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

2000 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 2000 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, secretary to Judge Knox, who retyped many of the instructions and edited them for consistency with the other published instructions. 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 computer disk from your clerk of court and in this volume. They will also be made available on an Eighth Circuit Website. The Committee plans to continue in operation 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 being advised.

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 Ross T. Roberts, who was reporter for this project for many years. A dedication page is included herein.

Respectfully submitted,
SCOTT O. WRIGHT
Chairman

DEDICATION

The Committee is honored to dedicate these instructions to Judge Ross T. Roberts. Ross was the Reporter for the Committee and he was relied on very heavily from the very outset in the formulation of these instructions. Because Ross had such a brilliant legal mind, his work and input on the Committee was highly valued by all of its members.

It is a great privilege for the Committee to recognize Ross's work on the Instruction Committee and dedicate these Instructions to his memory.

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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 which provides "[n]o party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the *grounds of the objection*" (emphasis added). *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 consideration is not sufficient to preserve an error based on a judge's failure subsequently to use the request. *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. The instruction models detailed herein will have to be modified in particular cases to reflect these variations.

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 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.

Numbered footnotes to portions of the instructions are set out under "Notes on Use" which follows "Committee Comments" for each instruction.

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1. 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.), *cert. denied*, 439 U.S. 840 (1978). Preliminary instructions are not a substitute for final instructions. *United States v. Ruppel*, 666 F.2d 261, 274 (5th Cir.), *reh. denied*, 671 F.2d 1378 (5th Cir.), *cert. denied*, 458 U.S. 1107, *reh. denied*, 458 U.S. 1132 (1982).

In addition to the preliminary instructions set out in this manual, other examples of preliminary instructions can be found in 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 10.01-10.09 (4th ed. 1992); Fifth Circuit Pattern Jury Instructions §§ 1.01, 1.02 (1997); Ninth Circuit Criminal Jury Instructions 1.1-1.11 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Trial) §§ 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

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

Ladies and gentlemen: I shall 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 shall 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.

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 the law as stated in my instructions, whether you agree with it or not.

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.

Preliminary Instructions Before Opening Statements

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.

Committee Comments

See Introductory Comment, Section 1.00, *supra*.

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 defendant.

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 shall 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.]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 10.01 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 1, Commentary (1988); Ninth Cir. Crim. Jury Instr. 1.2 (1997).

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.

Notes on Use

1. List the essential 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*.

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 shall 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 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 10.01, 12.04 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 1 (1988); Ninth Cir. Crim. Jury Instr. 1.3, 1.4, 1.5 (1997).

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.

Preliminary Instructions Before Opening Statements

1.04 DIRECT AND CIRCUMSTANTIAL EVIDENCE

[*See* final paragraph of Instruction 1.03, *supra*.]

Committee Comments

See Ninth Cir. Crim. Jury Instr. 1.5 (1997) and Federal Judicial Center, Pattern Criminal Jury Instructions § 1 (1988) for examples of a direct and circumstantial evidence instruction as part of the preliminary instructions. *See further* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.04 (4th ed. 1992), the substance of which was approved in *United States v. Kirk*, 534 F.2d 1262, 1279 (8th Cir. 1976), *cert. denied*, 433 U.S. 907 (1977). *See also* Fifth Circuit Pattern Jury Instructions: Criminal § 1.07 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 1.05 (1999); Eleventh Circuit Pattern Jury Instructions: Criminal (Basic) §§ 4.1, 4.2 (1997).

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's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's 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]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 10.01 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal § 1.03 (1999); Ninth Cir. Crim. Jury Instr. 1.7 (1997). *See generally* West Key # "Criminal Law" 785(1-16).

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).

Such factors may be considered by the jury in determining the credibility of the witness. *Clark v. United States*, 391 F.2d 57, 60 (8th Cir.), *cert. denied*, 393 U.S. 873 (1968). In *United States v. Phillips*, 522 F.2d 388, 390 n.3 (8th Cir. 1975), the trial court gave an even more detailed instruction on such factors as part of its preliminary instructions:

> In considering the weight and value of the testimony of any witness you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the case, the relation of the witness to the government or any of the defendants, the inclination of a witness to speak truthfully or not, the probability of the witness' statements, and all other facts and circumstances in evidence. Thus, you may give the testimony of any witness just such weight and value as you may believe the testimony of such witness is entitled to receive. (Emphasis omitted.)

In the final charge in *Phillips*, a more detailed credibility instruction was given to the jury.

Preliminary Instructions Before Opening Statements

Notes on Use

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

Preliminary Instructions Before Opening Statements

1.06 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]

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. Anthony*, 565 F.2d 533, 536 (8th Cir. 1977), *cert. denied*, 434 U.S. 1079 (1978); *United States v. Rhodes*, 631 F.2d 43, 45 (5th Cir. 1980). 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).

If note-taking is permitted, the Fifth Circuit requires an instruction concerning the use of notes during deliberations. *United States v. Rhodes*, 631 F.2d at 46 and n.3. The Eighth Circuit has not imposed such a requirement.

See Ninth Cir. Crim. Jury Instr. 1.9, 1.10 (1997). *See also* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 10.03 and 10.04 (4th ed. 1992); Federal .Judicial .Center, Pattern Criminal Jury Instructions § 3 (1988); Eleventh Circuit Pattern Jury Instructions: Criminal (Trial) §§ 1.2, 2.1, 2.2 (1997). *See generally* West Key # "Criminal Law" 855(1).

This instruction is identical to Model Instruction 1.04, Eighth Circuit Model Civil Jury Instructions.

Preliminary Instructions Before Opening Statements

Notes on Use

Preliminary Instructions Before Opening Statements

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.

Preliminary Instructions Before Opening Statements

1.06A 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.

Committee Comments

Some judges permit jurors to ask questions of witnesses during the course of both civil and criminal trials. The Eighth Circuit has strongly discouraged this practice. *United States v. Welliver*, 976 F.2d 1148 (8th Cir. 1992). The advantage of this practice is 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 Jurors' 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). *See United States v. Johnson*, 914 F.2d 136 (8th Cir. 1990) for a summary of Eighth Circuit opinions on the subject. The court applied the "abuse of discretion" standard of review to questions to which objections were made and the "plain error" rule to questions to which no objections were made. Some perceive dangers in the practice and have criticized it. *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 decision to permit questions by jurors, and the procedures employed to control such questions, are within the sound discretion of the trial judge. The Committee takes no position on whether jurors should be allowed to ask questions of witnesses.

This instruction is identical to Instruction 1.04A, Eighth Circuit Model Civil Jury Instructions.

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:

Preliminary Instructions Before Opening Statements

(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 shall 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 shall 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

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 § 1.01 (1997); Ninth Cir. Crim. Jury Instr. 2.2 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Trial) §§ 1.1, 1.2 (1997).

Preliminary Instructions Before Opening Statements

1.08 CONDUCT OF THE JURY

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

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

Second, do not talk with anyone else about this case, or about anyone 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 me.

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 or visit with you.

Fifth, do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it. [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 TV or radio newscasts at all. I do not know whether there might be any news reports of this case, but if there are you might inadvertently find yourself reading or listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, however, that by the time you have heard the evidence in this case you will know more about the matter than anyone will learn through the news media.][1]

Sixth, do not do any research or make any investigation about the case on your own.

Seventh, 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.

Committee Comments

See Ninth Cir. Crim. Jury Instr. 1.8 (1997); 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 11.01 and 11.02 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 1 (1988). *See generally* West Key # "Criminal Law" 1174(1) for cases on the conduct and deliberations of the jury.

A similar instruction should be repeated before the first recess, and as needed before other recesses (for example, before a weekend recess). *See* Instruction 2.01, *infra*, for a form of instruction before recesses. *See also* Committee Comments, Instruction 2.01, *infra*, regarding the necessity of instructions relating to recesses.

Notes on Use

1. Optional for those cases in which media coverage is expected.

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 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.

Committee Comments

See Ninth Cir. Crim. Jury Instr. 1.11 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Trial) §§ 1.1, 1.2 (1997); Federal Judicial Center, Pattern Criminal Jury Instructions § 1 (1988); 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 10.01 (4th ed. 1992).

Notes on Use

1. This sentence may be omitted if defendant so requests.

2. These sentences may be omitted if defendant so requests.

2. 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. *Roth v. Black & Decker, U.S., Inc.*, 737 F.2d 779, 782-83 (8th Cir. 1984).

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. Robinson*, 774 F.2d 261, 272 (8th Cir. 1985). 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. *See, e.g., United States v. Sopczak*, 742 F.2d 1119, 1122 (8th Cir. 1984) [witness mentioned 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 defendants as "pimps"]; *United States v. Singer*, 660 F.2d 1295, 1304-05 (8th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982) [prosecutor's comments during closing argument]; *United States v. Smith*, 578 F.2d 1227, 1236 (8th Cir. 1978) [codefendant's disruptive conduct at trial]; *United States v. Leach*, 429 F.2d 956, 963 (8th Cir. 1970), *cert. denied*, 402 U.S. 986 (1971) [witness characterized 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. *See, e.g., United States v. Wyant*, 576 F.2d 1312, 1319 (8th Cir. 1978).

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. Other examples of instructions

which may be given during trial are in 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 11.01-11.15 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions §§ 5-8 (1988); Fifth Circuit Pattern Jury Instructions: Criminal Chapter 1 (1997); Ninth Cir. Crim. Jury Instr. 2.1-2.13 (1997).

