_____
Foreperson

_____
(Date)

Verdict Forms

Notes on Use

1. *See* Instruction 3.10, *supra*. *See also, e.g., United States v. Friend*, 50 F.3d 548, 554 (8th Cir. 1995).

Committee Comments

A defendant has a nonwaivable right to a unanimous jury verdict. *United States v. Eagle Elk*, 820 F.2d 959, 961 (8th Cir. 1987); Fed. R. Crim. P. 31(a). However, indictments frequently allege a violation of federal law by "one or more specified means" as permitted by Rule 7(c)(1) of the Federal Rules of Criminal Procedure. *See, e.g., United Sates v. Lueth*, 807 F.2d 719, 733 (8th Cir. 1986). As a general rule, a general verdict of guilty is not subject to attack on the ground that one of the alternative means of committing the crime was not proved by sufficient evidence. The presumption is that the jury sorted out the evidence and that the verdict was based on the alternative supported by sufficient evidence. *See Griffin v. United States*, 502 U.S. 46 (1991). On the other hand, if one alternative basis for guilt is legally insufficient, and it cannot be determined whether the jury's verdict was based on a supportable ground or on an illegal or unconstitutional ground, the verdict must be set aside. *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 384 (8th Cir. 1992) (citing *Griffin, supra*). However, if a jury's finding of guilt of a greater offense necessarily includes a finding of guilt of a lesser offense, the verdict can stand as to the lesser offense even if there was insufficient evidence to support the verdict on the greater offense. *United States v. Friend*, 50 F.3d 548, 554 (8th Cir. 1995).

Beyond the general principles outlined above, there are cases which discuss the need for more definition of "the level of factual specificity at which jurors must concur to convict a defendant." Scott W. Howe, *Jury Fact-Finding in Criminal Cases: Constitutional Limits on Factual Disagreements Among Convicting Jurors*, 58 Mo. L. Rev. 1 (1993). For a general discussion of the need for unanimity as to facts supporting a conviction, *see United States v. Correa-Ventura*, 6 F.3d 1070 (5th Cir. 1993).

Verdict Forms

11.03. SAMPLE SPECIAL VERDICT FORM (Interrogatories to Follow Finding of Guilt)

VERDICT

We, the jury, find Defendant (name) _____ of the use of a firearm during
guilty/not guilty

and in relation to a crime of violence [as charged in Count _____ of the Indictment] [under Instruction No. _____].

If you find the defendant "guilty," you must answer the following: [1]

Which of the following firearms do you find were used by the defendant?

_____ A 9mm semi-automatic pistol.

_____ An M-16 fully automatic rifle.

_____ A short-barreled 12-gauge shotgun.

(Check each firearm which the jury unanimously agrees the defendant used.)

_____
Foreperson

_____
(Date)

Notes on Use

1. *See* Instruction 6.18.924, *supra*. This instruction may be used in a case where several firearms are charged in a single count as having been used by the defendant in violation of 18 U.S.C. § 924(c), and the minimum punishment will differ according to the type of firearm. *See, e.g., United States v. Correa-Ventura*, 6 F.3d 1070, 1087 n.35 (5th Cir. 1993). *Cf. United States v. Melvin*, 27 F.3d 710, 714 (1st Cir. 1994) (enhanced penalty available only if jury identifies an "enhancing" firearm as supporting the conviction).

Committee Comments

Special interrogatories to the jury, to be answered after finding guilt, have been approved or recommended in various situations. Several courts have considered situations in which special findings by the jury would have avoided error. In *United States v. Owens*, 904 F.2d 411 (8th Cir. 1990), the Court of Appeals found unacceptable instructions which had allowed the jury to convict if it found that either amphetamine or methamphetamine was the object of the charged conspiracy. The *Owens* opinion states, at p. 415:

> Because the establishment of Owens' base offense level required a determination of which drug the conspiracy involved, and because the Sentencing Guidelines provide disparate sentencing ranges for amphetamine and methamphetamine, the district court should have used a special verdict form to permit the jury to indicate which substance it found to be the object of the conspiracy.

See also United States v. Baker, 16 F.3d 854, 858 (8th Cir. 1994); *cf. United States v. Watts*, 950 F.2d 508, 514-15 (8th Cir. 1991) (distinguishing *Owens* in a case where evidence of the drug involved in the conspiracy was uncontradicted).

In *Newman v. United States*, 817 F.2d 635 (10th Cir. 1987), a general verdict on a charge of conspiracy to distribute both narcotic and non-narcotic drugs was held to be unacceptable because the sentencing court could not know which of two possible maximum sentences applied. The *Newman* opinion states, "The use of a special verdict identifying which underlying offenses were the objects of the conspiracy would have eliminated this ambiguity." 817 F.2d at 637. *Cf. United States v. Stanberry*, 963 F.2d 1323 (10th Cir. 1992) (the defendant not entitled to have special jury interrogatory on when conspiracy terminated since interrogatory was relevant only to sentencing factors). In *United States v. Holley*, 942 F.2d 916 (5th Cir. 1991), convictions on two counts of perjury were reversed for failure of the district court to give the defendant's requested "specific unanimity instruction." The counts of the indictment each alleged two or more false statements, any one of which would violate the statute. The court of appeals agreed with the defendant's argument that the jury should have been required to agree unanimously on at least one statement in each count. *See United States v. Bellrichard*, 62 F.3d 1046 (8th Cir. 1995) (majority opinion distinguishing *Holley*; dissent finding *Holley* on point). In *United States v. Pungitore*, 910 F.2d 1084, 1136 (3d Cir. 1990), the court noted that the jury's return of special interrogatories indicating the theory of murder on which it relied in finding RICO predicates eliminated concerns about unanimity of the verdict.

Special interrogatories to the jury may be helpful to the court in resolving sentencing issues, although a defendant is not entitled to jury determination of sentencing issues, and the court is not bound by the jury's findings on such issues. *United States v. Page-Bey*, 960 F.2d 724, 728 n.5 (8th Cir. 1992); *United States v. Romo*, 914 F.2d 889, 895 (7th Cir. 1990). *Cf. United States v. Stanberry*, 963 F.2d 1323, 1326 n.2 (10th Cir. 1992) (commenting that special verdicts "promise increased complexity and may debase the Sentencing Guidelines").

Special interrogatories to the jury should be submitted as questions to be answered only after finding guilt to avoid prejudice to the defendant in the form of leading the jury to a result. *See, e.g.*, appendix to the opinion in *United States v. Ryan*, 9 F.3d 660, 676 (8th Cir. 1993), *vacated on reh'g*, 41 F.3d 361 (1994). In *United States v. Console*, 13 F.3d 641, 663 (3d Cir. 1993), the court stated:

> The district court has discretion in determining whether to submit special interrogatories to the jury regarding the elements of an offense. [However, such interrogatories are not required.] . . . Moreover, even when special interrogatories regarding RICO are submitted to the jury, the court is permitted to give an instruction to the jury to answer

the interrogatories only after it votes to convict, thereby alleviating the danger of prejudice to the defendant. [Footnote omitted.]

12.00. HOMICIDE - DEATH PENALTY - SENTENCING (18 U.S.C. §§ 3591 et seq.)

Introductory Comment

Instructions 12.01-.03 are to be given at the beginning of the sentencing phase, before the introduction of evidence. They are intended to be a concise overview, so that the jury has a basic understanding of the decisions it will be called upon to make.

Instructions 12.04-.22 are to be given after all evidence has been presented and prior to deliberations.

Homicide - Death Penalty - Sentencing

12.01. INTRODUCTION TO PRELIMINARY INSTRUCTIONS

Members of the jury, you have unanimously found the defendant[1] _____ guilty of the offense of _____ as charged in Count____ [repeat for each offense] of the Indictment. You must now consider whether imposition of a sentence of death is justified, or whether the defendant should be sentenced to life imprisonment without the possibility of release[2][, or a lesser sentence] for commission of this [these] crime[s].

This decision is left exclusively to you, the jury. If you determine[3] that the defendant should be sentenced to death, or to life imprisonment without possibility of release, the court is required to impose that sentence.

Before you may consider whether to impose a sentence of death, you must make each of the following three findings unanimously and beyond a reasonable doubt:

[*First*, you must find unanimously and beyond a reasonable doubt that the defendant was at least 18 years of age at the time of the offense[s][4]; and]

[*First*] [*Second*], you must find unanimously and beyond a reasonable doubt that the defendant

[intentionally killed (name of victim)]

[intentionally inflicted serious bodily injury that resulted in the death of (name of victim)]

[intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and (name of victim) died as a direct result of the act]

[intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and (name of victim) died as a direct result of the act]; and

[*Second*] [*Third*], you must find unanimously and beyond a reasonable doubt that the Government has proved the existence of at least one statutory aggravating factor. I will define the term "aggravating factors" for you shortly.

If, after fair and impartial consideration of all the evidence in this case, any one of you does not make these [two] [three] findings beyond a reasonable doubt, your deliberations will be over. If you do unanimously make these [two] [three] findings beyond a reasonable doubt, you will then proceed to determine whether you unanimously find that the Government has proved the existence of any nonstatutory aggravating factors beyond a reasonable doubt, and whether any of you find that the defendant has proved any mitigating factors by a preponderance of the evidence. You must then engage in a weighing process. If you unanimously find that the aggravating factor or factors, which you all found to exist, sufficiently outweigh any mitigating factor or factors, which any one of you[5] found to exist to justify imposition of[6] a sentence of death, or, if, in the absence of a mitigating factor or factors, you find that the aggravating factor or factors alone are sufficient to justify imposition of a sentence of death, and that death is therefore the appropriate sentence in this case, the law provides that the defendant must[7] be sentenced to death.

If, after weighing the aggravating and mitigating factors, any one of you finds that a sentence of death is not justified, the jury must then determine whether the defendant should be sentenced to life imprisonment without possibility of release, or be given a lesser sentence to be determined by the court.

Again, whether or not the circumstances in this case justify a sentence of death is a decision that is <u>entirely</u> yours. [You must not take anything I may say or do during this phase of the trial as indicating [what I think of the evidence or] what I think your verdict should be.]

Two terms that you have already heard and will hear throughout this phase of the case are "aggravating factors" and "mitigating factors." These factors concern the circumstances of the crime or the personal traits, character or background of the defendant [and the effect of the offense on the victim (and the victim's family][8].

[The word "aggravate" means "to make worse or more offensive" or "to intensify." The word "mitigate" means "to make less severe" or "to moderate."][9] An aggravating factor[, then,] is a fact or circumstance which would tend to support imposition of the death penalty. A mitigating factor is any aspect of a defendant's character or background, any circumstance of the

offense(s), or any other relevant fact or circumstance which might indicate that the defendant should not be sentenced to death.

In the death penalty statute, a number of aggravating factors are listed. These are called "statutory aggravating factors." As I instructed you earlier, before you may consider imposition of the death penalty, you must find that the Government proved at least one of these aggravating factors specifically listed in the death penalty statute, and your finding must be unanimous and beyond a reasonable doubt. [In addition to statutory aggravating factors, there may also be aggravating factors not specifically set out in the death penalty statute. Again, your finding that any non statutory aggravating factor exists must be unanimous and beyond a reasonable doubt.]

The defendant has the burden of proving any mitigating factors. However, there is a different standard of proof as to mitigating factors. You need not be convinced beyond a reasonable doubt about the existence of a mitigating factor; you need only be convinced that it is more likely true than not true in order to find that it exists. A unanimous finding is not required. Any one of you may find the existence of a mitigating factor, regardless of the number of other jurors who may agree.

If you have unanimously found that at least one statutory aggravating factor exists, you then must weigh the aggravating factors you have all found to exist against any mitigating factors you have individually found to exist, to determine the appropriate sentence. Any juror may also weigh a mitigating factor found by another juror, even if he or she did not also find that factor to be mitigating.[10] I will give you detailed instructions regarding the weighing of aggravating [and mitigating] factors before you begin your deliberations. However, I instruct you now that you must not simply count the number of aggravating [and mitigating] factors and reach a decision [based on which number is greater]; you must consider the weight and value of each factor.

[The Government alleges the following statutory aggravating factors: [list factors] The Government also alleges the following nonstatutory aggravating factors: [list factors] The defendant alleges the following mitigating factors: [list factors]][11]

Homicide - Death Penalty - Sentencing

Notes on Use

1. These instructions have been prepared in a single-defendant format. Appropriate modifications for proceedings involving multiple defendants would be necessary.

2. In *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994), the Supreme Court held that where a defendant's future dangerousness was at issue and the only sentencing alternative to the death penalty under state law was life imprisonment without possibility of parole, due process required that the sentencing jury be informed that the defendant was ineligible for parole. The Court reiterated that holding in *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001).

Sections 3593(e) and 3594, Title 18, United States Code, provide that the jury shall make a recommendation regarding whether the defendant should be sentenced to death or life imprisonment without the possibility of release, which would require that they be informed of this option for offenses under sections 3591(b)(1)-(2). The practice in most states is to inform the sentencing jury of life without parole as an alternative to capital punishment. *Simmons v. South Carolina*, 512 U.S. at 167-68 nn.7-8.

3. Although the statute uses the word "recommend," the jury's determination is binding; the court MUST impose the sentence the jury "recommends" unless a new trial is ordered. The Committee recommends use of the word "determine," because of concern that use of the word "recommend" might tend to diminish the jury's sense of its ultimate responsibility for determining the sentence. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

4. Courts have consistently held that where a statute requires that a defendant be of a certain age in order to be guilty of an offense, the defendant's age is an element of the offense and must be proven beyond a reasonable doubt. *See, e.g., Watson v. State*, 140 N.E.2d 109, 110-11 (Ind. 1957); *State v. Thompson*, 365 N.W.2d 40, 41-42 (Iowa 1985); *Barnett v. State*, 488 So. 2d 24 (Ala. Crim. App. 1986); *State v. Lauritsen*, 261 N.W.2d 755, 756 (Neb. 1978); *Lee v. State*, 481 S.E.2d 264, 265-66 (Ga. App. 1997); *State in the Interest of A.N., A Juvenile*, 630 A.2d 1183, 1184 (N.J. Super. 1993); *State v. Collins*, 620 A.2d 1051, 1053 (N.J. Super. 1993). Therefore, the Committee recommends that the issue be submitted to the jury, unless the defendant agrees to stipulate that he/she was at least 18 years of age at the time of the offense.

5. In *Jones v. United States*, 527 U.S. 373, 377 (1999), the Supreme Court held that the jury may consider a mitigating factor in its weighing process so long as one juror accepts the factor as mitigating by a preponderance of the evidence.