The Committee recommends that any instruction which is given during trial be repeated in the court's final instructions given at the end of trial, unless valid reasons are presented to the court for doing otherwise.

Instructions for Use During Trial

2.01 DUTIES OF JURY: RECESSES[1]

We are about to take [our first] [a] recess[2] and I remind you of the instruction I gave you earlier. During this recess or any other recess, you must not discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else. If anyone tries to talk to you about the case, please let me know about it immediately. [Do not read, watch or listen to any news reports of the trial. Finally, keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors.

I may not repeat these things to you before every recess, but keep them in mind throughout the trial.][3]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 11.01 and 11.02 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 5 (1988); Ninth Cir. Crim. Jury Instr. 2.1 (1997).

See also Instruction 1.08, *supra*.

The court has considerable discretion to separate a jury before it has reached a verdict. *United States v. Williams*, 635 F.2d 744, 745 (8th Cir. 1980) and cases cited therein. However, the jury must be admonished as to their duties and responsibilities when not in court. Such an instruction may be given at the beginning of trial, before recesses and lunchtime, and most importantly before separating for the evening. *Id.* Although failure to give any instruction of this nature during the course of a trial which was completed in one day has been held harmless error, *Morrow v. United States*, 408 F.2d 1390 (8th Cir. 1969), it is prejudicial error to allow the jury to separate overnight without a cautionary instruction having been given at any stage of the trial prior to separation. *Williams*, 635 F.2d at 746. However, the failure to give a cautionary instruction prior to an overnight separation was held not reversible error, absent any other claim of prejudice where the jury had been so cautioned on at least thirteen other occasions. *United States v. Weatherd*, 699 F.2d 959, 962 (8th Cir. 1983). *See also United States v. McGrane*, 746 F.2d 632 (8th Cir. 1984) holding that the jury was adequately cautioned when they were so instructed on ten occasions.

See Instruction 3.12, *infra*, for final instructions on this topic.

Instructions for Use During Trial

Notes on Use

1. This instruction should be given before the first recess and at subsequent recesses within the discretion of the court.

2. This language should be modified for overnight or weekend recesses.

3. This language may be omitted for subsequent breaks during trial, but not for overnight or weekend recesses.

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 have 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

See Seventh Circuit Federal Jury Instructions: Criminal § 1.02 (1997); Ninth Cir. Crim. Jury Instr. 2.3 (1997). *See generally* Federal Judicial Center, Pattern Criminal Jury Instructions § 11 (1988); West Key # "Stipulations" 14(10).

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's 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.), *cert. denied*, 444 U.S. 941 (1979), for an example of such an instruction where only authenticity was stipulated.

Instructions for Use During Trial

2.03 STIPULATED FACTS

The Government 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

See Ninth Cir. Crim. Jury Instr. 2.4 (1997). *See generally* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.03 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 12 (1988); Seventh Circuit Federal Jury Instructions: Criminal § 3.15 (1999); West Key # "Stipulations" 14(10). *See also* Committee Comments, Instruction 2.02, *supra*.

When parties enter into stipulations as to material facts, those facts will be deemed to have been conclusively proved, and the jury may be so instructed. *United States v. Sims*, 529 F.2d 10, 11 (8th Cir. 1976); *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1976). "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), *cert. denied*, 444 U.S. 1048 (1980). 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]; *United States v. Terrack*, 515 F.2d 558, 560-61 (9th Cir. 1975) [whole case submitted on stipulated facts]. However, the extensive examination before entry of a guilty plea under Rule 11 is ordinarily not required. *Terrack*, 515 F.2d at 560-61, and cases cited therein; *United States v. Miller*, 588 F.2d 1256, 1263-64 (9th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979); *United States v. Schmidt*, 760 F.2d 828 (7th Cir.), *cert. denied*, 474 U.S. 827 (1985). Guilty plea safeguards may be required, however, where and by such stipulation the defendant effectively admits guilt and waives trial on all issues. *Schmidt*, 760 F.2d at 834.

Where the stipulated facts do not directly establish guilt, the court need not personally address defendants as to the voluntariness of the stipulation. *United States v. Ferreboeuf*, 632 F.2d 832, 836 (9th Cir. 1980), *cert. denied*, 450 U.S. 934 (1981), which held:

> [W]hen a stipulation to a crucial fact is entered into the record in open court in the presence of the defendant, and is agreed to by defendant's acknowledged counsel, the trial court may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it through his or

> her attorney. Unless a criminal defendant indicates objection at the time the stipulation is made, he or she is ordinarily bound by such a stipulation. [Case citations from Second, Seventh, Ninth and Tenth Circuits omitted.]

In *Ferreboeuf*, the stipulation was to one of the three necessary elements to establish the crime. *See also Loggins v. Frey*, 786 F.2d 364, 367-68 (8th Cir.), *cert. denied*, 479 U.S. 842 (1986), upholding a stipulation that a witness was unavailable (which allowed his prior testimony to be read into evidence), where, although defendant's attorney did not consult him about the stipulation, it appeared from the record that defendant acquiesced in it and the stipulation was motivated by sound strategic reasons.

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 readily 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

See Federal Judicial Center, Pattern Criminal Jury Instructions § 7 (1988); Ninth Cir. Crim. Jury Instr. 2.5 (1997); *United States v. Deckard*, 816 F.2d 426, 428 (8th Cir. 1987). *See generally* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.03 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal § 1.02 (1999); Fed. R. Evid. 201; West Key # "Criminal Law" 304.

The kinds of facts which may be judicially noticed are set out in Fed. R. Evid. 201(b).

An instruction regarding judicial notice is appropriately given at the time notice is taken. In *Deckard*, 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.

Fed. R. Evid. 201(g), 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 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.), *cert. denied*, 449 U.S. 863 (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.), *cert. denied*, 515 U.S. 1127 (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 802, 811 (2d Cir.), *cert. denied*, 515 U.S. 1127 (1995).

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 TAPE-RECORDED EVIDENCE

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

Committee Comments

See Federal Judicial Center, Pattern Criminal Jury Instructions § 13 (1988); Ninth Cir. Crim. Jury Instr. 2.8 (1997). *See generally* 18 U.S.C. §§ 2510-2520.

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 of a tape is offered and the tape is available, the tape, rather than the transcript, controls. *See* Fed. R. Evid. 1002. This is covered in Instruction 2.06, *infra*. In situations where a transcript is utilized together with the recording, Instruction 2.06 should be given immediately after this instruction.

In *United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975), the Court set forth the foundation requirements for use of tape 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.), *cert. denied*, 487 U.S. 1210 (1988); *United States v. Kandiel*, 865 F.2d 967 (8th Cir. 1989).

Instructions for Use During Trial

2.06 TRANSCRIPT OF TAPE-RECORDED CONVERSATION

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

You are permitted to have the transcript for the limited purpose of helping you follow the conversation as you listen to the tape recording, and also to help you keep track of the speakers. The transcript, however, is not evidence. The tape recording itself is the primary evidence of its own contents.

[You are specifically instructed that 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 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 tape recording. If you decide that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.][1]

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. You should, therefore, rely on what you hear rather than what you read when there is a difference.

Committee Comments

See generally United States v. McMillan, 508 F.2d 101 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975); *United States v. Bentley*, 706 F.2d 1498 (8th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984).

The transcript, absent stipulation of the parties, should not go to the jury room. *See United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977), 433 U.S. 907 (1977). 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).

Notes on Use

1. This language should be included if the accuracy of the transcript is an issue.

Instructions for Use During Trial

2.07 STATEMENT BY DEFENDANT

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

First, whether the defendant (name) made the statement and

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

In making these two decisions you should consider all of the evidence, including the circumstances under which the statement may have been made.[1]

Committee Comments

See Ninth Cir. Crim. Jury Instr. 4.1 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Special) § 2.1 (1997). *See also* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 14.03 and 14.04 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 36 (1988); Fifth Circuit Pattern Jury Instructions: Criminal § 1.26 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 3.02 (1999). *See generally* 18 U.S.C. § 3501; West Key # "Criminal Law" 405, 406 (1-3, 5-7), 409, 411, 412(1-6), 412.1(1-4), 412.2(1-5), 414, 781(1-6), 814(16), 815(8), 823(11).

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 pre-trial 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.), *cert. denied*, 429 U.S. 1025 (1976); *United States v. Bear Killer*, 534 F.2d 1253, 1258-59 (8th Cir.), *cert. denied*, 429 U.S. 846 (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 is made. *Crane v. Kentucky*, 476 U.S. 683 (1986); *United States v. Blue Horse*, 856 F.2d 1037, 1039 n.3 (8th Cir. 1988).

Instructions for Use During Trial

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

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.

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.

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). You may not use this evidence to decide whether the defendant carried out the acts involved in the crime charged in the indictment. However, if you are convinced beyond a reasonable doubt, based on other evidence introduced, that the defendant did carry out the acts involved in the crime charged in the indictment, then you may use this evidence to decide (describe purpose under 404(b) for which evidence has been admitted.)[1]

[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 of (state proper purpose under 404(b), e.g., intent, knowledge, motive.)][2]

Committee Comments

See Ninth Cir. Crim. Jury Instr. 2.10 (1997). *See also* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 17.08 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 50 (1988); Fifth Circuit Pattern Jury Instructions: Criminal § 1.30 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 3.04 (1999); Eleventh Circuit Pattern Jury Instructions: Criminal (Special) § 4 (1997). *See generally* Fed. R. Evid. 404(b); West Key # "Criminal Law" 369-374, 673(5), 761(14), 783(1). *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).

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. Anderson*, 879 F.2d 369, 378 (8th Cir. 1989); *United States v. Marin-Cifuentes*, 866 F.2d 988, 996 (8th Cir. 1989). 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. Kandiel*, 865 F.2d 967, 972 (8th Cir. 1989); *United States v. Mothershed*, 859 F.2d 585, 589 (8th Cir. 1988).

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. *Mothershed*, 859 F.2d at 589-90; *United States v. Nichols*, 808 F.2d 660, 663 (8th Cir.), *cert. denied*, 481 U.S. 1038 (1987). 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).

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 Rules 413 and 414, Fed. R. Evid., 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. It is the opinion of the Committee that, in an appropriate case, evidence otherwise admissible under Rules 413 and 414 may be excluded under Rule 403 if the danger of unfair prejudice or confusion of the issues substantially outweighs the probative value of the evidence.

If the defendant's prior conviction has been admitted under Rule 609, a different limiting instruction should be given. *See* Instruction 2.16, *infra*; 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 15.08 (4th ed. 1992).

Instructions for Use During Trial

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 which component of Rule 404(b) the prior similar act evidence is relevant to and explain the relationship between the prior acts and proof of that proper component).

2. 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 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.

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]

Remember, however, that the mere fact that the defendant may have committed [a similar act] [similar acts] in the past is not evidence that [he] [she] committed such [an act] [acts] in this case. 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.

Committee Comments

See S. Saltzburg & H. Perlman, FEDERAL CRIMINAL JURY INSTRUCTIONS § 2.14A (1985); *see generally* Fed. R. Evid. 404(b); West Key # "Criminal Law" 369.15, 372.

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), *cert. denied*, 424 U.S. 911 (1976); *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), *cert. denied*, 434 U.S. 1074 (1978); *United States v. Davis*, 551 F.2d 233, 234 (8th Cir.), *cert. denied*, 431 U.S. 923 (1977); *United States v. Weaver*, 565 F.2d 129, 133-35 (8th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978); *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).

Because similar act evidence tends not only to prove the commission of the act but also has a tendency to show 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.), *cert. denied*, 441 U.S. 951 (1979); *see also United States v. 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, Instruction 2.08, *supra*, and this Instruction 2.09 may need to be adapted to meet the particular situation.

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.

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 government attorney 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., 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 government attorney on that subject may not be used by you for any other purpose.

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

Committee Comments

See Federal Judicial Center, Pattern Criminal Jury Instructions § 52 (1988); 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 11.15 (4th ed. 1992). *See generally* Fed. R. Evid. 405(a); West Key # "Criminal Law" 673(2), "Witnesses" 274(l).

See also 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).

Character testimony is limited to the reputation of a defendant, not to specific instances of behavior. *United States v. Koessel*, 706 F.2d 271, 275 (8th Cir. 1983) (citing *Michelson*, 335 U.S. at 477). With respect to community reputation for a character trait, only reputation reasonably contemporaneous with the acts charged is relevant. *United States v. Curtis*, 644 F.2d 263, 268 (3d Cir. 1981), *cert. denied*, 459 U.S. 1018 (1982); *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*, 335 U.S. at 475-76; *United States v. Curtis*, 644 F.2d at 268.

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] [Those charges] [is] [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 has proved, beyond a reasonable doubt, the count[s] which remain, which are (list remaining count[s]).

[The following evidence is now stricken by me, and is thus no longer before you and may not be considered by you: (Describe stricken evidence).][3]

Committee Comments

See Federal Judicial Center, Pattern Criminal Jury Instructions § 16 (1988); Ninth Cir. Crim. Jury Instr. 2.12 (1997); *United States v. Beran*, 546 F.2d 1316, 1319-20 (8th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977). *See generally* West Key # "Criminal Law" 750, 867, 1166.22(2).

See also 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 defendant.

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. D'Alora*, 585 F.2d 16 (1st Cir. 1978) which approved the following instruction:

Instructions for Use During Trial

For reasons which need not concern the jury, Count II has been withdrawn from your consideration. However, the evidence you heard relating to that count may be considered by you in your deliberations on the remaining counts.

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 has proved, beyond a reasonable doubt, its case against defendant[s] (name remaining defendant[s]).

[The following evidence is now stricken by me, and is thus no longer before you and may not be considered by you (describe stricken evidence).][1]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 12.16 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 17 (1988); Ninth Cir. Crim. Jury Instr. § 2.13 (1997); *United States v. Schmaltz*, 562 F.2d 558 (8th Cir.), *cert. denied*, 434 U.S. 957 (1977). *See generally* West Key # "Criminal Law" 768(l), 793.

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

Courts have split on the question of whether the jury should be told the reason for the codefendant's departure or told not to concern themselves with it. *See* discussion in *United States v. Barrientos*, 758 F.2d 1152, 1155-58 (7th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986). This instruction follows the holding of the Seventh Circuit in that case. However, *see Wood v. United States*, 279 F.2d 359, 362-63 (8th Cir. 1960) in which the court approved the trial court's advising the jury that certain co-defendants had pleaded guilty.

If the jury should become aware that a codefendant has pleaded guilty, it should be clearly instructed that it is not to consider or discuss the plea in deciding the case of the remaining defendant or defendants. *Wood, Id.*; *United States v. Phillips*, 640 F.2d 87, 91 n. 7 (7th Cir.), *cert. denied*, 451 U.S. 991 (1981). However, the defense may elect to forego an instruction if it desires to avoid calling attention to the plea. *United States v. Francisco*, 410 F.2d 1283, 1288-89 (8th Cir. 1969).

Instructions for Use During Trial

Notes on Use

Instructions for Use During Trial

1. If the evidence remains admissible the jury may be so instructed. *See United States v. D'Alora*, 585 F.2d 16 (1st Cir. 1978).

Instructions for Use During Trial

2.13 DISPOSITION, DURING TRIAL, OF ONE OR MORE BUT LESS THAN ALL CHARGES AGAINST 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 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 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 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.

[The following evidence is now stricken by me, and is thus no longer before you and may not be considered by you: (describe stricken evidence).][2]

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

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.16 (4th ed. 1992); Ninth Cir. Crim. Jury Instr. § 2.13 (1997); *United States v. Schmaltz*, 562 F.2d 558 (8th Cir.), *cert. denied*, 434 U.S. 957 (1977). *See generally* West Key # "Criminal Law" 750, 1166.22(2).

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

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.

Instructions for Use During Trial

2. If the evidence remains admissible the jury may be so instructed. *See United States v. D'Alora*, 585 F.2d 16 (1st Cir. 1978) which approved the following instruction:

> For reasons which need not concern the jury, Count II has been withdrawn from your consideration. However, the evidence you heard relating to that count may be considered by you in your deliberations on the remaining counts.

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.

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]. Some of the evidence in this case is limited under the rules of evidence to one of the defendants, and cannot be considered against the others.

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

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.14 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 19 (1988); Ninth Cir. Crim. Jury Instr. § 1.4 (1997); *United States v. Leach*, 429 F.2d 956, 961(8th Cir. 1970), *cert. denied*, 402 U.S. 986 (1971). *See generally* West Key # "Criminal Law" 673(2).

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

Giving this type of instruction each time evidence limited to one or more defendants is admitted is an appropriate method to guard against prejudice, however such interim instructions are not required and it is within the discretion of the trial judge to determine when interim instructions are necessary. *United States v. Oxford*, 735 F.2d 276, 280 (7th Cir. 1984). In particularly complex cases, the judge might consider marshaling evidence at the end of the trial, thereby identifying the limited evidence available against a particular defendant. *Cf. United States v. Kelly*, 349 F.2d 720, 757 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).

An exhibit admissible against only one defendant may go to the jury room if adequate cautionary instructions are given. *United States v. Martinez*, 428 F.2d 86 (6th Cir.), *cert. denied*, 400 U.S. 881 (1970).

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 in the case against the other defendant[s]. What that means is that you may consider defendant (name)'s statement in the case against [him] [her] and for that purpose rely on it as much or as little as you think proper, but you may not consider or discuss that statement in any way when you are deciding if the Government has proved, beyond a reasonable doubt, its case against the other defendant[s].

Committee Comments

See Federal Judicial Center, Pattern Criminal Jury Instructions § 37 (1988). *See also* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 14.04 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal § 3.02 (1999). *See generally* West Key # "Criminal Law" 673(4).

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

The standard codefendant confession instruction is not as important as it once was due to the *Bruton* rule. *Bruton v. United States*, 391 U.S. 123 (1968). *Bruton* 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 Fed. R. Evid. 801(d)(2)(E). *See, e.g., United States v. Roth*, 736 F.2d 1222, 1229 (8th Cir.), *cert. denied*, 469 U.S. 1058 (1984), or in any other situation in which the codefendant's statement may be

directly admissible against the defendant. *See Cruz*, 481 U.S. at 193-94 (citing *Lee v. Illinois*, 476 U.S. 530 (1986)).

Instructions for Use During Trial

2.16 DEFENDANT'S TESTIMONY: IMPEACHMENT BY PRIOR CONVICTION

You [are about to hear] [have heard] evidence that the 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. That evidence 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]

Committee Comments

See Ninth Cir. Crim. Jury Instr. 4.6 (1997). *See also* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 15.08 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal § 3.05 (1999); Federal Judicial Center, Pattern Criminal Jury Instructions § 41 (1988). *See generally* West Key # "Criminal Law" 786(6), "Witnesses" 337(1-6).