6. The Committee was concerned that absence of the words "imposition of" rendered the decision before the jury too abstract.

7. In *United States v. Allen*, 247 F.3d 741, 780 (8th Cir. 2001), *judgment vacated and remanded on other grounds*, 536 U.S. 953 (2002), the Eighth Circuit held that this instruction and Instruction12.11 (the weighing instruction), which the defendant had attacked as impermissibly mandatory in nature, "accurately explain the jury's role in sentencing under the FDPA." The court also held that the district court did not abuse its discretion in refusing to give

the defendant's "mercy" instruction, which closely followed the language in the Title 21 statute, to the effect that the jury, "regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence." It concluded that

> Under the FDPA, the jury exercises complete discretion in its determination of whether the aggravating factors outweigh the mitigating factors. The jury was informed that whether or not the circumstances justify a sentence of death was a decision left entirely to them. Mercy is not precluded from entering into the balance of whether the aggravating circumstances outweigh the mitigating circumstances. The FDPA merely precludes the jurors from arbitrarily disregarding its unanimous determination that a sentence of death is justified.

Id. at 781. The Eighth Circuit reaffirmed its holding in *Allen* in *United States v. Ortiz*, 315 F.3d 873 (8th Cir. 2002).

8. This phrase should be used with extreme caution. Section 3593(a), Title 18, United States Code, provides that aggravating factors "may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family . . ." Some kinds of "victim impact" evidence are clearly admissible, i.e., evidence which amounts to "circumstances of the crime." *See Payne v. Tennessee*, 501 U.S. 808 (1991). Other "personal traits" of the victim are clearly not to be considered as part of the sentencing determination, i.e., race, color, religion, national origin or gender. *See* 18 U.S.C. § 3593(f); *Zant v. Stephens*, 462 U.S. 862, 885 (1983). Some "victim impact" evidence might be mitigating and must be submitted as such under *Lockett v. Ohio*, 438 U.S. 586, 604-08 (1978).

9. Whether to define the words "aggravate" and "mitigate" is a decision best left to the district court.

10. *See* Note 1, Instruction 12.09, *infra*.

11. Whether to list the aggravating and mitigating factors for the jury at the preliminary stage of the sentencing phase is a decision for the district court to make depending on the circumstances of the case before it.

In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), the Supreme Court held that statutory aggravating factors must be found by the jury beyond a reasonable doubt. By implication, those factors, as well as the requisite intent state, must also be alleged in the indictment. *Id.*; *United States v. Cotton*, 535 U.S. 625 (2002). Further, section 3593(a) requires the government to give notice of aggravating factors prior to trial or plea of guilty. The government is therefore precluded from offering evidence during the penalty phase of additional statutory aggravating factors which were not alleged in the indictment and of nonstatutory aggravating factors for which notice was not given. However, the statute does not require the defendant to disclose mitigating factors. Therefore, the district court should not limit the defendant in presenting evidence of any mitigating factor. Further, although Rule 16 gives the district court broad

discretion to regulate discovery, the Committee takes no position on whether the district court can order the defendant to disclose, prior to the penalty phase hearing, the mitigating factors he or she intends to prove.

Homicide - Death Penalty - Sentencing

12.02. BURDEN OF PROOF

This instruction is to be given at the beginning of the sentencing phase, before the introduction of evidence.

As I have just instructed you, the Government must meet its burden of proof beyond a reasonable doubt. A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence[1] received in this trial. It is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

The defendant does not have the burden of disproving the existence of anything the Government must prove beyond a reasonable doubt. The burden is wholly upon the Government; the law does not require the defendant to produce any evidence at all.

It is the defendant's burden to establish any mitigating factors, by a preponderance of the evidence. To prove something by the preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which of the evidence is more believable. [If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.]

[The preponderance of the evidence is not necessarily determined by the greater number of witnesses or exhibits presented by the Government or the defendant.]

[To prove something by the preponderance of the evidence is a lesser standard of proof than proof beyond a reasonable doubt.]

Notes on Use

1. The Supreme Court has emphasized the importance of providing the jury with all relevant and reliable <u>information</u>. *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Gregg v. Georgia*, 428 U.S. 153, 203-04 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("it [is] desirable for the jury to have as much information as possible when it makes the sentencing decision"); *accord Payne v. Tennessee*, 501 U.S. 808, 820-21 (1991) (the prosecutor is free to offer "a wide range of relevant material" in a capital sentencing proceeding). *See also* 18 U.S.C. § 3661 (use of information for sentencing) ("No limitation shall be placed on the information concerning the background, character, and conduct of [the defendant]."); *accord* Fed. R. Crim. P. 32(a).

Probably for this reason, section 3593(c) uses the word "information" rather than "evidence." It provides that "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." Nevertheless, the Committee recommends use of the word "evidence," to avoid the possibility of juror confusion.

The Eighth Circuit has rejected the contention that the "relaxed" evidentiary standards applicable at the penalty phase of the trial violate a capital defendant's constitutional rights. *United States v. Allen*, 247 F.3d 741, 759-60 (8th Cir. 2001), *judgment vacated and remanded on other grounds*, 536 U.S. 953 (2002). For a discussion of some of the issues that have arisen because of the nonapplicability of the Federal Rules of Evidence in capital sentencing proceedings, *see United States v. Beckford*, 964 F. Supp. 993 (E.D. Va. 1997).

Committee Comments

See Instructions 3.11, 6.21.853, *supra*; *8th Cir. Civil Jury Instr.* 3.04.

12.03. EVIDENCE [1]

This instruction is to be given at the beginning of the sentencing phase, before the introduction of evidence.

In making all the determinations you are required to make in this phase of the trial, you may consider any evidence that was presented during the guilt phase of the trial as well as evidence that is presented at this sentencing phase of the trial.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it. [In deciding what testimony of any witness to believe, consider the witness' intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness' memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with other evidence that you believe.]

Notes on Use

1. *See* Note 1, Instruction 12.02.

Committee Comments

See Instructions 1.03-.05, *supra*.

Homicide - Death Penalty - Sentencing

12.04. INTRODUCTION TO FINAL INSTRUCTIONS

Regardless of any opinion you may have as to what the law may be - or should be - it would be a violation of your oaths as jurors to base your verdict upon any view of the law other than that given to you in these instructions.

Some of the legal principles that you must apply to this sentencing decision duplicate those you followed in reaching your verdict as to guilt or innocence. Others are different. The instructions I am giving you now are a complete set of instructions on the law applicable to the sentencing decision. I have prepared them to ensure that you are clear in your duties at this extremely serious stage of the case. I have also prepared a special verdict form that you must complete. The form details special findings you must make in this case and will help you perform your duties properly.

Committee Comments

The Committee recommends that the court give each jury member a copy of the instructions and the Special Verdict Form to read and notate.

12.05. FINDING AS TO DEFENDANT'S AGE (18 U.S.C. § 3591) (Homicide)

[Before you may consider the imposition of the death penalty, you must first unanimously agree beyond a reasonable doubt that the defendant was eighteen years of age or older at the time of the offense.

If you unanimously make that finding, you should so indicate on [the appropriate] page [___] of the Special Verdict Form and continue your deliberations. If you do not unanimously make that finding, you should so indicate on [the appropriate] page [___] of the Special Verdict Form and follow the directions on page [___] of the form. No further deliberations will be necessary.][1]

Notes on Use

1. *See* Note 4, Instruction 12.01, *supra*.

Homicide - Death Penalty - Sentencing

12.06. FINDING OF REQUISITE MENTAL STATE (18 U.S.C. § 3591) (Homicide)

Before you may consider the imposition of the death penalty, you must [also] unanimously find beyond a reasonable doubt that the defendant intentionally [killed] [committed acts resulting in the death of] (name of victim) in [the] [one of the] manner(s)[1] described below. If you unanimously make that finding [as to the murder of (name of victim)], you should so indicate on [the appropriate] page [___] of the Special Verdict Form and continue your deliberations. If you do not unanimously make that finding [as to the murder of (name of victim)], you should so indicate on [the appropriate] page [___] of the Special Verdict Form, and follow the direction on page [___]. No further deliberations will be necessary [as to that murder].

The Government alleges that [LIST SEPARATELY FOR EACH MURDER AS APPROPRIATE]:[2]

[Examples]

1(A). [The defendant] intentionally killed the victim, [name of victim], by [summarize pertinent predicate facts, e.g., shooting her in the head]. To establish that the defendant intentionally killed the victim, the Government must prove that the defendant killed the victim with a conscious desire to cause the victim's death.

1(B). [The defendant] intentionally inflicted serious bodily injury that resulted in the death of the victim, [name of victim], by [summarize pertinent predicate facts, e.g., (inflicting a severe blow to the head of) (shooting) (stabbing)] [name of victim], which resulted in the death of (name of victim). The Government must prove that the defendant deliberately caused serious injury to the victim's body which in turn caused the victim's death. "Serious bodily injury" means a significant or considerable amount of injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of a body member, organ or mental faculty.

1(C). [The defendant] intentionally participated in an act, [contemplating that the life of a person [name of victim] would be taken] [intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim, [name of victim] died as a direct result of the act], by [summarize pertinent predicate facts, e.g., (ordering) (directing) (hiring) (another) (others) to (inflict a severe blow to the head of) (shoot) (stab) [name of victim], which directly resulted in the death of [name of victim]]. The Government must prove that the defendant deliberately (describe act(s) committed) with a conscious desire that a person be killed or that lethal force be employed against a person. The phrase "lethal force" means an act [or acts] of violence capable of causing death.

1(D). [The defendant] intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and [name of victim] died as a direct result of the act, by [summarize pertinent predicate facts].

[Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of the defendant's knowledge or intent.][3]

[You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.]

Notes on Use

1. If the court instructs on multiple intent states, it must ensure the instructions state clearly that the jury's finding as to a particular mental state be unanimous. *See* Special Verdict Form, pp. 83-84.

2. Impermissible duplication. In a death penalty case arising under 21 U.S.C. § 848(e), which defines these mental states as aggravating factors, the court in *United States v. Tipton*, 90 F.3d 861, 899 (4th Cir. 1996), stated that the purpose for requiring the finding of intent is

> to focus the jury's attention upon the different levels of moral culpability that these specific circumstances might reasonably be thought to represent, thereby channeling jury discretion in the weighing process.

The court went on to note that:

> To allow cumulative findings of these intended alternative circumstances, all of which do involve different forms of criminal intent, runs a clear risk of skewing the weighing process in favor of the death penalty and thereby causing it to be imposed arbitrarily, hence unconstitutionally.

Id.; *accord United States v. McCullah*, 87 F.3d 1136, 1137-38 (10th Cir. 1996); *United States v. Beckford*, 968 F. Supp. 1080 (E.D. Va. 1997) (jury could consider any mental states supported by the evidence, but could return a finding as to only one of the submitted factors); *United States v. Johnson*, 1997 WL 534163 (N.D. Ill. Aug. 20, 1997); *but see United States v. Flores*, 63 F.3d 1342, 1369-72 (5th Cir. 1995). Although section 3591(a)(2) does not define 1(A) - (D) as statutory aggravating factors which are weighed in determining whether to impose the death penalty, *see* Instruction 12.11, and therefore the same concerns addressed in *Tipton* and *McCullah* are not present, the Committee suggests that, to avoid any concern over "stacking the deck" in favor of the death penalty, the court instruct only on those mental states clearly supported by the evidence.

3. If "intent" is included in other instructions in addition to this one, the Committee recommends that a separate intent instruction be given based upon Instruction 7.05, *supra*.

Committee Comments

The mental states set forth in 18 U.S.C. § 3591(a)(2) concern the defendant's state of mind at the time of perpetrating or participating in the killing. At least one of the following mental states must be found to exist before the death penalty may be considered.

(A) The defendant intentionally killed the victim. *See Baldwin v. Alabama*, 472 U.S. 372, 385 (1985).

(B) The defendant intentionally inflicted serious bodily injury which resulted in the death of the victim. *See Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988).

(C) The defendant intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim. *See Enmund v. Florida*, 458 U.S. 782, 801 (1982).

(D) The defendant intentionally engaged in conduct which –

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim. *See Tison v. Arizona*, 481 U.S. 137, 158 (1987).

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In *United States v. Paul*, 217 F.3d 989, 997 (8th Cir. 2000), the court stated that "[t]he best way to comply with section 3591(a)(2) is to actually use the language of the statute in the jury instruction." Instruction 12.06(1)(A) - (D) use the exact language of the statute.

See Instruction 7.05, *supra*. *Francis v. Franklin*, 471 U.S. 307, 315 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 515 (1979); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 17.07 (5th ed. 2000).

12.07. STATUTORY AGGRAVATING FACTORS (18 U.S.C. § 3592) (Homicide)

If you unanimously find beyond a reasonable doubt that [the defendant] intentionally [committed the murder of] [committed acts resulting in the death of] (name of victim) in the manner described in Instruction [___], you must then proceed to determine whether the Government has proved beyond a reasonable doubt the existence of [any of] the following alleged statutory aggravating factor(s) [with respect to the same murder(s).] If you unanimously make that finding in the affirmative [as to the murder of (name of victim)], you should so indicate in Section III on [the appropriate] page [___] of the Special Verdict Form and continue your deliberations. If you do not unanimously make that finding in the affirmative [as to the murder of (name of victim)], you should so indicate on [the appropriate] page [___] of the Special Verdict Form, and follow the directions on page [___]. No further deliberations will be necessary [as to that murder].

The first statutory aggravating factor alleged by the Government is that [LIST AGGRAVATING FACTOR FROM §§ 12.07A THROUGH 12.07P SEPARATELY FOR EACH KILLING AS APPROPRIATE]:

The second statutory aggravating factor alleged by the Government is that [LIST AGGRAVATING FACTOR FROM §§ 12.07A THROUGH 12.07P SEPARATELY FOR EACH KILLING AS APPROPRIATE]:

The law directs you to consider and decide at this point the existence or nonexistence of only the statutory aggravating factors specifically claimed by the Government. You are reminded that to find the existence of a statutory aggravating factor, your decision must be unanimous and beyond a reasonable doubt.

Committee Comments

The Constitution requires that the class of defendants eligible for the death penalty be narrowed by means of statutory aggravating factors that furnish principled guidance for the choice between death and a lesser penalty. *See Maynard v. Cartwright*, 486 U.S. 356, 361-64 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 427-33 (1980); *Gregg v. Georgia*, 428 U.S. 153, 201 & n.54 (1976).