See also 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*.

Notes on Use

1. For use in a multiple defendant case.

Instructions for Use During Trial

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

There has been evidence that the defendant (name) was questioned at a time prior to trial, and made certain statements. You may use that evidence only to help you decide if [he] [she] said something different earlier, and if what [he] [she] said here in court was true. You must not, however, consider what was said earlier as any proof or evidence of the defendant (name)'s guilt.

Committee Comments

See Federal Judicial Center, Pattern Criminal Jury Instructions § 42 (1988). *See generally* West Key # "Witnesses" 390.

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

A statement obtained in violation of *Miranda* may constitutionally be used for impeachment purposes. *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.), *cert. denied*, 484 U.S. 945 (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. Of course, 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 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.

Instructions for Use During Trial

2.18 IMPEACHMENT OF WITNESS: PRIOR CONVICTION

You have heard evidence that witness (name) was once convicted of a crime. 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 Federal Judicial Center, Pattern Criminal Jury Instructions § 30 (1988); Ninth Cir. Crim. Jury Instr. § 4.08 (1997). *See also* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 15.07 (4th ed. 1992); Fifth Circuit Pattern Jury Instructions: Criminal § 1.11 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 3.11 (1999). *See generally* Fed. R. Evid. 609; West Key # "Witnesses" 344(l-5), 345(1-4).

See also 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 evidence that witness (name) has 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's guilty plea only for the purpose of determining how much, if at all, to rely upon that witness's testimony.[1]

Committee Comments

See generally West Key # "Criminal Law" 655(l), 673(3), 1170 1/2(1), 1173.2(9).

See also 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's 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. Roth*, 736 F.2d 1222, 1226 (8th Cir.), *cert. denied*, 469 U.S. 1058 (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.), *cert. denied*, 464 U.S. 934 (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), *cert. denied*, 431 U.S. 918 (1977).

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.), *cert. denied*, 469 U.S. 1058 (1984). If admitted for that purpose, the instruction should be so modified.

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 of a previous trial must have no effect on your consideration of this case.

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 10.08 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 14 (1988); Ninth Cir. Crim. Jury Instr. § 2.09 (1997). *See also 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 generally*, West Key # "Criminal Law" 713, 768(1).

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 has testified that [he] [she] viewed a photograph of the 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 have no effect on your consideration of the case.

Committee Comments

See Federal Judicial Center, Pattern Criminal Jury Instructions § 15 (1988); Ninth Cir. Crim. Jury Instr. § 2.11 (1997). *See generally United States v. Runge*, 593 F.2d 66, 69 (8th Cir.), *cert. denied*, 444 U.S. 859 (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 the 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 have no effect on your consideration of the case.

Committee Comments

See Federal Judicial Center, Pattern Criminal Jury Instructions § 6 (1988).

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

3. 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.]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.01 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal § 1.01 (1999); Ninth Cir. Crim. Jury Instr. 3.1 (1997). *See generally* West Key # "Criminal Law" 887.

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.

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 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.01 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal § 1.01 (1999); Ninth Cir. Crim. Jury Instr. 3.1 (1997).

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 shall 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]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 12.03, 12.08 (4th ed. 1992); Fifth Circuit Pattern Jury Instructions: Criminal § 1.07 (1997); Ninth Cir. Crim. Jury Instr. 3.4, 3.5 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Basic) §§ 4.1-4.2 (1997).

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

Final Instructions for Use in Every Trial (Boilerplate)

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* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.05 (4th ed. 1992). *See generally* West Key # "Criminal Law" 305-325.

In certain situations it may be appropriate to instruct the jury with respect to a specific inference it may make. *See* §§ 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 2.08-2.20, *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's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's 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]

Committee Comments

See Ninth Cir. Crim. Jury Instr. 3.7 (1997); 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 15.01, 15.02 (4th ed. 1992); Fifth Circuit Pattern Jury Instructions: Criminal § 1.08 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Basic) § 5 (1997); *United States v. Hastings*, 577 F.2d 38, 42 (8th Cir. 1978). *See generally* West Key # "Criminal Law" 785 (1-16).

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.), *cert. denied*, 393 U.S. 873 (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's 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 Ninth Cir. Crim. Jury Instr. 3.7 (1997) and former 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 17.01 (now § 15.01 (4th ed. 1992)) 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.

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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), 4.05 (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), *cert. denied*, 479 U.S. 1031 (1987); *United States v. Reda*, 765 F.2d 715, 718-19 (8th Cir. 1985); 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 17.05 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal § 1.03 (1999); Ninth Cir. Crim. Jury Instr. 4.8 (1997). 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.*, 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 15.12 (4th ed. 1992). 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.), *cert. denied*, 429 U.S. 846 (1976). *See also Taylor v. United States*, 390 F.2d 278, 282 (8th Cir.), *cert. denied*, 393 U.S. 869 (1968); *United States v. Brown*, 453 F.2d 101, 107 (8th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972); *United States v. Standing Soldier*, 538 F.2d 196, 204 (8th Cir.), *cert. denied*, 429 U.S. 1025 (1976).

The credibility of a child witness is covered in 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 15.13 (4th ed. 1992). 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 2.16-2.19, *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), *cert. denied*, 431 U.S. 918 (1977). *See also* impeachment instructions in Ninth Cir. Crim. Jury Instr. 4.6-4.8 (1997); 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 15.07, 15.09 (4th ed. 1992); Fifth Circuit Pattern Jury Instructions: Criminal §§ 1.10-1.13 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Basic) §§ 6.1-6.7 (1997).

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* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 15.01 (4th ed. 1992); *United States v. Ashford*, 530 F.2d 792, 799 (8th Cir. 1976).

Notes on Use

1. With respect to the use of prior inconsistent statements (second paragraph of this instruction), Fed. R. Evid. 105 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 defendant has testified. *See Taylor v. United States*, 390 F.2d 278, 282 (8th Cir.), *cert. denied*, 393 U.S. 869 (1968).

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3.05 DESCRIPTION OF CHARGE; INDICTMENT NOT EVIDENCE; PRESUMPTION OF INNOCENCE; BURDEN OF PROOF (SINGLE DEFENDANT, SINGLE COUNT)

The indictment in this case charges that the defendant committed the crime of (insert offense).[1] The defendant has pleaded not guilty to that charge.

As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendant is presumed to be innocent. Thus the defendant, even though charged, begins the trial 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 essential element of the crime charged.

[There is no burden upon a defendant to prove that [he] [she] is innocent.] [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 verdict.][2]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 13.01-13.04, 12.10 (4th ed. 1992). *See generally* West Key # "Criminal Law" 308, 317, 778 (3-4,6), 857(1).

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), *reh'g denied*, 444 U.S. 887 (1979).

Federal Judicial Center, Pattern Criminal Jury Instructions § 9 (1988), Seventh Circuit Federal Jury Instructions: Criminal § 2.03 (1999) and Ninth Cir. Crim. Jury Instr. 3.2.1 (1997) all contain more abbreviated versions of the presumption of innocence. In *United States v. Hollister*, 746 F.2d 420, 424 (8th Cir. 1984), however, the Eighth Circuit criticized former Fifth Circuit Basic Instruction 3A as "too abbreviated" and urged the continued use of former § 11.13 (now 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.08 (4th ed. 1992)), holding: "The clarity of the Devitt & Blackmar instruction renders it preferable to other preference instructions." *Hollister* further cited *Taylor*, which held that former § 11.14 (now 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.10 (4th ed. 1992)) "appears to have been well

suited to forestalling the jury's consideration of extraneous matters * * *." 463 U.S. at 488 n.16. The present instruction incorporates 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.10 (4th ed. 1992) on the presumption of innocence.

Notes on Use

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

2. The sentences in this paragraph should be given only if defendant so requests. The Committee recommends that the court require the defense to make this request on the record.

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. Under Count[s] I [___], the indictment charges that the defendant committed the crime of (describe offense).[1]

[Under Count[s] __ [___], the indictment charges that the defendant committed the crime of (describe offense). (Continue as necessary.)] The defendant has pleaded not guilty to each of those charges.

As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendant is presumed to be innocent. Thus the defendant, even though charged, begins the trial 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 essential element of the 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.] [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 verdict.][2]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 13.01-13.04, 12.10, 12.12 (4th ed. 1992). *See generally* West Key # "Criminal Law" 308, 317, 778(3-4,6), 857(1).

See also Committee Comments, Instruction 3.05, *supra*.

When the counts are satisfactorily distinguished in the jury charge, it will be presumed that the jury followed the instructions and thus did not confuse the evidence pertinent to the individual counts. This instruction will also help avoid prejudicial error resulting from misjoinder of offenses. *See* Fed. R. Crim. P. 14; *Opper v. United States*, 348 U.S. 84, 95 (1954); *United States v. Brim*, 630 F.2d 1307, 1310

(8th Cir. 1980), *cert. denied*, 452 U.S. 966 (1981); *United States v. Wedelstedt*, 589 F.2d 339, 343 n.4 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979); *United States v. Jines*, 536 F.2d 1255, 1257 (8th Cir.), *cert. denied*, 429 U.S. 942 (1976); *Fisher v. United States*, 324 F.2d 775, 781 (8th Cir.), *cert. denied*, 377 U.S. 999 (1964).

Notes on Use

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

2. The sentences in this paragraph should be given only if defendant so requests. The Committee recommends the court require the defense make this request on the record.

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 that the defendants committed the crime of (describe offense).[1]

As I told you at the beginning of trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, each defendant is presumed to be innocent. Thus each defendant, even though charged, begins the trial 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 essential 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.] [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 verdict.][2]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 13.01-13.04, 12.10, 12.12, 12.13 (4th ed. 1992). *See generally* West Key # "Criminal Law" 308, 317, 778(3-4, 6), 857(1).

See also Committee Comments, Instructions 3.05 and 3.06, *supra*.

Notes on Use

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

2. The sentences in this paragraph should be given only if defendant so requests. The Committee recommends the court require the defense make this request on the record.

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 charges in this case are as follows:

Under Count[s] I [___], the indictment charges that defendant[s] (insert names) committed the crime of (describe offense).[1]

[Under Count[s] __ [___], the indictment charges that defendant[s] (insert names) committed the crime of (describe offense). (Continue as necessary). Each defendant has pleaded not guilty to each crime with which [he] [she] is charged.

As I told you at the beginning of trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, each defendant is presumed to be innocent. Thus each defendant, even though charged, begins the trial with no evidence against [him] [her]. So 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 essential 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. Also keep in mind that you must consider, separately, each crime charged against each individual defendant, and 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.] [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 verdict.][2]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 13.01-13.04, 12.10, 12.12, 12.13 (4th ed. 1992). *See generally* West Key # "Criminal Law" 308, 317, 778(3-4, 6), 857(1).

See also Committee Comments, Instructions 3.05 and 3.06, *supra*.

Final Instructions for Use in Every Trial (Boilerplate)

In *United States v. Nabors*, 762 F.2d 642, 652 (8th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986) the Court held that the following instruction sufficiently informed the jury that it was deciding the guilt or innocence of two separate individuals on two separate counts:

> Each offense, and the evidence pertaining to it, should be considered separately. The fact that you may find some or all of the accused guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged against any of the defendants.

Notes on Use

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

2. The sentences in this paragraph should be given only if defendant so requests. The Committee recommends the court require the defense make this request on the record.

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 ____ essential elements, which are:

One, _____;

Two, _____; and

Etc., _____.

If all of [these] [the][2] essential 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] [coerced] [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]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.10 (4th ed. 1992). *See generally* West Key # "Criminal Law," 772, 811(3), 814(5), 815(4), 822(6), 823(4), 825(2), 829(3), 834(3).

The Committee has prepared an essential 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 essential 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 thing 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, *infra*.

Final Instructions for Use in Every Trial (Boilerplate)

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 ____ essential 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 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 that it is consistent with *Norton* to place the affirmative defense in the verdict directing paragraph of this instruction as has been done here since 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 essential elements have been proved beyond a reasonable doubt, you must find defendant *guilty, unless* you also find that 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.

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 essential 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. *See* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 12.12 and 12.13 (4th ed. 1992).

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Appendix A

The crime of interstate transportation of stolen securities, as charged in Counts II-IX of the indictment, has four essential 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] essential 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] [coerced] [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* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.12 (4th ed. 1992).)

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 essential 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] essential 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] [coerced] [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* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.13 (4th ed. 1992).)

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 forms 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 _____ essential 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 essential 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]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 20.05 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 48 (1988); Seventh Circuit Federal Jury Instructions: Criminal § 2.02 (1999); Ninth Cir. Crim. Jury Instr. 3.13 (1997).

See generally Fed. R. Crim. P. 31(c); West Key # "Criminal Law," 763(9), 795, 814(20), 815(13), 822(17), 824(3), 829(3).

In *Catches v. United States*, 582 F.2d 453 (8th Cir. 1978), the Eighth Circuit adopted the Second Circuit's holding in *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir.), *cert. denied*, 435 U.S. 995 (1978), that is was not "wrong as a matter of law" to require a unanimous verdict of not guilty on the greater offense before the jury could consider a lesser included offense, but also approved an alternative instruction permitting the jury to consider the lesser included offense "if after all reasonable efforts it is unable to reach a verdict on the greater." The Eighth Circuit concurred with the rule that "if the defendant seasonable expresses a preference for [this] alternative instruction, the district court should give that form of instruction." This approach is followed in *United States v. Hanson*, 618 F.2d 1261, 1265 (8th Cir.),

cert. denied, 449 U.S. 854 (1980) and *United States v. Roy*, 843 F.2d 305, 309 (8th Cir.), *cert. denied*, 487 U.S. 1222 (1988).

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

A five-part test for determining whether a lesser included instruction should be given as been enunciated frequently. *See, e.g.*, *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.

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).

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 essential elements instruction and burden of proof instruction for the lesser included offense.

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 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.

Final Instructions for Use in Every Trial (Boilerplate)

3.11 REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt 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.

Committee Comments

See United States v. Conley, 523 F.2d 650, 655 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976); 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 11.14-11.15 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 21 (1988); *see also* Fifth Circuit Pattern Jury Instructions: Criminal § 1.05 (1997); Ninth Cir. Crim. Jury Instr. 3.3 (1997); Eleventh Circuit Pattern Jury Instruction: Criminal (Basic) § 3 (1997). *See generally* West Key # "Criminal Law" 789 (1-18), 822(16), 823(15), 824(12), 829(18), 834(5).

The instruction must be couched in terms of hesitation to act. *United States v. Conley*, 523 F.2d at 655; *United States v. Jensen*, 561 F.2d 1297, 1300-01 (8th Cir. 1977), and cases cited therein.

Some jurisdictions define "beyond a reasonable doubt" as "firmly convinced." *See* Federal Judicial Center, Pattern Criminal Jury Instructions § 21 (1988).

The instruction approved in *Conley* is as follows:

> It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense--the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly. Putting it in another way, a reasonable doubt means a doubt based on reason and not the mere possibility of innocence.

523 F.2d at 655.

The language of the *Conley* instruction has been "explicitly approved" by this circuit "without reservation." *United States v. Wilkerson*, 691 F.2d 425, 428 (8th Cir. 1982); *United States v. Harris*,

974 F.2d 84, 85 (8th Cir. 1992); *United States v. Knight*, 547 F.2d 75, 77 (8th Cir. 1976); *United States v. Robertson*, 588 F.2d 575, 579 (8th Cir. 1978), *cert. denied*, 441 U.S. 946 (1979).

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).

This instruction does not use the phrases, "moral evidence" or "moral certainty," which raised some serious questions in *Sandoval v. California*, 511 U.S. 1, 114 S. Ct. 1239 (1994), nor other offensive language, such as requiring a "grave uncertainty," which was found objectionable in *Cage v. Louisiana*, 498 U.S. 39, 40 (1990). It also does not follow the proposal of Justice Ginsburg in her concurring opinion which endorses the Federal Judicial Center's wording. Federal Judicial Center, Pattern Criminal Jury Instructions § 21 (1988) provides as follows:

> As I have said many times, the Government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the Government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

The Supreme Court reiterated in *Sandoval* that the Constitution does not mandate any particular form of words, and that the "hesitate to act" formulation is permissible.

This instruction has been regularly approved in the Eighth Circuit, *see United States v. Simms*, 18 F.3d 588 (8th Cir. 1994); *United States v. West*, 28 F.3d 748 (8th Cir. 1994), and in the opinion of this Committee, is more helpful to the average juror than is the Federal Judicial Center instruction.

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 shall 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.]

Committee Comments

As to the subject covered by the "First" point, *see* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 20.01 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 58 (1988); Ninth Cir. Crim. Jury Instr. 7.1-7.8 (1997).

As to the subject covered by the "Second" point, *see* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 20.01 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 10 (1988); Fifth Circuit Pattern Jury Instructions: Criminal § 1.24 (1997); Seventh Circuit Federal Jury Instructions § 7.06 (1999); Ninth Cir. Crim. Jury Instr. 7.1 (1997). *See generally* West Key # "Criminal Law" 768(3), 865(1), 1174(1).

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.), *cert. denied*, 404 U.S. 833 (1971).

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

As to the subject covered by the "Third" point, *see* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 20.01 (4th ed. 1992); Ninth Cir. Crim. Jury Instr. 7.3 (1997).

As to the subject covered by the "Fourth" point, *see* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 20.01 (4th ed. 1992); Fifth Circuit Pattern Jury Instructions: Criminal § 1.24 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 7.05 (1999); Ninth Cir. Crim. Jury Instr. 7.5 (1997).

Final Instructions for Use in Every Trial (Boilerplate)

As to the subject covered by the "Fifth" point, *see* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 20.01 (4th ed. 1992); Ninth Cir. Crim. Jury Instr. 7.2 (1997).

As to the subject covered by the "Final" point, *see* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 20.01 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 58 (1988); Ninth Cir. Crim. Jury Instr. 7.4 (1997).

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).

Final Instructions for Use in Every Trial (Boilerplate)

3.13 VENUE

The Government must prove by the [(greater weight) (preponderance)] of the evidence that the offense charged[1,2] was begun, continued or completed[3] in the (insert district) District of (insert State)[4].

To prove something by the [(greater weight) or (preponderance)] of the evidence is to prove that it is more likely true than not true. This is a lesser standard than proof beyond a reasonable doubt. The requirement of proof beyond a reasonable doubt applies to all other issues in the case [except insanity].

Committee Comments

Proof of venue is an essential element of the Government's case. Where venue is not disputed, the determination of venue is for the court to make as a matter of law. *United States v. Redfearn*, 906 F.2d 352 (8th Cir. 1990). *United States v. Netz*, 758 F.2d 1308, 1312 (8th Cir. 1985). However, failure to give such an instruction is not reversible error where the evidence establishing venue is very clear or uncontradicted. *United States v. Moeckly*, 769 F.2d 453, 461 (8th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986); *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.