Identifying at least one nonduplicative statutory aggravating factor at either the guilt phase or the penalty phase of the trial is sufficient to meet this requirement. *See Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976). An "aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)," *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).

The statutory aggravating factors under 18 U.S.C. § 3592(c) correspond generally to "traditional" statutory aggravating factors upheld by the Supreme Court in reviewing state death penalty statutes. An issue that commonly arises is whether one aggravating factor impermissibly duplicates another. Justice Thomas, joined by three other justices, noted in *Jones v. United States*, 527 U.S.373, 398 (1999) that:

> [w]e have never before held that aggravating factors could be duplicative so as to render them constitutionally invalid, nor have we passed on the "double counting" theory that the Tenth Circuit advanced in *McCullah* and the Fifth Circuit appears to have followed here. What we have said is that the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor. (citations and footnotes omitted).

Justice Thomas went on to point out that, even accepting for the sake of argument the duplication theory, in the *Jones* case the factors "as a whole were not duplicative - at best, certain evidence was relevant to two different aggravating factors." *Id.* at 399.

Lower courts have expressed concern about the problem of duplicative factors. As noted above in Note 2, Instruction 12.06, *supra*, courts have warned of the dangers of submitting duplicative mental intent states to the jury. As to aggravating factors, in *United States v. Bin Laden*, 126 F. Supp. 2d 290, 299 (S.D.N.Y. 2001), the court held that

> an aggravating factor that is necessarily and wholly subsumed by a different aggravator within the same death penalty notice is invalid per se and should not be submitted to the penalty jury for sentencing consideration. . . [A] duplicative aggravator of this sort serves no significant sentencing role other than to cloud the issues and place an unwarranted thumb on death's scale.

The court went on to state that

> the Government's attempt to spin off multiple freestanding aggravators from what should really only be one represents a strategy that should not be permitted. . . [T]he sole motivation for doing so is to ratchet up the number of aggravating factors and "give the government free reign to trump whatever mitigating factors are raised by the defendant." (*United States v. Bradley*, 880 F. Supp. 271, 285 (M.D. Pa. 1994).)

The *Bin Laden* court also reserved until after the jury returned a liability verdict the issue of whether a single aggravating factor may be alleged more than once, *i.e.*, for each capital offense in a prosecution of multiple murders. The court noted that a "grouping" approach was taken in

the *McVeigh* prosecution: each aggravating factor was alleged only once, even though both defendants faced eleven capital counts each. *Id.* n.14.

The Committee recommends that care be taken to ensure that aggravating factors, whether statutory or nonstatutory, are submitted in such a way that they do not impermissibly duplicate the requirements under sections 3591(a) and (b) or each other. As the Eighth Circuit held in *Sloan v. Delo*, 54 F.3d 1371, 1385 (8th Cir. 1995), where the death penalty statute calls for the weighing of aggravating circumstances against mitigating circumstances, "the invalidation of an aggravating circumstance is of tremendous import because the removal of that factor from the equation might change the result. *See Stringer v. Black*, 503 U.S. 222, 230-32 (1992)."

12.07A. DEATH OR INJURY RESULTING IN DEATH DURING THE COMMISSION OF AN OFFENSE LISTED UNDER 18 U.S.C. § 3592(c)(1)

The [death] [injury resulting in death] occurred [during the [attempted] commission of] [during the immediate flight from the commission of] [state the qualifying offenses, e.g., kidnaping, listed under section 3592(c)(1)]. The Government must prove beyond a reasonable doubt that [list elements of qualifying offense or attempt as in the corresponding verdict director, e.g., *first*, the defendant knowingly and willfully seized, confined, kidnaped, abducted, or carried away (name of victim); *second*, (name of victim) was thereafter transported in interstate commerce while so seized, confined, kidnaped, or abducted; and *third*, the defendant held (name of victim) for ransom, reward, or other benefit or reason.] [Alternatively, refer to separate count for which the defendant was found guilty at the first stage.][1]

Notes on Use

1. There may be instances in which the qualifying offense listed under section 3592(c)(1) was not charged in the indictment. It is not necessary for the government to charge the qualifying offense in the indictment for it to be alleged as an aggravating factor.

Committee Comments

Section 3592(c)(1) establishes as an aggravating factor that the death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of an offense under one of the following sections:

Title 18:

-- 32 (destruction of aircraft or aircraft facilities),

-- 33 (destruction of motor vehicles or motor vehicle facilities),

-- 36 (violence at international airports),

-- 351 (violence against Members of Congress, Cabinet Officers, or Supreme Court Justices),

-- 751 (prisoners in custody of institution or officer),

-- 794 (gathering or delivering defense evidence to aid foreign government),

-- 844(d) (transportation of explosives in interstate commerce for certain purposes),

-- 844(f) (destruction of Government property by explosives),

-- 1118 (prisoners serving life term),

-- 1201 (kidnaping),

-- 844(i) (destruction by explosives of property affecting interstate commerce),

-- 1116 (killing or attempted killing of diplomats),

-- 1203 (hostage taking),

-- 1992 (wrecking trains),

-- 2280 (maritime violence),

-- 2281 (maritime platform violence),

-- 2332 (terrorist acts abroad against U.S. Nationals),

-- 2339 (use of weapons of mass destruction),

-- 2381 (treason),

Title 49:

-- 1472(i) (aircraft piracy within special aircraft jurisdiction), and/or

-- 1472(n) (aircraft piracy outside special aircraft jurisdiction).

In *United States v. Jones*, 132 F.3d 232, 249 (5th Cir. 1998), *aff'd*, 527 U.S. 373 (1999), the court rejected the defendant's contention that a statutory aggravating factor providing that the defendant caused the death of the victim, which occurred during the commission of a kidnaping, failed to genuinely narrow the class of persons eligible for the death penalty. The court concluded that

> Although the jury had already found the defendant guilty of kidnaping with death resulting at the guilt phase of the trial, the jury did not consider whether [the defendant] caused the death of the victim during the commission of the crime of kidnaping until the penalty phase of the trial. The jury could have convicted [the defendant] of kidnaping with death resulting in the guilt phase of the trial and still answered "no" to statutory aggravating factor 2(A) in the penalty phase if the jury found that [the defendant] did not cause the death of the victim during the commission of the crime of kidnaping. The submission of the elements of the crime as an aggravating factor merely allowed the jury to consider the circumstances of the crime when deciding whether to impose the death penalty. Thus, the kidnaping was weighed only once by the jury during the penalty phase of the trial. Consequently, the repetition of the elements of the crime as an aggravating factor did not contradict the constitutional requirement that aggravating factors genuinely narrow the jury's discretion.

Accord United States v. Hall, 152 F.3d 381, 416-17 (5th Cir. 1998), *abrogated in part on other grounds*, *United States v. Martinez-Salazar*, 528 U.S. 304 (2000).

In a closely related issue, the courts are divided on the question whether this statutory aggravating factor is impermissibly duplicative and therefore improperly tilts the jury in favor of the death penalty. In *United States v. Bin Laden*, 126 F. Supp. 2d 290, 301 (S.D.N.Y. 2001), the court rejected the duplication argument, concluding that it was proper for the jury to consider the crimes for which it had found the defendant guilty in determining sentencing, and that "the impermissible double-counting caused by an aggravator that is duplicative of another aggravator is simply not at issue here." *Accord United States v. Johnson*, 136 F. Supp. 2d 553, 559 (W.D. Va. 2001); *United States v. Cooper*, 91 F. Supp. 2d 90, 108-09 (D.D.C. 2000); *United States v. Frank*, 8 F. Supp. 2d 253, 276 (S.D.N.Y. 1998); *United States v. Edelin*, 134 F. Supp. 2d 59 (D.D.C. 2001) (§ 848).

On the other hand, the courts in *United States v. McVeigh*, 944 F. Supp. 1478, 1489-90 (D. Colo. 1996), and *United States v. Kaczynski*, 1997 WL 34626785, at *23 (E.D. Cal. 1997), dismissed statutory aggravating factors which were based on the crimes alleged in those cases. The court in *Kaczynski*, at *23, stated that:

> To allow the jury to weigh as an aggravating factor a crime which they had already necessarily found beyond a reasonable doubt would unfairly tip the scale toward death. This skews the weighing process by beginning the penalty phase with one aggravating factor already on death's side of the scale. Furthermore, when dealing with a weighing statute, there is always the danger that one or more jurors will weigh by counting. (internal citations omitted)

12.07B. DEFENDANT'S PRIOR CONVICTION OF A VIOLENT FELONY INVOLVING A FIREARM (18 U.S.C. § 3592(c)(2))

[The defendant] has been [previously] convicted[1] of (describe the federal or state offense punishable by a term of imprisonment of more than one year, involving the [use] [attempted use] [threatened use] of a firearm against another person). [The term "firearm" means [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] [the frame or receiver of any such weapon] [any firearm muffler or firearm silencer] [any destructive device]. [It does not include an antique firearm.]

Notes on Use

1. Although section 3592(c)(2) uses language that the defendant "has previously been convicted," the statute does not make clear whether the jury may only consider convictions which occurred prior to the date of the murder with which the defendant was charged. Although there are as yet no federal cases on the issue, the majority of state courts that have examined this question have found that the term "prior conviction" in the context of a statutory aggravating factor simply means a conviction that has become final prior to the date of sentencing, regardless of the date of occurrence of the crime itself. *Daugherty v. State*, 419 S.2d 1067, 1069 (Fla. 1982); *Ruffin v. State*, 397 S.2d 277, 282 (Fla. 1981); *State v. Brooks*, 541 S.2d 801, 809-10 (La. 1989); *People v. White*, 870 P.2d 424, 442-46 (Colo., *en banc*, 1994); *People v. McClain*, 757 P.2d 569 (1988); *People v. Grant*, 755 P.2d 894 (1988); *People v. Hendrix*, 737 P.2d 1350 (1987); *Stephens v. Hopper*, 247 S.E.2d 92, 97 (Ga. 1978); *Templeman v. Commonwealth*, 785 S.W.2d 259, 260 (Ky. 1990); *State v. Biegenwald*, 542 A.2d 442, 446 (N.J. 1988); *State v. Teague*, 680 S.W.2d 785, 789-90 (Tenn. 1984). Thus, criminal activity subsequent to the present homicide has been found sufficient to support statutory aggravating factors requiring "prior convictions." *See also State v. Coffey*, 444 S.E.2d 431 (N.C. 1994), in which the North Carolina Supreme Court interpreted a statutory provision referring to "prior criminal activity" as opposed to "prior convictions." Of note, another North Carolina court has concluded that the term "prior convictions" includes convictions for offenses which occurred subsequent to the charged offense but became final prior to trial. *See State v. McCullers*, 335 S.E.2d 348, 350 (N.C. App. 1985).

On the other hand, in *Thompson v. State*, 492 N.E.2d 264 (Ind. 1986), the court held that the phrase "prior convictions" included only convictions which occurred prior to the presently charged murder. However, the court also held that the Indiana death penalty provisions specifically allow the use as a statutory aggravating factor of the commission of another <u>murder</u>, regardless of when committed. *Id.* at 269.

Subsequent serious criminal activity can be used as nonstatutory aggravating evidence. *United States v. Pitera*, 795 F. Supp. 546, 564 (E.D.N.Y.), *aff'd*, 986 F.2d 499 (2d. Cir. 1992).

12.07C. DEFENDANT'S PRIOR CONVICTION OF AN OFFENSE RESULTING IN DEATH FOR WHICH A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS AUTHORIZED BY STATUTE (18 U.S.C. § 3592(c)(3), (d)(1))

[The defendant] has been [previously] convicted[1] of [name of offense], a [federal] [state] offense which resulted in the death of [name of victim], for which a sentence of life imprisonment or a sentence of death was authorized by statute.

Notes on Use

1. *See* Note 1, Instruction 12.07B, *supra*.

12.07D. DEFENDANT'S PRIOR CONVICTION OF TWO OR MORE OFFENSES INVOLVING THE INFLICTION OF SERIOUS BODILY INJURY OR DEATH (18 U.S.C. §§ 3592(c)(4), (d)(2))

[The defendant] has [previously] been convicted[1] of two or more [state] [federal] offenses each of which is punishable by a term of imprisonment of more than one year, committed on different occasions, and involves the [infliction of] [attempted infliction of] serious bodily injury upon another person, [summarize pertinent aspects of the predicate offense(s) including name of each offense and whether each offense involved infliction of or attempted infliction of seriously bodily injury upon another person].

Notes on Use

1. *See* Note 1, Instruction 12.07B, *supra*.

12.07E. CREATION OF A GRAVE RISK OF DEATH TO ONE OR MORE PERSONS IN ADDITION TO THE VICTIM (18 U.S.C. § 3592(c)(5); 21 U.S.C. § 848(n)(5))

[In the commission of the offense] [In escaping apprehension for the offense], [the defendant] knowingly created a grave risk of death to one or more persons in addition to (the [intended][1] victim[s]) [summarize pertinent predicate facts].

To establish the existence of this factor, the Government must prove that the defendant knowingly created a grave risk of death[2] to one or more persons in addition to the victim(s) of the offense, [in committing the offense] [or] [in escaping apprehension for the offense]. "Persons in addition to the victim(s)" include innocent bystanders in the zone of danger created by the defendant's acts, but does not include other participants in the offense.][3] "Grave risk of death" means a significant and considerable possibility that another person might be killed. "Knowingly" creating such a risk means that the defendant was conscious and aware that his conduct in the course of [committing the offense] [or] [escaping apprehension for the offense] might have this result.

[Knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant(s), and all the facts and circumstances in evidence which may aid in a determination of the defendant's(s') knowledge.]

Notes on Use

1. This factor is broadly worded, and may be applicable to intended victims who escape death. *See, e.g., United States v. Tipton*, 90 F.3d 861, 869, 894 (4th Cir. 1996). However, the court in *United States v. Glover*, 43 F. Supp. 2d 1217, 1221-22 (D. Kan. 1999), held that this factor and the factor enumerated in section 3592(c)(16), that "the defendant attempted to kill more than one person," were impermissibly duplicative, and that the government had to strike one of the aggravators in advance of trial.