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).

2. 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 mails.

3. This language applies to continuous crimes. *See* 18 U.S.C. § 3237(a) (1988).

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

4. 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 Fed. R. Evid. 105, 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 No. 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 Nos. 3.05 - 3.08, *supra*.]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 15.14 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 22 (1988); Seventh Circuit Federal Jury Instructions § 3.01 (1999); Ninth Cir. Crim. Jury Instr. 3.2.2 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Basic) § 2.2 (1997). *See generally* West Key # "Criminal Law" 787(1), 1173.2(5).

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), *cert. denied*, 401 U.S. 943 (1971).

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.

4.02 CHARACTER AND REPUTATION, FOR TRUTHFULNESS, WITNESSES (INCLUDING 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.

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 15.09 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal §§ 3.06, 3.12 (1999); Ninth Cir. Crim. Jury Instr. 4.7 (1997). *See generally* Fed. R. Evid. 404(a)(3), 608; West Key # "Criminal Law" 785(8-13).

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), Fed. R. Evid. 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.), *cert. denied*, 374 U.S. 807 (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).

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.), *cert. denied*, 484 U.S. 860 (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, No. 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).

4.03 DEFENDANT'S CHARACTER "STANDING ALONE"

[No instruction recommended.]

Committee Comments

See United States v. Krapp, 815 F.2d 1183, 1187 (8th Cir.), *cert. denied*, 484 U.S. 860 (1987). *See generally* West Key # "Criminal Law" 375-381, 776, 829(16).

Rule 405 of the Federal Rules of Evidence allows testimony as to the reputation of defendant or an opinion as to 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 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), *cert. denied*, 372 U.S. 934 (1963). *See also United States v. Winter*, 663 F.2d 1120, 1148 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983); 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), *cert. denied*, 444 U.S. 1043 (1980); *United States v. Ruppel*, 666 F.2d 261 (5th Cir.), *cert. denied*, 458 U.S. 1107 (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 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 15.15 (4th ed. 1992) 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's guilty plea cannot be considered by you as any evidence of this defendant's guilt. The witness's guilty plea can be considered by you only for the purpose of determining how much, if at all, to rely upon the witness's testimony.][1]

Committee Comments

See United States v. Ridinger, 805 F.2d 818, 821 n.5 (8th Cir. 1986); 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 15.03 (4th ed. 1992); *United States v. Hastings*, 577 F.2d 38, 42 (8th Cir. 1978). *See generally* West Key # "Criminal Law" 507, 508(2, 9).

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), *cert. denied*, 479 U.S. 1043 (1987); *United States v. Ridinger*, 805 F.2d 818, 821-22 (8th Cir. 1986). This instruction and Instructions 4.05 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.*, 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 15.02-15.05 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury. Instructions §§ 24, 25 (1988); Seventh Circuit Federal Jury Instructions: Criminal § 3.13 (1999); Ninth Cir. Crim. Jury Instr. 4.9, 4.10.1, 4.10.2, 4.11, 4.15 (1997). 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, 4.05, and 4.06).

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*.

4.05 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); 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 15.04 (4th ed. 1992); *United States v. Valdez*, 529 F.2d 996, 997 (8th Cir.), *cert. denied*, 426 U.S. 909 (1976). *See generally* West Key # "Criminal Law" 780.

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.), *cert. denied*, 488 U.S. 931 (1988); *United States v. Schriver*, 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).

Final Instructions: Consideration of Particular Kinds of Evidence

4.05A CREDIBILITY - COOPERATING WITNESS

You have heard 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 a "plea agreement" with [name of agency] which provides (specify general agreement, for example, that in return for his assistance, the Government will file a motion for reduction in his sentence). [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's 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 generally* West Key # "Criminal Law" 785(4).

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 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, 779-780 (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), *cert. denied*, 421 U.S. 1002 (1975).

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.), *cert. denied*, 393 U.S. 1057 (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.), *cert. denied*, 454 U.S. 849 (1981) (lists several factors obviating need for addict-informant instruction); *United States v. Shigemura*, 682

F.2d 699, 702-03 (8th Cir. 1982), *cert. denied*, 459 U.S. 1111 (1983); *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]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 18.02 (4th ed. 1992)

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. Fed. R. Evid. 801(d)(2)(E) defining such declarations to be non-hearsay applies whether or not a conspiracy was charged. *United States v. Kieffer*, 694 F.2d 1109, 1112 n.2 (8th Cir. 1982); *United States v. Miller*, 644 F.2d 1241, 1244 (8th Cir.), *cert. denied*, 454 U.S. 850 (1981).

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.

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 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 defendant, or made an identification that was inconsistent with [his] [her] identification at trial.]

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); 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 14.10, 14.11 (4th ed. 1992). *See generally* West Key # "Criminal Law" 566, 785(10), 829(16), 1173.2(8).

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.), *cert. denied*, 404 U.S. 958 (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, 549-550 (8th Cir.), *cert. denied*, 434 U.S. 959 (1977); *United States v. Dodge*, 538 F.2d 770, 783-84 (8th Cir. 1976), *cert. denied sub nom., Escamilla v. United States*, *cert. denied*, 429 U.S. 1099 (1977); *United States v. Roundtree*, 527 F.2d 16, 19 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976).

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 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 549-550.

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*: 1) 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.

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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 defendants[s] in any way at all, and must not be used against [him] [her] [them] for any purpose whatsoever.][1]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 14.07 (4th ed. 1992). *See generally* West Key # "Criminal Law" 351(8, 10), 778(10).

If the probative value of the evidence outweighs the prejudicial impact under Fed. R. Evid. 403, 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).

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.

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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's 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 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 14.01 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 27 (1988); Fifth Circuit Pattern Jury Instructions: Criminal § 1.17 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 3.07 (1999); Ninth Cir. Crim. Jury Instr. 4.16 (1997). *See also Chatman v. United States*, 557 F.2d 147, 148-49 (8th Cir.), *cert. denied*, 434 U.S. 863 (1977). *See generally* Fed. R. Evid. 602, 701-05; West Key # "Criminal Law" 785(7).

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 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 14.02 (4th ed. 1992); Ninth Cir. Crim. Jury Instr. 4.17 (1997); *United States v. Lewis*, 759 F.2d 1316, 1329 n.6 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985); *United States v. Diez*, 515 F.2d 892, 905-06 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976). *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 Fed. R. Evid. 1006, do *not* give this instruction. For summaries admitted as evidence pursuant to Fed. R. Evid. 1006, *see* No. 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.

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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]

Committee Comments

See Seventh Circuit Federal Jury Instructions: Criminal § 3.16 (1999). *See generally* Fed. R. Evid. 1006, 1008(c); 5 *Weinstein's Evidence* ¶¶ 1006, 1008 (1978); West Key # "Criminal Law" 673(a), 858(3).

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.), *cert. denied*, 446 U.S. 969 (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), *cert. denied*, 482 U.S. 927 (1987); *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.

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.

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4.13 SPECIFIC INFERENCES[1]

[[(Insert fact deduced) is an essential 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]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.05 (4th ed. 1992). *See generally* West Key # "Criminal Law" 305-325, 745, 778(1)-(11), 782(7).

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), *cert. denied*, 434 U.S. 1021 (1978) [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]; 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 44.05 (4th ed. 1990), 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), *cert. denied*, 444 U.S. 1090 (1980) [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 (No. 4.15, *infra*) and failure to produce certain witnesses under certain conditions (No. 4.16, *infra*). Other common law inferences on which instructions may be proper include "presumptions of regularity." *See* 1 Edward

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J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.06 (4th ed. 1992); *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* No. 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 No. 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.), *cert. denied*, 435 U.S. 955 (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* Instructions 6.18.659A, Note 4, and 6.18.659B Note 4, *infra*; 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 31.07 (4th ed. 1990). 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), *cert. denied*, 397 U.S. 1007 (1970). *See also* Nos. 6.26.7201 and 6.26.7206, *infra*; 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 56.22 (4th ed. 1990). 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), *cert. denied*, 431 U.S. 903 (1977).

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 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, 315-320 (1988).

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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), *cert. denied*, 434 U.S. 1021 (1978) and 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 50.16 (4th ed. 1990) on the inferences arising from possession of recently stolen property; *United States v. Hayes*, 631 F.2d 593, 594 (8th Cir. 1980) and 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 44.05 (4th ed. 1990) on the inferences arising from the possession of recently stolen mail; *United States v. Beardslee*, 609 F.2d 914, 919 (8th Cir. 1979), *cert. denied*, 444 U.S. 1090 (1980) on the inferences arising from the possession of property recently purchased in another state.

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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]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 14.05 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal § 3.03 (1999); *United States v. Carter*, 760 F.2d 1568, 1580 n.5 (11th Cir. 1985). *See generally* West Key # "Criminal Law" 407(1), (2), 736(2), 781(7).

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 Fed. R. Evid. 801(d)(2)(B). *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 1579-580. If the court allows the evidence, whether those elements have been proved becomes a jury question. *Arpan*, 260 F.2d at ___; *Carter*, 760 F.2d at 1580 n.5.

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).

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 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.

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 (8th 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 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 14.06 (4th ed. 1992); *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.), *cert. denied*, 431 U.S. 942 (1977). *See generally* West Key # "Criminal Law," 351(10), 778(10), 781(6), 781(8).