Some states whose capital punishment statutes include a similar aggravating factor have construed that aggravating factor as not including surviving intended victims. *See, e.g., State v. Bracy*, 703 P.2d 464, 481 (Ariz. En Banc 1985); *State v. Rossi*, 706 P.2d 371, 378 (Ariz. En Banc 1985); *State v. McCall*, 677 P.2d 920, 934 (Ariz. En Banc 1983). Proximity to the murderous act is an important factor in applying this aggravating circumstance. *See Commonwealth v. Stokes*, 615 A.2d 704, 713 (Pa. 1992) ("the aggravating circumstance at issue applies to situations when the defendant in the course of killing his particular victim acts in a manner which endangers the lives of others close in proximity to the intended or actual victim.");

State v. Wood, 881 P.2d 1158, 1174-75 (Ariz. En Banc 1994) ("The grave risk of death to another factor applies only if the defendant's murderous act itself put other people in the zone of danger. . . . No single factor is dispositive of this circumstance. Our inquiry is whether during the course of the killing, the defendant engaged in conduct that created a real and substantial likelihood that a specific third person might suffer fatal injury.")

2. The term "knowingly create a grave risk of death" has been interpreted to mean "reckless disregard for human life," *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987), or "extreme indifference to human life," *Enmund v. Florida*, 458 U.S. 782, 790-91 (1982).

The instruction given at the *McVeigh* trial reads as follows:

> This aggravating factor requires you to find that the defendant's conduct not only resulted in death but also posed a significant risk of death to other persons who were in close proximity to those who died in terms of time and location. The defendant must have acted knowingly in creating this grave risk of death to other persons, which means that he must have been conscious and aware of the grave risk of death, must have realized what he was doing, and must not have acted because of ignorance, mistake or accident.

3. *See* Note 1, *supra*.

Committee Comments

See Profitt v. Florida, 428 U.S. 242, 256 (1976); *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987); *Francis v. Franklin*, 471 U.S. 307, 315 (1985); *Enmund v. Florida*, 458 U.S. 782, 790-91 (1982); *Sandstrom v. Montana*, 442 U.S. 510, 515 (1979); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 17.04 and 17.07 (5th ed. 2000).

In *United States v. Allen*, 247 F.3d 741, 786-87 (8th Cir. 2001), *judgment vacated and remanded on other grounds*, 536 U.S. 953 (2002), the court rejected the defendant's challenges that the "grave risk of death" aggravator was unconstitutionally vague and did not serve a narrowing function because it applied to too large a class of defendants.

12.07F. COMMISSION OF THE OFFENSE IN AN ESPECIALLY HEINOUS CRUEL OR DEPRAVED MANNER (18 U.S.C. § 3592(c)(6))

[The defendant] committed the offense in an especially [heinous] [cruel] [or] [depraved] manner in that it involved [torture] [or] [serious physical abuse] to the victim, (name of victim) [summarize pertinent predicate facts]. To establish that the defendant killed the victim in an especially heinous, cruel, or depraved manner, the Government must prove that the killing involved either torture or serious physical abuse to the victim. You must not find this factor to exist unless you unanimously agree as to which alternative - torture or serious physical abuse - has been proved beyond a reasonable doubt. In other words, all twelve of you must agree that it involved torture and was thus heinous, cruel or depraved, or all twelve of you must agree that it involved serious physical abuse to the victim and was thus heinous, cruel or depraved.][1]

["Heinous" means extremely wicked or shockingly evil, where the killing was accompanied by such additional acts of torture or serious physical abuse of the victim as to set it apart from other killings.]

["Cruel" means that the defendant intended to inflict a high degree of pain by torturing the victim in addition to killing the victim.]

["Depraved" means that the defendant relished the killing or showed indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.]

["Torture" includes mental as well as physical abuse of the victim. In either case, the victim must have been conscious of the abuse at the time it was inflicted, and the defendant must have specifically intended to inflict severe mental or physical pain or suffering upon the victim, in addition to the killing of the victim.]

[Severe mental pain or suffering means prolonged mental harm caused by or resulting from [intentionally inflicting or threatening to inflict severe physical pain or suffering] [administering or applying, or threatening to administer or apply, mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality] [the threat of imminent death] [the threat that another person will imminently be subjected to death, severe physical pain or suffering] [the threat that another person will imminently be subjected to the

administering or applying, or threatening to administer or apply, mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality.]

["Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body. Serious physical abuse -- unlike torture -- may be inflicted either before or after death and does not require that the victim be conscious of the abuse at the time it was inflicted. However, the defendant must have specifically intended the abuse in addition to the killing.]

Pertinent factors in determining whether a killing was especially [heinous] [cruel] [or] [depraved] include: an infliction of gratuitous violence upon the victim above and beyond that necessary to commit the killing; the needless mutilation of the victim's body; the senselessness of the killing; and the helplessness of the victim.

The word "especially" means highly or unusually great, distinctive, peculiar, particular, or significant, when compared to other killings.

Notes on Use

1. This statutory aggravator contains the disjunctive phrases "torture or serious physical abuse." The Committee concluded that juror unanimity as to one of these two disjunctive elements is required to support a finding of this aggravator. The Committee notes that in *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998), *aff'd*, 527 U.S. 373 (1999), the instruction given did not require specific unanimity as to whether the defendant inflicted torture or serious physical abuse. *Id.* at 250 n.12.

Committee Comments

"Heinous" means that a killing was "extremely wicked or shockingly evil." *Sochor v. Florida*, 504 U.S. 527, 537 (1992) (quoting *State v. Davis*, 283 S.2d 1, 9 (Fla. 1973)). "Cruel" means that the defendant intended "to inflict a high degree of pain." *Id.* "Depraved" means that the defendant "relish[ed] the murder" or show[ed] indifference to the suffering of the victim." *Walton v. Arizona*, 497 U.S. 639, 654-55 (1990), *overruled by, Ring v. Arizona*, 536 U.S. 584 (2002). Torture includes psychological as well as physical abuse of the victim. *Id.* at 652-56. However, the defendant must have specifically intended the abuse apart from the killing (*Richmond v. Lewis*, 506 U.S. 40, 45, 51 (1992), and the victim must have been conscious of the abuse (*Sochor v. Florida*, 504 U.S. at 537). *See also* 18 U.S.C. § 2340 (2); *United States v. Jones*, 132 F.3d 232, 249-50 (5th Cir.), *aff'd*, 527 U.S. 373 (1999); *United States v. Hall*, 152 F.3d 381, 414-16 (5th Cir. 1998); *abrogated in part on other grounds, United States v. Martinez-Salazar*, 528 U.S. 304 (2000).

This statutory language has been challenged as impermissibly vague and overbroad on its face. *Maynard v. Cartwright*, 486 U.S. 356, 362-65 (1988). *But see Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976) ("especially heinous, atrocious, or cruel" language is not unconstitutionally vague when limited to "conscienceless or pitiless crime which is unnecessarily torturous to the victim").

In *United States v. Paul*, 217 F.3d 989, 1001 (8th Cir. 2000), the court concluded that the limiting instruction extensively defining the words "heinous," "cruel" and "depraved" cured any vagueness problem. The court also rejected the defendant's contention that this factor and the vulnerable victim factor (4.03K) were impermissibly duplicative, finding that each of the factors was directed to entirely distinct aspects of the offense. *Id.*

12.07G. PROCUREMENT OF COMMISSION OF THE OFFENSE BY PAYMENT OF SOMETHING OF PECUNIARY VALUE (18 U.S.C. § 3592(c)(7); 21 U.S.C. § 848(n)(6) and (7))

[The defendant] procured the commission of the offense by [payment] [promise of payment] of anything of pecuniary value [summarize pertinent predicate facts]. To establish that the defendant procured the commission of the offense by [payment] [promise of payment] of anything of pecuniary value, the Government must prove, in essence, that the defendant arranged to have someone else commit the offense or assist in committing it. [There is no requirement that the Government prove that something of pecuniary value actually changed hands.] To "procure commission of the offense" means to obtain it or bring it about. The words "payment or promise of payment" should be given their ordinary, everyday meaning which includes giving or offering compensation in return for services. "Anything of pecuniary value" means anything in the form of money, property, or anything else having some economic value, benefit, or advantage.

Committee Comments

Section 1958(b)(1), Title 18, United States Code, describes the term "anything of pecuniary value" as "anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage." *United States v. Ransbottom*, 914 F.2d 743, 745-46 (6th Cir. 1990).

The court in *United States v. Edelin*, 134 F. Supp. 2d 59, 80-81 (D.D.C. 2001) (§ 848), rejected vagueness and overbreadth challenges to this aggravator.

12.07H. COMMISSION OF THE OFFENSE FOR PECUNIARY GAIN (18 U.S.C. § 3592(c)(8); 21 U.S.C. § 848(n)(7))

[The defendant] committed the offense [as consideration for the receipt] [in the expectation of the receipt] of anything of pecuniary value [summarize pertinent predicate facts].

To establish that a defendant committed an offense [as consideration for the receipt] [in the expectation of the receipt] of anything of pecuniary value, the Government must prove that the defendant committed the offense [in consideration for] [in the expectation of] anything in the form of money, property, or anything else having some economic value, benefit, or advantage. ["Consideration" in this context means a payment or promise of payment in return for services.] [There is no requirement that the Government prove that something of pecuniary value actually changed hands.] [The words "receipt or expectation of receipt" should be given their ordinary, everyday meaning which includes obtaining or expecting to obtain something.]

Committee Comments

In *United States v. Bernard*, 299 F.3d 467, 483 (5th Cir. 2002), the Fifth Circuit held that "the application of the 'pecuniary gain' aggravating factor is limited to situations where 'pecuniary gain' is expected 'to follow as a direct result of the [murder],'" (quoting *United States v. Chanthadara*, 230 F.3d 1237, 1263 (10th Cir. 2000)). The *Bernard* court concluded that "this aggravating factor is only applicable where the jury finds beyond a reasonable doubt that the murder itself was committed 'as consideration for, or in the expectation of' pecuniary gain." 299 F.3d at 483.

However, in *United States v. Walker*, 910 F. Supp. 837 (N.D.N.Y. 1995), the district court addressed identical language contained in the Title 21 death penalty provision, 21 U.S. C. § 848(n)(7), and determined that the clause has two prongs: (1) "the offense was committed 'as consideration for the receipt' or (2) 'in expectation of the receipt' of something of pecuniary value." It held that the first prong is intended to cover murder-for-hire situations, but the second prong has a much wider scope and includes any murder where the murderer expected to receive anything of pecuniary value. 910 F. Supp. at 848-49. It also noted that the source of the pecuniary gain is irrelevant. 910 F. Supp. at 848-49. *Accord United States v. Cooper*, 91 F. Supp. 2d 90, 105-06 (D.D.C. 2000).

The phrase "anything of pecuniary value" appears in 18 U.S.C. § 1958(b)(1). That statute defines the phrase as "anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage." *United States v. Ransbottom*, 914 F.2d 743, 745-46 (6th Cir. 1990).

The courts in *United States v. Spivey*, 958 F. Supp. 1523, 1531 (D.N.M. 1997) and *United States v. Davis*, 904 F. Supp. 554, 558 (E.D. La. 1995), rejected vagueness and overbreadth challenges to sections 848(n)(7) and 3592(c)(8), respectively.

As to impermissible duplication, the Eighth Circuit in *United States v. Paul*, 217 F.3d 989, 1001 (8th Cir. 2000), found that any error in the use of pecuniary gain as a statutory aggravating factor because it was also an element of the underlying offense was harmless, given that the jury found two other aggravators beyond a reasonable doubt.

12.07I. COMMISSION OF THE OFFENSE AFTER SUBSTANTIAL PLANNING AND PREMEDITATION (18 U.S.C. § 3592(c)(9); 21 U.S.C. § 848(n)(8))

[The defendant] committed the offense of (name of offense)[, as charged in Count ___ of the Indictment], for which you have found [him] [her] guilty, after substantial planning and premeditation to cause the death of (name of victim). "Planning" means mentally formulating a method for doing something or achieving some end. "Premeditation" means thinking or deliberating about something and deciding whether to do it beforehand. "Substantial" planning and premeditation means a considerable or significant amount of planning and premeditation.[1]

Notes on Use

1. *See United States v. McCullah*, 76 F.3d 1087, 1110-11 (10th Cir. 1996) ("'Substantial' planning does not require 'considerably more planning than is typical' but rather it means 'considerable' or 'ample for commission of the crime.'"); *United States v. Tipton*, 90 F.3d 861, 896 (4th Cir. 1996) ("substantial" means "more than the minimum amount sufficient to commit the offense" or "'more than merely adequate.'"); *United States v. Flores*, 63 F.3d 1342, 1374 (5th Cir. 1995) ("substantial" denotes "a thing of high magnitude" and "the term alone, without further explanation, [is] sufficient to convey that meaning and to enable the jury to make an objective assessment.").

Committee Comments

The court in *United States v. Glover*, 43 F. Supp. 2d 1217, 1225 (D. Kan. 1999), rejected a vagueness challenge to section 3592(c)(9). The court in *United States v. Spivey*, 958 F. Supp. 1523, 1531 (D.N.M. 1997), rejected vagueness and overbreadth challenges to the comparable aggravator in the Title 21 death penalty statute, section 848(n)(8).

12.07J. DEFENDANT'S PRIOR CONVICTIONS FOR TWO OR MORE FELONY DRUG DISTRIBUTION OFFENSES (18 U.S.C. § 3592(c)(10), (d)(2); 21 U.S.C. § 848(n)(4))

[The defendant] has [previously][1] been convicted of two or more [state] [federal] offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance, to wit: [summarize pertinent aspects of the predicate offense(s), including name of each offense and how each offense involved distribution of a controlled substance].

Notes on Use

1. *See* Note 1, Instruction 12.07B, *supra*.

12.07K. VULNERABLE VICTIM
(18 U.S.C. § 3592(c)(11); 21 U.S.C. § 848(n)(9))

[Name of victim] was particularly vulnerable due to [old age] [youth] [infirmity] [summarize pertinent predicate facts].

To establish the existence of this factor, the Government must prove that the victim was particularly vulnerable due to old age, youth, or infirmity. The words "particularly" and "vulnerable" should be given their plain, ordinary, everyday meaning.

"Particularly" means especially, significantly, unusually, or high in degree. "Vulnerable" means subject to being attacked or injured by reason of some weakness. Thus, to be "particularly vulnerable" means to be especially or significantly vulnerable, or vulnerable to an unusual or high degree.

"Old age" means advanced in years, aged, elderly, or an old person, that is: any person who was, by reason of a condition related to old age, significantly less able: (1) to avoid, resist, or withstand any attacks, persuasions, or temptations, or (2) to recognize, judge, or discern any dangers, risks, or threats.

"Youth" means that the victim was a child, a juvenile, a young person, or a minor, that is: any person who was, by reason of youthful immaturity or inexperience, significantly less able: (1) to avoid, resist, or withstand any attacks, persuasions, or temptations, or (2) to recognize, judge, or discern any dangers, risks, or threats.

"Infirmity" means a mental or physical weakness, disability, deficiency, illness or condition which makes a person less able: (1) to avoid, resist, or withstand any attacks, persuasions, or temptations, or (2) to recognize, judge, or discern any dangers, risks, or threats.

Committee Comments

See Webster's Ninth New Collegiate Dictionary, 233, 424, 656, 858, 1323, 1335, 1369 (1990); *Francis v. Franklin*, 471 U.S. 307, 315 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 515 (1979); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 17.04 and 17.07 (5th ed. 2000); *United States v. Pretlow*, 779 F. Supp. 758, 774 (D.N.J. 1991) (youth).

In *United States v. Johnson*, 136 F. Supp. 2d 553, 560 (W.D. Va 2001), the court struck this aggravator, which was based on the fact that the victim was pregnant. The court rejected the

government's contention that it was not required to show a nexus between the victim's pregnancy and the crime, relying on the fact that "those state courts which have interpreted and applied similar aggravating factors have universally required that the victim's pregnancy-based vulnerability somehow contribute to the victim's injury or death." The court concluded that no nexus was shown - the victim was killed instantaneously by an explosive device, and nothing about her pregnancy weakened her ability to withstand the blast.

In *United States v. Paul*, 217 F.3d 989, 1001 (8th Cir. 2000), the court rejected the defendant's contention that the heinous, cruel and depraved factor (Instruction 12.07F) and the vulnerable victim factor were impermissibly duplicative, finding that each of the factors was directed to entirely distinct aspects of the offense. *Id.*

12.07L. PREVIOUS CONVICTION FOR A FEDERAL NARCOTICS VIOLATION FOR WHICH A SENTENCE OF FIVE OR MORE YEARS MAY BE IMPOSED, OR PRIOR CONVICTION FOR A CONTINUING CRIMINAL ENTERPRISE (18 U.S.C. § 3592(c)(12), (d)(3); 21 U.S.C. § 848(n)(10))

[The defendant] had been convicted[1] of [[federal narcotics violation] for which a sentence of five or more years may be imposed] [engaging in a continuing criminal enterprise] [summarize pertinent aspects of the predicate offense(s)].

Notes on Use

1. The use of the past perfect tense "had" in this subsection makes it clear that the conviction must predate the charged murder. *Compare* Instructions 12.07B, 12.07C, 12.07D and 12.07J in which the past tense "has" is used. Subsequent serious criminal activity can be used as nonstatutory aggravating evidence. *See United States v. Pitera*, 795 F. Supp. 546, 564 (E.D.N.Y.), *aff'd*, 986 F.2d 499 (2d. Cir. 1992).

12.07M. CONTINUING CRIMINAL ENTERPRISE INVOLVING DRUG SALES TO MINORS (18 U.S.C. §§ 3592(c)(13), (d)(5)(6) and (7); 21 U.S.C. § 848(n)(11); 21 U.S.C. §§ 802(8) (11))

The defendant committed the offense of (describe the pertinent offense, e.g., the details of distribution[1] in violation of 21 U.S.C. § 848(c) of controlled substances to persons under 21 in violation of 21 U.S.C. § 859) in the course of engaging in a continuing criminal enterprise in violation of section 408(c) of the Controlled Substances Act.

Notes on Use

1. The term "distribution" may be defined if the meaning is unclear in the context of the case.

Committee Comments

See 21 U.S.C. § 802(10) ("'dispense' means to deliver a controlled substance to an ultimate user"). Congress, by using the word "distribute" rather than the word "dispense," did not limit factor (n)(11) only to the distribution of drugs to minors for ingestion. Section (n)(11)'s reference to section 845 does not change this result. Section 845 (and section 859, to which it was transferred) proscribe "distributing a controlled substance to a person under twenty-one years of age" without any limitation that such distribution must be for the recipient's use. This applies equally to the similarly-worded aggravating factor contained in 18 U.S.C. § 3592(c)(13) for Title 18 homicides. *Cf.* 18 U.S.C. § 3592(d) (statutory aggravating factors for nonhomicidal drug offenses in violation of 18 U.S.C. § 3591(b)(1)-(2) at sections 3592(c)(5)-(7) separately enumerating distribution to persons under 21, distribution near schools, and using minors in trafficking). Had Congress intended this same distinction for the statutory aggravating factors for Title 21 and 18 homicides under sections 848(n)(11) and 3592(c)(13), respectively, Congress could (and presumably would) have indicated this in the same manner. Thus, such a distinction should not be "read into" the statutory aggravating factors under sections 848(n)(11) and 3592(c)(13) where, evidently, it was not intended by Congress.

12.07N. COMMISSION OF THE OFFENSE AGAINST A HIGH PUBLIC OFFICIAL

[The defendant] committed the offense against [name of victim], who was at that time [specify position and/or activity which makes the victim a high public official as designated in section 3592(c)(14)].

Committee Comments

Section 3592(c)(14) establishes as an aggravating factor that the defendant committed the offense against:

> (A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;
>
> (B) a chief of state, head of government, or the political equivalent, of a foreign nation;
>
> (C) a foreign official listed in section 1116(b)(3)(A), if the official is in the United States on official business; or
>
> (D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution --
>
> > (i) while he or she is engaged in the performance of his or her official duties;
> >
> > (ii) because of the performance of his or her official duties; or
> >
> > (iii) because of his or her status as a public servant.
>
> For purposes of this subparagraph, a "law enforcement officer" is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution or adjudication of an offense, and includes those engaged in corrections, parole, or probation functions.

12.07O. DEFENDANT'S PREVIOUS CONVICTION FOR SEXUAL ASSAULT, CHILD MOLESTATION (18 U.S.C. § 3592(c)(15))

[The defendant] has previously been convicted of (describe the predicate offense of sexual assault or child molestation).[1]

Notes on Use

1. *See* Note 1, Instruction 12.07B, *supra*.

Committee Comments

This factor can be applied only where the defendant is being sentenced pursuant to 18 U.S.C. §§ 2245 or 2251. *See* 18 U.S.C. §§ 2241-45 for pertinent definitions regarding "sexual assault" and "child molestation."

12.07P. MULTIPLE KILLINGS OR ATTEMPTED KILLINGS (18 U.S.C. § 3592(c)(16); 18 U.S.C. § 3591(a)(2)(A))

[The defendant] intentionally [killed] [attempted to kill] [more than one person] [name or names of additional persons, if known] in a single criminal episode.

To establish the existence of this factor, the Government must prove that the defendant intentionally killed or attempted to kill more than one person in a single criminal episode.

"More than one person" means one or more other people in addition to killing the victim, _____, named in Count _____. In this case, the Government alleges that the defendant intentionally killed or attempted to kill (describe the person(s) by name or other sufficient detail) in addition to killing the victim.

"Intentionally killing" a person means killing a person on purpose, that is: willfully, deliberately, or with a conscious desire to cause a person's death (and not just accidentally or involuntarily).

"Attempting to kill" a person means purposely doing some act which constitutes a substantial step (beyond mere preparation or planning) toward killing a person, and doing so with the intent to cause a person's death.

"A single criminal episode" is an act or series of related criminal acts which occur within a relatively limited time(s) and place(s), or are directed at the same person(s), or are part of a continuous course of conduct related in time, place, or purpose.

A person of sound mind and discretion may be presumed to have intended the ordinary, natural, and probable consequences of his knowing and voluntary acts. However, this presumption is not required. Thus, you may infer from the defendant's conduct that the defendant intended to kill a person if you find: (1) that the defendant was a person of sound mind and discretion; (2) that person's death was an ordinary, natural, and probable consequence of the defendant's acts (even if the person's death did not actually result, in the case of an attempt); and (3) that the defendant committed these acts knowingly and voluntarily. But once again, you are not required to make such an inference.

Committee Comments

See Black's Law Dictionary, 127, 810-11 (6th ed. 1990); *Francis v. Franklin*, 471 U.S. 307, 315 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 515 (1979); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 17.07 (5th ed. 2000); *United States v. Graham*, 858 F.2d 986, 992 (5th Cir. 1988); *United States v. Reeves*, 594 F.2d 536, 541 (6th Cir. 1979); *United States v. Washington*, 898 F.2d 439, 440-42 (5th Cir. 1990); *Zito v. Moutal*, 174 F. Supp. 531, 535-37 (N.D. Ill. 1959).

In *United States v. Bin Laden*, 126 F. Supp. 2d 290, 300 (S.D.N.Y. 2001), the court rejected the defendants' argument that the "multiple killings or attempted killings" aggravator was impermissibly duplicative of the "grave risk of death" aggravator or the "victim impact" aggravator. The court concluded that the multiple killings aggravator related to the defendants' "particular desire that there be multiple victims, rather than just one - i.e., the sheer magnitude of the crime." It stated that the "grave risk of death" aggravator related to "defendants' mental state with respect to persons who were not the intended victims of the bombings." The "victim impact" aggravator, on the other hand, "highlight[ed] the objective human effects of Defendants' actions, as distinct from Defendants' subjective mindset."

12.08. NONSTATUTORY AGGRAVATING FACTORS

[If you have found the existence of one or more statutory aggravating factors unanimously and beyond a reasonable doubt, you must then consider whether the Government has proved the existence of [a] [any] non-statutory aggravating factor[s]. As in the case for statutory aggravating factors, you must unanimously agree that the Government has proved beyond a reasonable doubt the existence of [any of] the alleged non-statutory aggravating factor[s][1] before you may consider such factor[s] in your deliberations on the appropriate punishment for the defendant in this case.

In addition to any statutory aggravating factors you have found, you are permitted to consider and discuss only the nonstatutory aggravating factor[s] specifically claimed by the Government and listed below. You must not consider any other facts in aggravation which you think of on your own.

The [first] non-statutory aggravating factor alleged by the Government is that [LIST AS APPROPRIATE] [THE FOLLOWING ARE EXAMPLES]:

1. [The defendant] participated in additional uncharged murders, attempted murders, or other serious crimes of violence (describe pertinent facts)[2], and his participation in those acts tends to support imposition of the death penalty.[3]

2. [The defendant] would be a danger in the future to the lives and safety of other persons,[4] as evidenced by (describe pertinent facts):

   a. specific threats of violence,[5]

   b. continuing pattern of violence,[6]

   c. low rehabilitative potential,[7]

   d. lack of remorse,[8]

   e. mental evaluation, i.e., psychopathic personality,[9]

   f. custody classification, and/or

   g. other.

and his dangerousness tends to support imposition of the death penalty.[10]

3. [The defendant] obstructed a criminal investigation, tampered with or retaliated against a witness, (describe pertinent facts),[11] and that [obstruction] [tampering] [retaliation] tends to support imposition of the death penalty.[12]

4. [Victim impact - the wording of this aggravator must be tailored to the facts of the case.][13]

At this point you must record your findings regarding whether you unanimously find that the Government has proven beyond a reasonable doubt the existence of [this] [any of these] non-statutory aggravating factor[s] [with respect to the same murder]. Please enter that finding on [Page __] [the appropriate page] of the Special Verdict Form, and continue your deliberations.]

Notes on Use

1. Whether a factor is aggravating is a question of law, rather than a question of fact for the jury to decide. *United States v. McCullah*, 76 F.3d 1087, 1107 (10th Cir. 1996); *United States v. McVeigh*, 944 F. Supp. 1478, 1486 (D. Colo. 1996).

2. In *United States v. Allen*, 247 F.3d 741, 789-90 (8th Cir. 2001), *judgment vacated and remanded on other grounds*, 536 U.S. 953 (2002), the court rejected the defendant's contention that the "other criminal acts" aggravator is impermissibly duplicative of the six statutory aggravating factors based upon prior criminal acts and violates the Constitution. The court also held, on the facts of the case, that the aggravator was not impermissibly duplicative of the future dangerousness factor, because the government's evidence used to support the finding of each factor was sufficiently different. In *United States v. Johnson*, 136 F. Supp. 2d 553, 556 (W.D. Va. 2001), the court struck the "criminal livelihood" aggravator because there was nothing about the factor, and the non-adjudicated, non-violent criminal acts which the government presented in support of the factor, that were "particularly relevant to the sentencing decision."

3. To avoid jury confusion in the event that the jury finds that the facts supporting the aggravator have been proved but the jury does not consider those facts to be aggravating, each nonstatutory aggravating factor submitted to the jury should include language that the factor is aggravating as that term is defined in Instruction 12.01, *supra*.

4. The Supreme Court has approved consideration of a defendant's future dangerousness in capital sentencing, as both statutory and non-statutory aggravation. *See Simmons v. South Carolina*, 512 U.S. 154, 162-63 (1994) (and cases cited therein). *See also Jurek v. Texas*, 428 U.S. at 272-73 ("probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

As a general rule, "relevant, unprivileged evidence [of future dangerousness] should be admitted and its weight left to the factfinder[.]" *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983)

(allowing expert testimony on future dangerousness). *See, e.g., Johnson v. Texas*, 509 U.S. 350, 355-56 (1993) (affirming a death sentence where a finding of future dangerousness was based in part upon lay witness testimony about unadjudicated acts of violence committed by the defendant *both* prior and subsequent to the instant capital murder).

In *United States v. Allen*, 247 F.3d 741, 789-90 (8th Cir. 2001), *judgment vacated and remanded on other grounds*, 536 U.S. 953 (2002), the court rejected the defendant's contention that future dangerousness is duplicative of the statutory aggravating factors and violative of the Constitution. The court also reiterated the Supreme Court's holding in *Simmons v. South Carolina*, 512 U.S. at 178, that when future dangerousness is asserted as an aggravating factor, the jury must be instructed that the defendant is parole ineligible. *Id. See* Instruction 12.12. However, the court noted that "we have little doubt that future dangerousness to society and to prison officials and other inmates during incarceration is relevant to the jury's final determination. . . . A defendant in prison for life is still a risk to prison officials and to other inmates, and even though a life sentence without the possibility of parole greatly reduces the future danger to society from that particular defendant, there is still a chance that the defendant might escape from prison or receive a pardon or commutation of sentence." 247 F.3d at 788.

5. In *United States v. Davis*, 912 F. Supp. 938, 947 (E.D. La. 1996), *aff'd*, 132 F.3d 1454 (5th Cir. 1997), the court held that "[t]hreatening words and warped bravado, without affirmative acts" were not admissible to prove future dangerousness.