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; *Hudson*, 717 F.2d 1211; *see also Rizzo v. United States*, 304 F.2d 810, 830 (8th Cir.), *cert. denied*, 371 U.S. 890 (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 (5th Cir. 1981) (citing *United States v. Bear Killer*, 534 F.2d 1253, 1260 (8th Cir.), *cert. denied*, 429 U.S. 846 (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), *cert. denied*, 464 U.S. 828 (1983); *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. Boekelmon*, 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]

Committee Comments

See Ninth Cir. Crim. Jury Instr. 4.15 (1997). *See generally* West Key # "Criminal Law" 788. Examples of missing witness instructions may be found in 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 14.15 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 39 (1988); Seventh Circuit Federal Jury Instructions: Criminal § 3.24 (1999).

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), *cert. denied*, 430 U.S. 906 (1977); *United States v. Williams*, 481 F.2d 735, 738 (8th Cir.), *cert. denied*, 414 U.S. 1026 (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), *cert. denied*, 383 U.S. 944 (1966) *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.), *cert. denied*, 399 U.S. 914 (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 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), *cert. denied*, 410 U.S. 909 (1973), or where it would be irrelevant. *United States v. Emalfarb*, 484 F.2d 787 (7th Cir.), *cert. denied*, 414 U.S. 1064 (1973).

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.

Final Instructions: Consideration of Particular Kinds of Evidence

4.17 DIRECT AND CIRCUMSTANTIAL EVIDENCE

[*See* last paragraph of Instruction 1.03, *supra*]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.04 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 1 (1988); Fifth Circuit Pattern Jury Instructions: Criminal § 1.07 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 1.05 (1999); Ninth Cir. Crim. Jury Instr. 1.5 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Basic) §§ 4.1, 4.2 (1997); *United States v. Kirk*, 534 F.2d 1262, 1279 (8th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977).

5. 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 & ABETTING[1] (18 U.S.C. § 2(a))

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 essential 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.]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 18.01 (4th ed. 1992); Fifth Circuit Pattern Jury Instructions: Criminal § 2.06 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 5.06 (1999); Ninth Cir. Crim. Jury Instr. 5.1 (1997); *United States v. Roan Eagle*, 867 F.2d 436 (8th Cir.), *cert. denied*, 490 U.S. 1028 (1989). *See generally* West Key # "Criminal Law" 59(5), 67, 814(19), 815(12), 823(16).

Final Instructions: Criminal Responsibility

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

> 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 at 445. The appellate courts are divided as to whether accomplice liability applies to the continuing criminal enterprise (CCE) offense, 21 U.S.C. § 848(a). *United States v. Amen*, 831 F.2d 373, 381-82 (2d Cir. 1987) (CCE offense cannot be aided and abetted. *See also United States v. Benevento*, 836 F.2d 60 (2d Cir. 1987). *United States v. Ambrose*, 740 F.2d 505, 508 (7th Cir. 1984) (CCE offense can be committed by aiders and abettors). *See also United States v. Pino-Perez*, 870 F.2d 1230, 1231 (7th Cir. 1989) to the same effect. The Eighth Circuit touched on the issue in a footnote in *United States v. O'Connell*, 841 F.2d 1408, 1425 n.9 (8th Cir. 1988) and assumed that an aiding and abetting instruction could be given in a CCE charge, but was not required to resolve that issue on appeal. The issue is discussed in a student article at 58 U. Chi. L. Rev. 391 (1991). The Committee takes no position on the recommendations contained in the article. The same issue may arise in conspiracy cases.

The elements of aiding and abetting are generally that the defendant must have 1) associated himself with the unlawful venture 2) participated in it as something he wished to bring about and 3) sought by his actions to make it succeed. *See United States v. Lanier*, 838 F.2d 281, 284 (8th Cir. 1988); *United States v. Rodriguez*, 812 F.2d 414, 416 (8th Cir. 1987); *United States v. Sopczak*, 742 F.2d 1119, 1121-22 (8th Cir. 1984); *United States v. Brim*, 630 F.2d 1307, 1311 (8th Cir. 1980), *cert. denied*, 452 U.S. 966 (1981); *United States v. Hudson*, 717 F.2d 1211, 1214 n.2 (8th Cir. 1983); *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949).

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 on Use 4, *infra*.

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), *cert. denied*, 444 U.S. 1090 (1980). 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).

Final Instructions: Criminal Responsibility

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 at 1214.

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).

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 No. 3.09 should be deleted and the Burden of Proof language from No. 5.01 used. If there is a self defense, coercion or entrapment defense, the appropriate language from No. 3.09 must be included. The instruction should look something like the following:

The crime of _____ as charged in the indictment, has ____ essential 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 essential 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 defendant was not [entrapped] [coerced] [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 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.), *cert. denied*, 423 U.S. 849 (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).

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 defendant voluntarily and intentionally caused any acts he did not personally do.)[1]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 18.01 (4th ed. 1992). *See generally* West Key # "Criminal Law" 62.

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), *cert. denied*, 469 U.S. 1220 (1985).

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).

Notes on Use

1. Thus, for example, the elements of Mail Theft, No. 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).

Final Instructions: Criminal Responsibility

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 essential 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

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.08 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal §§ 5.03, 5.04 (1999); Ninth Cir. Crim. Jury Instr. 3.17 (1997); *see also* "Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions," 92 Harv. L. Rev. 1227, 1247 (1979). *See generally* West Key # "Corporations" 526.

"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.), *cert. denied*, 459 U.S. 991 (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.), *cert. denied*, 320 U.S. 788 (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), *cert. denied*, 409 U.S. 1125 (1973).

"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, 149-150 (6th Cir. 1960); *United States v. Carter*, 311 F.2d 934, 941-42 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963); *United States v. Koppers Co., Inc.*, 652 F.2d 290, 298 (2d Cir.), *cert. denied*, 454 U.S. 1083 (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 379-380 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), *cert. denied*, 401 U.S. 948 (1971); *United States v. Basic Const. Co.*, 711 F.2d 570, 572-73 (4th Cir.), *cert. denied*, 464 U.S. 956 (1983); *United States v. Bi-Co Pavers, Inc.*, 741 F.2d 730, 737-38 (5th Cir. 1984); Seventh Circuit Federal Jury Instructions: Criminal § 5.03 (1999). "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 149-150. *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.* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 18.05 (4th ed. 1992), 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), *cert. denied*, 469 U.S. 1217 (1985); *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).

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 above, 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 only be given 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.

Final Instructions: Criminal Responsibility

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]

Committee Comments

See Seventh Circuit Federal Jury Instructions: Criminal § 5.02 (1999). *See generally* West Key # "Criminal Law" 58.

Notes on Use

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

Final Instructions: Criminal Responsibility

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 essential elements, which are:

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

Two, the defendant knew that (name of principal) 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., _____.

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 22.03, 22.04 (4th ed. 1990); Seventh Circuit Federal Jury Instructions: Criminal § 5.07 (1999); Ninth Cir. Crim. Jury Instr. 5.2 (1997); *United States v. Bissonette*, 586 F.2d 73, 76 (8th Cir. 1978). *See generally* West Key # "Criminal Law" 74-77, 79-80, 82, 814(19), 815(12), 823(16).

Final Instructions: Criminal Responsibility

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.), *cert. denied*, 295 U.S. 757 (1935).

Knowledge is an essential 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), *cert. denied*, 472 U.S. 1017 (1985).) 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).

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 essential elements of the offense to which the defendant is alleged to have been an accessory after the fact. *See* No. 3.09, *supra*, and Section 6, *infra*.

Final Instructions: Criminal Responsibility

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

The crime of conspiracy[1] as charged in [Count __ of] the indictment, has four[2] essential 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*.)

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 18.02 (4th ed. 1992); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 28.01-28.11, at (4th ed. 1990); Fifth Circuit Pattern Jury Instructions: Criminal § 2.20 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 5.08 (1999); Ninth Cir. Crim. Jury Instr. 8.5.1 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 11.1 (1997); *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), *cert. denied*, 440 U.S. 910 (1979). *See generally* West Key # "Conspiracy" .23.

"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.), *cert. denied*, 404

U.S. 833 (1971) and *United States v. Jackson*, 549 F.2d 517, 530 (8th Cir.), *cert. denied*, 430 U.S. 985 (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.), *cert. denied*, 384 U.S. 1011 (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.), *cert. denied*, 419 U.S. 828 (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.), *cert. denied*, 449 U.S. 861 (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), *cert. denied*, 459 U.S. 1110 (1983). 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.), *cert. denied*, 454 U.S. 1086 (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), *cert. denied*, 465 U.S. 1005 (1984); *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).

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, 115 S. Ct. 382 (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).

5.06B CONSPIRACY: "AGREEMENT" EXPLAINED

The Government must prove that 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]

Final Instructions: Criminal Responsibility

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 28.04, 28.05, 28.07 (4th ed. 1990); Fifth Circuit Pattern Jury Instructions: Criminal § 2.20 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 11.1 (1997). *See generally* West Key # "Criminal Law" 59(*l*)-(4).

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), *cert. denied*, 471 U.S. 1115 (1985); *Nilva v. United States*, 212 F.2d 115, 121 (8th Cir.), *cert. denied*, 348 U.S. 825 (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, defendants need not have knowledge of every detail or part of a conspiracy, as long as the evidence overall shows that 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.), *cert. denied*, 469 U.S. 820 (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).

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.), *cert. denied*, 434 U.S. 870 (1977).