6. Participation in additional uncharged homicides, attempted homicides, or other serious crimes of violence. *See, e.g., United States v. Allen*, 247 F.3d 741, 789 (8th Cir. 2001), *judgment vacated and remanded on other grounds*, 536 U.S. 953 (2002); *United States v. Pitera*, 795 F. Supp. at 564 (holding that the evidence of the defendant's participation in other murders was "relevant to his character and his propensity to commit violent crimes"). For the appropriateness of the nonstatutory aggravating factor of causing the death of a fetus, *see United States v. Johnson*, 136 F. Supp. 2d 553, 561-62 (W.D. Va. 2001). *See United States v. Glover*, 43 F. Supp. 2d 1217, 1226 (D. Kan. 1999); *United States v. Beckford*, 964 F. Supp. 993 (E.D. Va. 1997), *United States v. Walker*, 910 F. Supp. 837, 852-54 (N.D.N.Y. 1995), and *United States v. Bradley*, 880 F. Supp. 271, 286-87 (M.D. Pa. 1994), for a discussion on whether and in what circumstances evidence of unadjudicated criminal conduct is admissible to prove future dangerousness.

7. Two courts have stricken "low potential for rehabilitation" as duplicative of future dangerousness, where the government alleged each as a separate nonstatutory aggravating factor. *United States v. Davis*, 912 F. Supp. 938, 946 (E.D. La. 1996), *aff'd*, 132 F.3d 1454 (5th Cir. 1997); *United States v. Nguyen*, 928 F. Supp. 1525, 1543 (D. Kan. 1996). In *United States v. Spivey*, 958 F. Supp. 1523, 1535 (D.N.M. 1997), the court rejected the defendant's contention that the phrase "low rehabilitative potential" was void for vagueness. In *United States v. Davis*, 912 F. Supp. at 946, the court concluded that, while the phrase was too vague to stand on its own as a separate nonstatutory aggravator, it could be used to prove future dangerousness.

8. In *United States v. Nguyen*, 928 F. Supp. 1525, 1541-42 (D. Kan. 1996), the court cautioned the government that the evidence it submits to prove lack of remorse must be "more than mere silence . . . and it may not implicate [the defendant's] constitutional right to remain silent." In *United States v. Davis*, 912 F. Supp. 938, 946 (E.D. La. 1996), *aff'd*, 132 F.3d 1454 (5th Cir. 1997), the court held that the government may not assert lack of remorse as an independent nonstatutory factor, but could argue it as probative of the defendant's future dangerousness. *Accord United States v. Cooper*, 91 F. Supp. 2d 90, 113 (D.D.C. 2000).

9. Mental evaluation evidence may also be mitigating, and the jury must be allowed to give full effect to it as such. *Penry v. Johnson*, 532 U.S. 782, 797 (2001).

10. *See* Note 3, *supra*.

11. *See* 18 U.S.C. §§ 1510, 1512, and 1513; *United States v. Edelin*, 134 F. Supp. 2d 59, 77 (D.D.C. 2001). In *United States v. Friend*, 92 F. Supp. 2d 534, 537, 545 (E.D. Va. 2000), the court struck the nonstatutory aggravating factor that the defendant discussed killing a potential witness after the murder of the victim because it did not meet the relevance and heightened reliability standards required under the FDPA and the Supreme Court's death penalty jurisprudence.)

12. *See* Note 3, *supra*

13. In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court overruled its prior decisions in *South Carolina v. Gathers*, 490 U.S. 805 (1989), and *Booth v. Maryland*, 482 U.S. 496 (1987), and held that the victim's personal characteristics and the impact of the murder on the victim's family may be considered in capital sentencing. Section 3593(a)(2) states that:

> The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information.

In *United States v. Jones*, 132 F.3d 232, 251 (5th Cir. 1998), the court concluded that language referring to the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas," where the crime occurred, "fail[ed] to guide the jury's discretion, or distinguish this murder from any other murder." The court also noted that "the district court offered no additional instructions to clarify the meaning" of that language. Id. The court concluded that submission of a "victim vulnerability" nonstatutory aggravating factor in these circumstances was error, but that the error was harmless. *Id.* at 252. A plurality of four Justices of the Supreme Court disagreed, concluding that because the victim impact aggravator directed the jury to evidence specific to the case before it, the aggravator was not overbroad in a way that offends the Constitution. *Jones v. United States*, 527 U.S. 373, 401-02 (1999). Three of the Justices agreed with the lower court. *Id.* at 420.

Several Courts of Appeals have approved the admission of victim impact testimony: *United States v. Allen*, 247 F.3d 741, 778-79 (8th Cir. 2001), *judgment vacated and remanded on other grounds*, 536 U.S. 953 (2002); *United States v. Barnette*, 211 F.3d 803, 818-819 (4th Cir. 2000); *United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), *abrogated in part on other grounds*, *United States v. Martinez-Salazar*, 528 U.S. 304 (2000); *United States v. Webster*, 162 F.3d 308 (5th Cir. 1998) (companion case to *Hall*, same result. *Id.* at 321); *United States v. Battle*, 173 F.3d 1343 (11th Cir. 1999); *United States v. McVeigh*, 153 F.3d 1166, 1218-23 (10th Cir. 1998). The Tenth Circuit in *McVeigh* found victim impact testimony such as the unique qualities of the victims, the witnesses' last contacts with the victims, and the impact of learning of the victims' deaths to be appropriate under *Payne v. Tennessee*, 501 U.S. 808 (1991). In *United States v. Bernard*, 299 F.3d 467, 478-79 (5th Cir. 2002), the court held that evidence of the victims' religious beliefs, and of the victims' parents' reliance on their religious beliefs for comfort, were not unduly prejudicial. The court in *Bernard* found other evidence introduced during the victim impact portion of the sentencing phase to be error, but not plain error. *Id.* at 480-81.

For an extensive discussion of types of victim-impact testimony properly admitted in the circumstances of the Oklahoma City bombing case, *see United States v. McVeigh*, 153 F.3d at 1216-22.

See Note 3, *supra*.

Committee Comments

The Supreme Court has held that the Constitution allows consideration of nonstatutory aggravating factors "relevant to the character of the defendant or the circumstances of the crime[,]" *Barclay v. Florida*, 463 U.S. 939, 967 (1983), after at least one statutory aggravating factor that narrows the class of defendants eligible for the death penalty is found, *Zant v. Stephens*, 462 U.S. 862, 878 (1983). In *Tuilaepa v. California*, 512 U.S. 967, 976 (1994), the Supreme Court stated that:

> our capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty. See, e.g., Woodson, 428 U.S. at 304, 96 S. Ct., at 2991 ("consideration of . . . the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death"). . . . We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. . . . The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

Furthermore, as the court stated in *United States v. Bin Laden*, 126 F. Supp. 2d 290, 302 (S.D.N.Y. 2001): "Congress allowed for the admission of non-statutory aggravating factors precisely because it could not foresee every criminal circumstance that might arise." At the same time, a nonstatutory aggravating factor must be "sufficiently indicative of a defendant's disdain for human life" to warrant its submission to the jury. *Id.* at 302-03. The *Bin Laden* court

rejected as an appropriate nonstatutory aggravating factor that the defendants disrupted important governmental functions, concluding that the factor was "simply not sufficiently indicative" of the defendants' disdain for human life. *Id.* at 303. The court in *United States v. Cuff*, 38 F. Supp. 2d 282, 288-89 (S.D.N.Y. 1999), rejected as a nonstatutory aggravating factor that firearms had been used in connection with the homicides, concluding that "use of a firearm does not, in any rational sense, make a homicide worse."

The added protections of written notice in advance of trial under section 3593(a) and proof beyond a reasonable doubt under section 3593(c), which are not required for sentencing information in non-capital cases, are intended to meet the constitutional requirements for "heightened procedural safeguards" in capital cases to ensure fairness and consistency in the imposition of the death penalty. *See, e.g., United States v. Pretlow*, 779 F. Supp. 758, 770 (D.N.J. 1991) (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

Defendants typically make vagueness, overbreadth, and duplication challenges to nonstatutory aggravating factors. As to vagueness, Justice Thomas, joined by three other justices, reiterated recently in *Jones v. United States*, 527 U.S. 373, 400 (1999), that

> Ensuring that a sentence of death is not so infected with bias or caprice is our "controlling objective when we examine eligibility and selection factors for vagueness." *Tuilaepa v. California*, 512 U.S. 967, 973, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994). Our vagueness review, however, is "quite deferential." Ibid. As long as an aggravating factor has a core meaning that criminal juries should be capable of understanding, it will pass constitutional muster. Ibid.

See also Walton v. Arizona, 497 U.S. 639, 655 (1990).

As to overbreadth, Justice Thomas, joined by three other justices, stated in *Jones*, 527 U.S. at 401, with reference to victim vulnerability and victim impact factors:

> We have not . . . specifically considered what it means for a factor to be overbroad when it is important only for selection purposes and especially when it sets forth victim vulnerability or victim impact evidence. . . . Even though the concepts of victim impact and victim vulnerability may well be relevant in every case, evidence of victim vulnerability and victim impact in a particular case is inherently individualized. And such evidence is surely relevant to the selection phase decision, given that the sentencer should consider all of the circumstances of the crime in deciding whether to impose the death penalty. See Tuilaepa, 512 U.S. at 976.
>
> What is of common importance at the eligibility and selection phases is that "the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." Id. at 973. So long as victim vulnerability and victim impact factors are used to direct the jury to the individual circumstances of the case, we do not think that principle will be disturbed.

As to duplication, Justice Thomas, joined by three other justices, noted in *Jones*, 527 U.S. at 398 that:

> We have never before held that aggravating factors could be duplicative so as to render them constitutionally invalid, nor have we passed on the "double counting" theory that the Tenth Circuit advanced in McCullah and the Fifth Circuit appears to have followed here. What we have said is that the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor.

Justice Thomas went on to point out that, even accepting for the sake of argument the duplication theory, in *Jones* the factors "as a whole were not duplicative–at best, certain evidence was relevant to two different aggravating factors." *Id.* at 399.

Whether a particular nonstatutory aggravating factor impermissibly duplicates one of the statutory aggravating factors is an issue that has arisen in several of the lower courts. *See generally* Committee Comments to Instruction 4.03, *supra*; *United States v. Bin Laden*, 126 F. Supp. 2d 290, 298-99 (S.D.N.Y. 2001) and cases therein cited. In *Bin Laden*, the court concluded that the nonstatutory aggravating factor that the defendants targeted high public officials of the United States serving abroad was not impermissibly duplicative of the statutory aggravating factor that the offense involved a high public official. (Instruction 12.07N) *Id.* at 302. In *United States v. Cooper*, 91 F. Supp. 2d 90, 108-09 (D.D.C. 2000), the court concluded that inclusion of seven racketeering acts charged in the indictment and found by the jury in the case before it as part of the "other criminal activity" nonstatutory aggravating factor was not impermissibly duplicative.

The court in *United States v. Johnson*, 1997 WL 534163, *6 (N.D. Ill. Aug. 20, 1997), rejected the defendant's contention that the nonstatutory aggravating factor "vileness of the crime" was impermissibly duplicative of the statutory aggravating factor "heinous, cruel, or depraved manner of committing the offense." The court explained that

> statutory factors narrow the class of defendants eligible for the death penalty, whereas non-statutory factors serve the separate "individualizing" function that ensures the "jury [has] before it all possible relevant information about the individual defendant whose fate it must determine." *Walker*, 910 F. Supp. at 855 (quoting *Jurek v. Texas*, 428 U.S. 262, 276 (1976)). There is no reason to believe that by choosing one factor for one purpose Congress excluded the use of related (and even broader) factors for a completely separate purpose. *Id.*; *Spivey*, 958 F. Supp. at 1534-35.

Whether the government can reallege as a separate nonstatutory aggravating factor one or more of the mental states listed in sections 3591(a)(2)(A)-(D) is also currently being litigated. The court in *United States v. Nguyen*, 928 F. Supp. 1525, 1538-40 (D. Kan. 1996), rejected the defendant's contention that to do so would result in impermissible duplication. *Accord United States v. Cooper*, 91 F. Supp. 2d 90, 109-10 (D.D.C. 2000). The court in *United States v. Chanthadara*, 928 F. Supp. 1055, 1059 (D. Kan. 1996), held, however, that the government

could not submit as aggravating factors overlapping mental states listed in sections 3591(a)(2)(A)-(D) to the jury; to do so would be impermissibly duplicative.

Defendants have argued that the death penalty provisions under section 3591, *et seq.* impermissibly permit the prosecutor to define and the jury to consider non-statutory aggravating factors in violation of the nondelegation doctrine. This contention has been uniformly rejected by courts construing this statute and 21 U.S.C. § 848. *See United States v. Allen*, 247 F.3d 741, 758-59 (8th Cir. 2001), *judgment vacated and remanded on other grounds*, 536 U.S. 953 (2002); *United States v. Paul*, 217 F.3d 989, 1001 (8th Cir. 2000); *United States v. Pitera*, 795 F. Supp. 546, *aff'd*, 986 F.2d 499 (2d Cir. 1992); *United States v. Cooper*, 754 F. Supp. 617, 626, *aff'd*, 19 F.3d 1154 (7th Cir. 1994).

Defendants have also asserted an ex post facto challenge. This too has been rejected. The limited function of nonstatutory aggravating factors under the statute does not change either the elements of the crime or the quantum of punishment attached to the crime; thus, there is no violation of the ex post facto clause of the Constitution. *See United States v. Allen*, 247 F.3d 741, 759 (8th Cir. 2001), *judgment vacated and remanded on other grounds*, 536 U.S. 953 (2002). *See also Miller v. Florida*, 482 U.S. 423, 430, 433 (1987) (no ex post facto violation if a change does not increase punishment beyond what was prescribed when the crime was committed); *Walton v. Arizona*, 497 U.S. 639, 648 (1990) (even statutory "[a]ggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment" which have otherwise been established by the statute) (quoting *Poland v. Arizona*, 476 U.S. 147, 156 (1986)).

Finally, defendants have contended that "the lack of proportionality review combined with the prosecutor's unrestrained authority to allege non-statutory aggravating factors" renders the Title 18 death penalty statute unconstitutional. The court in *United States v. Jones*, 132 F.3d at 240, rejected this contention, concluding that the statute "is not so lacking in other checks on arbitrariness that it fails to pass constitutional muster for lack of proportionality review."

12.09. MITIGATING FACTORS

Before you may consider the appropriate punishment, you must consider whether the defendant has established the existence of [a] [any] mitigating factor[s]. A mitigating factor is a fact about the defendant's life or character, or about the circumstances surrounding the offense(s) that would suggest, in fairness, that a sentence of death is not the most appropriate punishment, or that a lesser sentence is the more appropriate punishment.

Unlike aggravating factors, which you must unanimously find proved beyond a reasonable doubt in order to consider them in your deliberations, the law does not require unanimous agreement with regard to mitigating factors. Any juror persuaded of the existence of a mitigating factor must consider it in this case. Further, any juror may consider a mitigating factor found by another juror, even if he or she did not find that factor to be mitigating.[1]

It is the defendant's burden to establish any mitigating factors, but only by a preponderance of the evidence. This is a lesser standard of proof under the law than proof beyond a reasonable doubt. A factor is established by a preponderance of the evidence if its existence is shown to be more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, produces in your mind the belief that what is sought to be established is, more likely than not, true. [In Part V of the Special Verdict Form relating to mitigating factors, you are asked [, but not required,][2] to report the total number of jurors that find a particular mitigating factor established by a preponderance of the evidence.]

Notes on Use

1. In *Jones v. United States*, 527 U.S. 373, 377 (1999), the Supreme Court held that the jury may consider a mitigating factor in its weighing process so long as one juror accepts the factor as mitigating by a preponderance of the evidence.

2. The court in *United States v. Chandler*, 996 F.2d 1073, 1087 (11th Cir. 1993), construed similar language in 21 U.S.C. § 848(k) as requiring that the jury be informed that it has the **option** to return written findings as to mitigating factors. The Committee recommends that, in order to facilitate appellate review, the jury be required to make written findings as to mitigating factors. However, if the defendant objects to the return of written findings, the court may be advised, based on *Chandler*, to give the jury the option. Note that in *United States v. Paul*, 217 F.3d 989, 999, n.6 (8th Cir. 2000), the court questions whether it is even able to review

the jury's findings regarding the number of jurors who found a particular mitigator, because the FDPA does not require the jury to make special findings regarding mitigating factors.

Committee Comments

The Constitution requires that a death penalty statute must permit the defendant to raise any aspect of character or background and the circumstances of the offense as a mitigating factor. *Penry v. Johnson*, 532 U.S. 782, 797 (2001); *Penry v. Lynaugh*, 492 U.S. 302, 319-28 (1989); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). This includes a wide range of relevant factors. *See, e.g., Johnson v. Texas*, 509 U.S. 350, 367-68, 113 S. Ct 2658, 2668-69 (1993) (lack of maturity and underdeveloped sense of responsibility); *Graham v. Collins*, 506 U.S. 461, 475-76 (1993) (family background and positive character traits); *Penry v. Lynaugh*, 492 U.S. at 328 (mental retardation and childhood abuse); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (good conduct in jail between arrest and trial); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (youth and susceptibility to influence); *Lockett v. Ohio*, 438 U.S. at 607-08 (victim involvement, impaired capacity, and substantial duress, coercion, or provocation).

In *Lockett v. Ohio*, the Court cautioned that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." 438 U.S. at 604 n.12. *See California v. Brown*, 479 U.S. 538, 542 (1987) (holding that "mere sympathy" is not a proper consideration in determining whether to impose a death sentence); *United States v. Edelin*, 134 F. Supp. 2d 59, 69 (D.D.C. 2001) (holding that, while race in and of itself is not a proper mitigating factor, " 'the <u>effects</u> and <u>experiences</u> of race may be admissible,'" (quoting *United States v. Webster*, 162 F.3d 308, 356-57 (5th Cir. 1998) (emphasis in original)).

The question exists whether the fact that, if the jury does not impose the death sentence, the defendant must be sentenced to life in prison without the possibility of parole, is a mitigating factor. In *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994), the Supreme Court held that where a defendant's future dangerousness was at issue and the only sentencing alternative to the death penalty under state law was life imprisonment without possibility of parole, due process required that the sentencing jury be informed that the defendant was ineligible for parole. The Court reiterated that holding in *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001). However, the court in *United States v. Chandler*, 996 F.2d 1073, 1086 (11th Cir. 1993), held that the "possibility" of receiving a sentence of life imprisonment without parole is not a relevant mitigating factor); *accord Byrne v. Butler*, 845 F.2d 501, 507 (5th Cir. 1988).

Evidence of mitigating factors, like that of aggravating factors, may be considered regardless of admissibility under the Federal Rules of Evidence, except where its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. 18 U.S.C. § 3593(c). (Under 21 U.S.C. § 848(j), evidence is admissible except where its probative value is <u>substantially</u> outweighed by the danger of unfair prejudice.)

Both 21 U.S.C. § 848(k) and 18 U.S.C. § 3593(d) provide that any mitigating factor may be considered without limitation by the jury. In *Jones v. United States*, 527 U.S. 373, 377

(1999), the Supreme Court indicated that all jurors may consider a mitigating factor found by any juror. No special finding or unanimous verdict -- or even a vote -- is required. *See McKoy v. North Carolina*, 494 U.S. 433 (1990) (statutory requirement for unanimous finding as to mitigating factors violated Eighth and Fourteenth Amendments); *Mills v. Maryland*, 486 U.S. 367 (1988) (death sentence reversed because the instructions and verdict form could be interpreted as precluding jury consideration of any mitigating factor in the absence of unanimous agreement).

12.10. MITIGATING FACTORS ENUMERATED (18 U.S.C. § 3592(a))

The mitigating factors which the defendant asserts he has proved by a preponderance of the evidence are: (Include any of the following applicable mitigating factors)

1. [The defendant's] capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, regardless of whether his capacity was so impaired as to constitute a defense to the charge.
2. [The defendant] was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.
3. [The defendant] is punishable as a principal in the offense, which was committed by another, but his participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.
4. Another defendant or defendants, equally culpable in the crime, will not be punished by death.
5. [The defendant] does not have a significant prior history of other criminal conduct.
6. [The defendant] committed the offense under severe mental or emotional disturbance.
7. The victim consented to the criminal conduct that resulted in the victim's death.

[8. [The defendant] demonstrated severe learning problems in school, which led to academic failure, increased frustration, and eventual dropout, and those problems tend to indicate that the defendant should not be sentenced to death.][1]

You are permitted to consider <u>anything</u> else about the commission of the crime or about [the defendant's] background or character that would mitigate against imposition of the death penalty. If there are any such mitigating factors, whether or not specifically argued by defense counsel, which are established by a preponderance of the evidence, you are free to consider them in your deliberations.

In Part V on Page ___ of the Special Verdict Form, you are [asked] to identify any mitigating factors that any one of you finds has been proved by a preponderance of the evidence [, but you are not required to do so][2].

Notes on Use

1. To avoid jury confusion in the event that a juror concludes that the facts supporting the mitigator have been proved but does not consider those facts to be mitigating, each mitigating factor falling within the "catch-all" section 3592(a)(8) provision should include language that the factor is mitigating as that term is defined in Instruction 12.01.

2. *See* Note 1, Instruction 12.09, *supra*.

Committee Comments

Source: 18 U.S.C. § 3593(d). *See Penry v. Lynaugh*, 492 U.S. 302, 319-28 (1989); *Lockett v. Ohio*, 438 U.S. 586, 604, 607-08 (1978); *United States v. Chandler*, 996 F.2d 1073, 1086-88 (11th Cir. 1993); *United States v. Pitera*, 795 F. Supp. 546, 564 (E.D.N.Y.), *aff'd*, 986 F.2d 499 (2d Cir. 1992). *See also Johnson v. Texas*, 509 U.S. 350, 367-68, 113 S. Ct 2658, 2668-69 (1993); *Graham v. Collins*, 506 U.S. 461, 475-76 (1993); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

Many factors, both aggravating and mitigating, may be factually true, and yet not be perceived by a juror as aggravating or mitigating. For instance, in *United States v. Paul*, 217 F.3d 989, 1000 (8th Cir. 2000), one of the mitigating factors submitted to the jury was the fact that the defendant was eighteen when he committed the offense. The court found no error in the failure of six jurors to find his age as mitigating, concluding that a juror is not required to give mitigating effect to any factor. *Accord United States v. Bernard*, 299 F.3d 467, 485-86 (5th Cir. 2002). To prevent confusion, the Committee suggests that nonstatutory aggravating and mitigating factors include some version of the phrase "and that fact tends to [support] [mitigate] imposition of the death penalty." *See* Note 4, Instruction 12.08, *supra*.

12.11. WEIGHING AGGRAVATION AND MITIGATION

If you find unanimously and beyond a reasonable doubt [that the defendant was eighteen years of age or older when he committed the offenses;] that he acted with the requisite intent; and that the Government proved the existence of at least one statutory aggravating factor; and after you then determine whether the Government proved the existence of the nonstatutory aggravating factors submitted to you, and whether the defendant proved the existence of any mitigating factors, you will then engage in a weighing process.[1] In determining the appropriate sentence, all of you must weigh the aggravating factor or factors that you unanimously found to exist -- whether statutory or nonstatutory - and each of you must weigh any mitigating factor(s) that you individually found to exist, and may weigh any mitigating factor(s) that [another] [others] of your fellow jurors found to exist. In engaging in the weighing process, you must avoid any influence of passion, prejudice, or undue sympathy. Your deliberations should be based upon the evidence you have seen and heard and the law on which I have instructed you.

Again, whether or not the circumstances in this case justify a sentence of death is a decision that the law leaves entirely to you.

The process of weighing aggravating and mitigating factors against each other [or weighing aggravating factors alone, if there are no mitigating factors,] in order to determine the proper punishment is not a mechanical process. In other words, you should not simply count the number of aggravating [and mitigating] factors and reach a decision [based on which number is greater]; you should consider the weight and value of each factor.

The law contemplates that different factors may be given different weights or values by different jurors. Thus, you may find that one mitigating factor outweighs all aggravating factors combined, or that the aggravating factor(s) proved [does] [do] not, standing alone, justify imposition of a sentence of death. If one or more of you so find, you must return a sentence of life in prison without possibility of release [or a lesser sentence to be determined by the court]. Similarly, you may unanimously find that a particular aggravating factor sufficiently outweighs all mitigating factors combined to justify a sentence of death. You are to decide what weight or

value is to be given to a particular aggravating or mitigating factor in your decision-making process.

If you unanimously conclude that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors which any of you found to exist to justify a sentence of death, [or in the absence of any mitigating factors, that the aggravating factor or factors alone are sufficient to justify a sentence of death], and that therefore death is the appropriate sentence in this case, you must record your determination that a sentence of death shall be imposed in Section [V] [VI](a), on [Page __ of] the Special Verdict Form.

[Continue with Option A or Option B, as appropriate]

Option A: To be given if the statute requires that the sentence be death or life imprisonment without possibility of parole:

If you determine that death is not justified, you must complete Section [V] [VI](a) of the Special Verdict Form, and you must then record your determination that the defendant be sentenced to life imprisonment without possibility of release[2] in Section [V] [VI](b)on [Page ___ of] the Special Verdict Form.]

Option B: To be given if the statute allows a sentence less than life imprisonment without possibility of release:

If you determine that death is not justified, you must complete Section [V] [VI](a) of the Special Verdict Form, and then determine whether the appropriate punishment is life in prison without possibility of release. Record that determination in Section [V] [VI](b)on [Page __ of] the Special Verdict Form.] If you do not return a punishment of death or life imprisonment without possibility of release, the court must sentence the defendant to a lesser punishment as provided by law. [That sentence may or may not be life imprisonment.] [There is no parole in the federal system.]

Notes on Use

1. If no mitigators are offered, the Committee suggests that a record be made that the defendant knows he has the right to offer evidence of mitigating factors, and agrees with his attorneys' decision not to do so. If no evidence of mitigating factors is offered, the instructions should be modified so that the defendant will not be prejudiced by references to mitigating factors when there are none.

Homicide - Death Penalty - Sentencing

2. In *Shafer v. South Carolina*, 532 U.S. 36 (2001), the Supreme Court reiterated its holding in *Simmons v. South Carolina*, 512 U.S. 154 (1994), that a jury considering whether to impose the death penalty or life imprisonment must be instructed that life imprisonment means life imprisonment without possibility of parole whenever the defendant's future dangerousness is placed in issue.

Committee Comments

In *United States v. Allen*, 247 F.3d 741, 780-82 (8th Cir. 2001), *judgment vacated and remanded on other grounds*, 536 U.S. 953 (2002), the Eighth Circuit held that this instruction and Instruction 1.01 (the preliminary instruction), which were given to the jury in the case, "accurately explain the jury's role in sentencing under the FDPA." The court also held that the district court did not abuse its discretion in refusing to give the defendant's "mercy" instruction, which closely followed the language in the Title 21 statute to the effect that the jury, "regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence." It concluded that

> Under the FDPA, the jury exercises complete discretion in its determination of whether the aggravating factors outweigh the mitigating factors. The jury was informed that whether or not the circumstances justify a sentence of death was a decision left entirely to them. Mercy is not precluded from entering into the balance of whether the aggravating circumstances outweigh the mitigating circumstances. The FDPA merely precludes the jurors from arbitrarily disregarding its unanimous determination that a sentence of death is justified.

The Eighth Circuit reaffirmed its holding in *Allen* in *United States v. Ortiz*, 315 F.3d 873 (8th Cir. 2002).

12.12. CONSEQUENCES OF DELIBERATIONS (18 U.S.C. § 3594)

At the end of your deliberations, if you unanimously determine that the defendant should be sentenced to death, or to life imprisonment without possibility of release, the court is required to impose that sentence. (Continue with Option A or Option B, as appropriate.)

Option A, to be given if the defendant may be sentenced to death, life without parole, or a lesser sentence:

If you determine the defendant should be sentenced to a lesser sentence, or if you cannot unanimously agree whether [the defendant] should be sentenced to death or life imprisonment without possibility of release, the court will sentence the defendant to a sentence other than death, which must be a term of imprisonment without parole and may be up to life imprisonment without the possibility of release.[1] The court will determine what that sentence should be, and you should not speculate on the sentence the defendant might receive.] [There is no parole in the federal system.]

Option B, to be given if the defendant must be sentenced either to death or life in prison without possibility of parole:

If you cannot unanimously agree whether [the defendant] should be sentenced to death or life imprisonment without possibility of release, the court will sentence the defendant to a minimum of life in prison and may sentence the defendant to life imprisonment without the possibility of release. [There is no parole in the federal system.]

Notes on Use

1. In *Jones v. United States*, 527 U.S. 373, 380 (1999), the Supreme Court held that if the jury reaches a result other than a unanimous verdict recommending a sentence of death or of life imprisonment without possibility of release, the district court shall impose a sentence less than death. The Court also held that the Eighth Amendment does not require that the jury be instructed regarding the consequences of their failure to agree. *Id.* Finally, the Court declined to exercise its supervisory powers to require that such an instruction be given in every case. *Id.* at 382-83.

Committee Comments

See U.S.S.G. §§ 2A1.1 and 5K2.0; *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994); *California v. Ramos*, 463 U.S. 992, 1011-14 (1983); *United States v. Chandler*, 996 F.2d 1073, 1086 (11th Cir. 1993); *United States v. Villarreal*, 963 F.2d 725, 727 (5th Cir. 1992);

Byrne v. Butler, 845 F.2d 501, 507 (5th Cir. 1988); *United States v. Pitera*, 795 F. Supp. 546, 552 (E.D.N.Y.), *aff'd*, 986 F.2d 499 (2d Cir. 1992). *See generally* "Prejudicial effect of statement or instruction of court as to possibility of parole or pardon," 12 A.L.R. 3d 832 (1967).

12.13. JUSTICE WITHOUT DISCRIMINATION (18 U.S.C. § 3593(f))

In your consideration of whether the death sentence is justified, you must not consider the race, color, religious beliefs, national origin, or sex of either the defendant or the victim(s). You are not to return a sentence of death unless you would return a sentence of death for the crime in question without regard to the race, color, religious beliefs, national origin, or sex of either the defendant [and] [or any] victim.[1]

To emphasize the importance of this consideration, Section [VI] [VII] of the Special Verdict Form contains a certification statement. Each juror should carefully read the statement, and sign in the appropriate place if the statement accurately reflects the manner in which each of you reached your decision.

Notes on Use

1. Some courts have held that section 3593(f) only prohibits consideration of these factors as aggravating; the jury may consider them as mitigating factors in appropriate circumstances. *See, e.g., United States v. Walker*, 910 F. Supp. 837, 857 (N.D.N.Y. 1995); *United States v. Nguyen*, 928 F. Supp. 1525, 1547 (D. Kan. 1996) and cases cited therein. However, the court in *United States v. Cooper*, 91 F. Supp. 2d 90, 101-02 (D.D.C. 2000), concludes that "in light of the Supreme Court's mandate in Zant that race be 'totally irrelevant to the sentencing process,' 462 U.S. at 318, 103 S. Ct. at 2368, . . . this interpretation may be problematic." It cites the court's conclusion in *United States v. Webster*, 162 F.3d 308, 355 (5th Cir. 1998) that these factors cannot be considered as either mitigating or aggravating factors. It goes on to make the distinction that neither the Constitution nor the FDPA precludes the jury from considering "the defendant's experiences resulting from his race, color, religion, national origin or gender, and the effect those experiences have had on his life." *Cooper*, 91 F. Supp. 2d at 90. *Accord United States v. Edelin*, 134 F. Supp. 2d 59, 69 (D.D.C. 2001).

Committee Comments

See Zant v. Stephens, 462 U.S. 862, 885 (1983).

12.14. DEFENDANT'S RIGHT NOT TO TESTIFY

[The defendant] did not testify. There is no burden upon a defendant to prove that he or she should not be sentenced to death. The burden is entirely on the prosecution to prove that a sentence of death is justified. Accordingly, the fact that [a] defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your decision.

Committee Comments

See Instruction 4.01, *supra*. This instruction should only be given upon request of the defendant. The Committee recommends the practice of inquiring, on the record, whether the defendant desires this instruction.

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12.15 - 12.19. [Reserved for Future Use]

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12.20. SPECIAL VERDICT (18 U.S.C. § 3593(d); 21 U.S.C. § 848(k), (q))

I have prepared a form entitled "Special Verdict Form" to assist you during your deliberations. You are required to record your decisions on this form.

[Section I of the Special Verdict Form contains space to record your findings on the defendant's age;] Section [I] [II] contains space to record your findings on the requisite mental state; Section [II] [III] contains space to record your findings on statutory aggravating factors; and Section [III] [IV] contains space to record your findings on non-statutory aggravating factors. Section [IV] [V] of the Special Verdict Form contains space to record your findings on mitigating factors. [Add the following language, if the court determines that written findings should not be required. See Note 1, Instruction 12.09, supra] [if you choose to do so. If you choose not to do so, cross out each page of Section [IV] [V] with a large "X." [In this case, [the defendant] has requested that you [do] [do not] record written findings on the mitigating factors.]]

You are each required to sign the Special Verdict Form.

Committee Comments

See United States v. Chandler, 996 F.2d 1073, 1086-88 (11th Cir. 1993). *See Schad v. Arizona*, 501 U.S. 624, 644 (1991).

12.21. CONCLUDING INSTRUCTION

If you want to communicate with me at any time during your deliberations, please write down your message or question and pass the note to the [marshal] [bailiff] who will bring it to my attention.

I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally.

I caution you, however, with any message or question you might send, that you should not tell me any details of your deliberations or how many of you are voting in a particular way on any issue.

Let me remind you again that nothing that I have said in these instructions -- and nothing that I have said or done during the trial -- has been said or done to suggest to you what I think your decision should be. The decision is your exclusive responsibility.

Committee Comments

Lowenfield v. Phelps, 484 U.S. 231, 239-40 (1988); *Brasfield v. United States*, 272 U.S. 448, 450 (1926); *United States v. Ulloa*, 882 F.2d 41, 44 (2d Cir. 1989).

The district court has the option to give an *Allen* instruction in appropriate circumstances. *Jones v. United States*, 527 U.S. 373, 382 n. 5 (1999); *Lowenfield v. Phelps*, 484 U.S. 231, 237-40 (1988); *Allen v. United States*, 164 U.S. 492, 501-02 (1896). Instruction 10.02, *supra*, must be modified if it is to be used in a death penalty case.

12.22. SPECIAL VERDICT FORM

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA	**	
	*	
v.	*	**CRIMINAL NO. _____**
	*	
[THE DEFENDANT]	*	
	*	

SPECIAL VERDICT FORM

MURDER OF (Name of Victim) BY (DEFENDANT)

[I. [AGE OF THE DEFENDANT (Unless the defendant stipulates that he/she was eighteen years of age at the time of the offense. See Note 4, Instruction 12.01, supra.)

Instructions: Answer "YES" or "NO." Do you, the jury, unanimously find that the Government has established beyond a reasonable doubt that:

(The defendant) was eighteen years of age or older at the time of the offense.

YES _____

NO _____

_____

Foreperson

Instructions: If you answered "NO" with respect to the determination in this section, then stop your deliberations, cross out Sections II, III, IV, V and VI of this form, and proceed to Section VII. Each juror should then carefully read the statement in Section VII, and sign in the appropriate place if the statement accurately reflects the manner in which he or she reached his or her decision. You should then advise the court that you have reached a decision.

If you answered "YES" with respect to the determination in this Section I, proceed to Section II which follows.]

[I] [II.] REQUISITE MENTAL STATE

Instructions: [For each of the following,] answer "YES" or "NO."

[1(A) Do you, the jury, unanimously find that the Government has established beyond a reasonable doubt that (the defendant) intentionally killed (name of victim).][1]

YES _____

NO _____

_____

Foreperson

[1(B) Do you, the jury, unanimously find that the Government has established beyond a reasonable doubt that (the defendant) intentionally inflicted serious bodily injury which resulted in the death of (name of victim).]

YES _____

NO _____

_____

Foreperson

[1(C) Do you, the jury, unanimously find that the Government has established beyond a reasonable doubt that (the defendant) intentionally participated in an act, contemplating that the life of a person would be taken and/or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim (name of victim) died as a direct result of the act.]

YES _____

NO _____

_____

Foreperson

[1(D) Do you, the jury, unanimously find that the Government has established beyond a reasonable doubt that (the defendant) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim (name of victim) died as a direct result of the act.]

YES _____

NO _____

_____

Foreperson

Instructions: If you answered "NO" with respect to [all of] the determination[s] in this section, then stop your deliberations, cross out Sections [II], III, IV, [and] V [and VI] of this form, and proceed to Section [VI] [VII]. Each juror should carefully read the statement in Section [VI] [VII], and sign in the appropriate place if the statement accurately reflects the manner in which he or she reached his or her decision. You should then advise the court that you have reached a decision.

If you answered "YES" with respect to [one or more of] the determination[s] in this Section [I] [II], proceed to Section [II] [III] which follows.

[II] [III]. STATUTORY AGGRAVATING FACTORS

Instructions: [For each of the following,] [A]nswer "YES" or "NO." [List all aggravating factors supported by the evidence, using the language contained in 18 U.S.C. § 3592(c)(1)-(16); the following are examples]:

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1. Do you, the jury, unanimously find that the Government has established beyond a reasonable doubt that (the defendant) [procured the commission of the offense by payment [promise of payment] of anything of pecuniary value], as set out in Instruction No. ___?

YES _____

NO _____

_____

Foreperson

2. Do you, the jury, unanimously find that the Government has established beyond a reasonable doubt that the defendant committed the offense of (name of offense) after substantial planning and premeditation [to cause the death of a person] [commit an act of terrorism], as set out in Instruction No. ___?

YES _____

NO _____

_____

Foreperson

Instructions: If you answered "NO" with respect to [all of] the Statutory Aggravating Factor[s] in this Section [II] [III], then stop your deliberations, cross out Sections [III], IV, [and] V [and VI] of this form, and proceed to Section [VI] [VII] of this form. Each juror should then carefully read the statement in Section [VI] [VII], and sign in the appropriate place if the statement accurately reflects the manner in which he or she reached his or her decision. You should then advise the court that you have reached a decision.

If you found [the requisite age in Section I], the requisite mental state in Section [I] [II] and answered "Yes" with respect to [one or more of] [the] aggravating factor[s] in this Section [II] [III], proceed to Section [III] [IV] which follows.

[III] [IV]. NON-STATUTORY AGGRAVATING FACTORS

Instructions: [For each of the following,] [A]nswer "YES" or "NO." [List all nonstatutory aggravating factors supported by the evidence; the following is an example:

1. Do you, the jury, unanimously find that the Government has established beyond a reasonable doubt that (the defendant) caused (DESCRIBE THE IMPACT OF THE KILLING ON THE VICTIM'S FAMILY), and that this factor tends to support imposition of the death penalty?][2]

YES _____

NO _____

_____

Foreperson

Instructions: Regardless of whether you answered "YES" or "NO" with respect to the Non-Statutory Aggravating Factor[s] in this Section [III] [IV], proceed to Section [IV] [V], which follows.

[IV] [V]. MITIGATING FACTORS

Instructions: For each of the following mitigating factors, [you have the option to] indicate, in the space provided, the number of jurors who have found the existence of that mitigating factor to be proven by a preponderance of the evidence. [If you choose not to make these written findings, cross out each page of Section V with a large "X" and then continue your deliberations in accordance with the instructions of the court.]

A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established in considering whether or not a sentence of death shall be imposed, regardless of the number of other jurors who agree that the factor has been established. Further, any juror may also weigh a mitigating factor found by another juror, even if he or she did not also find that factor to be mitigating:

[List only those mitigating factors for which evidence has been offered, using the language contained in 18 U.S.C. § 3592(a)(1)-(7); the following are examples]

1. (The defendant)'s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

Number of jurors who so find _____.

2. (The defendant) was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

Number of jurors who so find _____.

3. (The defendant) is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

Number of jurors who so find _____.

[Submit section 3592(a)(8) factors in accordance with the following example:

4. The defendant demonstrated severe learning problems in school, which led to academic failure, increased frustration, and eventual dropout, and those problems tend to indicate that the defendant should not be sentenced to death.[3]

Number of jurors who so find _____.]

[List additional section 3592(a)(8) factor(s) in [the defendant]'s background or character, the circumstances of the crime(s), or other relevant fact or circumstance as mitigation:

__. _____
_____.

Number of jurors who so find _____.

__. _____
_____.

Number of jurors who so find _____.

__. _____
_____.

Number of jurors who so find _____.]

The following extra spaces are provided to write in additional mitigating factors, if any, found by any one or more jurors. If none, write "NONE" and line out the extra spaces with a large "X." If more space is needed, write "CONTINUED" and use the reverse side of this page.

__. _____
_____.

Number of jurors who so find _____.

__. _____
_____.

Number of jurors who so find _____.

__. _____
_____.

Number of jurors who so find _____.

__. _____
_____.

Number of jurors who so find _____.

Instructions: [Regardless of whether you chose to make written findings for the Mitigating Factors in Section [IV] [V] above,] [P][p]roceed to Section [V] [VI] and Section [VI] [VII] which follow.

[V] [VI]. DETERMINATION

Based upon consideration of whether the aggravating factor[s] found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of any mitigating factors, whether the aggravating factor[s] [is] [are] [itself] [themselves] sufficient to justify a sentence of death, and whether death is therefore the appropriate sentence in this case:

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A. Death Sentence

We determine, by unanimous vote, that a sentence of death shall be imposed.

YES _____

NO _____

If you answer "YES," the foreperson must sign here, and you must then proceed to Section [VI] [VII]. If you answer "NO," the foreperson must sign, and you must then proceed to Section [V] [VI](B):

_____

Foreperson

Date: _____ __, ____

B. Sentence of Life in Prison Without Possibility of Release

We determine, by unanimous vote, that a sentence of life imprisonment without possibility of release shall be imposed.

YES _____

NO _____

If you answer "YES," the foreperson must sign here, and then you must proceed to Section [VI] [VII]. [If you answer "NO," the foreperson must sign, and you must proceed to Section [V] [VI](C)] :

_____

Foreperson

Date: _____ __, ____

C. Lesser Sentence.

We recommend, by unanimous vote, that a sentence lesser than death or life imprisonment without possibility of release shall be imposed.

YES _____

NO _____

If you answer "YES," the foreperson must sign here, and then you must proceed to Section [VI] [VII]:

_____

Foreperson

Date: _____ __, ____]

[VI] [VII]. <u>CERTIFICATION</u>

By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or [the] [any] victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime or crimes in question regardless of the race, color, religious beliefs, national origin, or sex of the defendant, or the victim(s).

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

Foreperson

Date: _____ __, _____

Notes on Use

1. The Committee again suggests that, to avoid any concern over "stacking the deck" in favor of the death penalty, the court instruct only on those mental states clearly supported by the evidence. *See* Note 2, Instruction 12.06, *supra*.

2. Each nonstatutory aggravating factor should include language that the factor tends to support imposition of the death penalty.

3. Each section 3592(a)(8) mitigating factor should include language that the factor is mitigating as defined in Instruction 12.01, *supra*.