2. This paragraph is consistent with the court's ruling in *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775 (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.3d 175, 180 (5th Cir. 1991); *United States v. de Ortiz*, 907 F.2d 629, 635 (7th Cir. 1990) (en banc).

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 the 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 essential 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.

Final Instructions: Criminal Responsibility

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 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.]

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 28.03, 28.07 (4th ed. 1990). *See generally* West Key # "Conspiracy" 27.

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.), *cert. denied*, 412 U.S. 928 (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. Alphonso-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.), *cert. denied*, 474 U.S. 994 (1985).

Notes on Use

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

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 Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 11.1 (1997); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 28.08 (4th ed. 1990).

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

5.06F CONSPIRACY: MULTIPLE OFFENSES[1]

The indictment charges a conspiracy to commit [two] [three, etc.] separate crimes or offenses. It is not necessary for the Government to prove a conspiracy to commit [*both*] [*all*] of those offenses. It would be sufficient if the Government proves, beyond a reasonable doubt, a conspiracy to commit *one* of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon *which* of the [two] [three, etc.] offenses was the subject of the conspiracy. If you cannot agree in that manner, you must find the defendant not guilty. [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]

Committee Comments

See Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 11.2 (1997).

United States v. Ballard, 663 F.2d 534, 544 (5th Cir. 1981), *reh'g denied*, 680 F.2d 352 (5th Cir. 1982) requires this instruction in order to assure a unanimous verdict when a single conspiracy embraces multiple alleged objects.

Notes on Use

1. For use only where the indictment has charged a conspiracy with multiple objects.

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 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 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.]

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 28.09 (4th ed. 1990). *See generally* West Key # "Conspiracy" 23.

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.), *cert. denied*, 513 U.S. 949 (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.), *cert. denied*, 506 U.S. 1025 (1992); *United States v. Wilson*, 497 F.2d 602 (8th Cir.), *cert. denied*, 419 U.S. 1069 (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), *cert. denied*, 471 U.S. 1115 (1985); *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), *cert. denied*, 479 U.S. 1031 (1987). 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.), *cert. denied*, 474 U.S. 980 (1985) (quoting *United States v. Jackson*, 696 F.2d 578, 582-83 (8th Cir. 1982), *cert. denied*, 460 U.S. 1073 (1983)); *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), *cert. denied*, 465 U.S. 1078 (1984)). 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).

Final Instructions: Criminal Responsibility

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), *cert. denied*, 486 U.S. 1006 (1988) [addressing a double jeopardy claim].

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:

> 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.

Final Instructions: Criminal Responsibility

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.), *cert. denied*, 506 U.S. 1006 (1992); and *United States v. Figueroa*, 900 F.2d 1211, 1216 (8th Cir.), *cert. denied*, 496 U.S. 942 (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), *cert. denied*, 405 U.S. 1040 (1972); *United States v. Jackson*, 696 F.2d at 585-86; *United States v. Snider*, 720 F.2d 985, 990 (8th Cir. 1983), *cert. denied*, 465 U.S. 1107 (1984).

Final Instructions: Criminal Responsibility

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] [a preponderance] of the evidence. To prove something by [the greater weight] [a 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 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] [a preponderance] of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.]

Committee Comments

See Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 11.4 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 5.12 (1999); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 28.11 (4th ed. 1990). *United States v. Jimenez*, 622 F.2d 753 (5th Cir. 1980). *See generally* West Key # "Conspiracy" 40.4.

Withdrawal requires an affirmative act to defeat or disavow the purpose of the conspiracy; mere cessation of activity is insufficient. *Hyde v. United States*, 225 U.S. 347, 368-69 (1912); *United States v. Lewis*, 759 F.2d 1316, 1343 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985); *United States v. Hamilton*, 689 F.2d 1262, 1268 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983); *United States v. Cohen*, 516 F.2d 1358, 1364 (8th Cir. 1975). *See also United States v. Boyd*, 610 F.2d 521, 528 (8th Cir.), *cert. denied*, 444 U.S. 1089 (1980). To withdraw, a conspirator must show that he took "affirmative action, either making a clean breast to the authorities or communicating his withdrawal in a manner reasonably calculated to reach co-conspirators." *United States v. Parnell*, 581 F.2d 1374, 1384 (10th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979). These are only two possible methods of

withdrawal. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). However, a mere cessation of activities or periods of inactivity are not sufficient to make the required showing.

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. Nicoll*, 664 F.2d 1308 (5th Cir.), *cert. denied*, 457 U.S. 1118 (1982).

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), *cert. denied*, 442 U.S. 916 (1979). The burden of proof that defendant withdrew is on the defendant. *United States v. Boyd*, 610 F.2d 521, 528 (8th Cir. 1979), *cert. denied*, 444 U.S. 1089 (1980); *United States v. Jiminez*, 622 F.2d at 757. *But see United States v. Read*, 658 F.2d 1225 (7th Cir. 1981).

Notes on Use

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

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

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]

Committee Comments

See United States v. Shigemura, 682 F.2d 699, 705 (8th Cir. 1982), *cert. denied*, 459 U.S. 1111 (1983). *See also* West Key # "Criminal Law" 422(1); "Conspiracy" 41.

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).

Fed. R. Evid. 104(a) 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.), *cert. denied*, 513 U.S. 852 (1994); *United States v. Sepulveda*, 15 F.3d 1161, 1181 (1st Cir. 1994); *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, 638-641 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).]

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 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), *cert. denied*, 474 U.S. 1064 (1986), 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), *cert. denied*, 457 U.S. 1133 (1982) 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* §§ 6.03-6.05, *supra*. 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.), *cert. denied*, 460 U.S. 1086 (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 Fed. R. Evid. 806. Then the jury could be given a standard credibility instruction tailored to apply to the non-testifying declarant.

A third instruction on the standard of admissibility, former 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 28.06 (4th ed. 1990), is no longer in use because this threshold question of admissibility is a question of law.

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 624, 633 (7th Cir. 1990) (en banc); *United States v. Petrozzielo*, 548 F.2d 20, 23 (1st Cir. 1977); *United States v. Stancich*, 550 F.2d 1294 (2d Cir. 1977);

United States v. Enright, 579 F.2d 980, 986, 987 (6th Cir. 1978); *United States v. Gantt*, 617 F.2d 831, 845, 846 (D.C. Cir. 1980); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 28.06 (4th ed. 1990).

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* No. 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), *cert. denied*, 465 U.S. 1107 (1984).

See also Grunewald v. United States, 353 U.S. 391 (1957); *United States v. Steele*, 685 F.2d 793, 800-01 (3d Cir.), *cert. denied*, 459 U.S. 908 (1982); *United States v. Del Valle*, 587 F.2d 699 (5th Cir.), *cert. denied*, 442 U.S. 909 (1979); *United States v. Payne*, 635 F.2d 643, 645 (7th Cir. 1980), *cert. denied*, 451 U.S. 972 (1981). 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.

6. 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 essential 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

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

The crime of assault on a federal officer [with a dangerous or deadly weapon], as charged in [Count __ of] the indictment, has three essential elements, which are:

One, the defendant forcibly assaulted (describe federal officer by position and name)[1] [with a deadly or dangerous weapon][2];

Two, the assault was done voluntarily and intentionally;[3] and

Three, at the time of the assault (name of officer) was doing what he was employed by the federal Government to do.[4]

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.[5]

"Forcibly" means by use of force. Physical force is sufficient. 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.

[A "deadly and dangerous weapon" is an object used in a manner likely to endanger life or inflict serious bodily harm.][6]

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

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 42.01-42.11 (4th ed. 1990); Fifth Circuit Pattern Jury Instructions: Criminal § 2.09 (1997); Ninth Cir. Crim. Jury Instr. 8.2.1 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) §§ 1.1, 1.2 (1997).

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. Alvarez*, 755 F.2d 830, 842-43 (11th Cir.), *cert. denied*, 474 U.S. 905 (1985); *see also* Instructions 3.09, *supra*, and 9.00 and 9.04, *infra*.

Final Instructions: Elements of Offenses

Notes on Use

1. 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, e.g., United States v. Oakie*, 12 F.3d 1436 (8th Cir. 1993); *United States v. Lopez*, 586 F.2d 978, 979-980 (2d Cir. 1978), *cert. denied*, 440 U.S. 923 (1979); *United States v. Patrin*, 575 F.2d 708, 712-14 (9th Cir. 1978). 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.

2. This language must be used if it is charged that the assault was with a deadly or dangerous weapon. The question of what constitutes a "deadly and 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).

3. The assault must be intentional, even though the term "willful" is not used in the statute. *United States v. Feola*, 420 U.S. 671, 684 (1975); *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.), *cert. denied*, 449 U.S. 854 (1980). In *United States v. Sweet*, 985 F.2d 443 (8th Cir. 1993), the court stated "[n]less 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. Goldson*, 954 F.2d 51 (2d Cir. 1992); *United States v. Feola*, 420 U.S. at 684-86; *United States v. Alvarez*, 755 F.2d 830, 842-47 (11th Cir. 1985); *United States v. Maynard*, 452 F.2d 1087, 1088 (1st Cir. 1971).

4. 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 and the test is whether the person is acting within that area of responsibility. *United States v. Murdock*, 826 F.2d 771, 774 n.2 (8th Cir. 1987).

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.

5. *See United States v. Maynard*, "assault is the act of putting in fear." 452 F.2d at 1088. This case covers the typical situation of a firearm being pointed at an agent.

6. *See United States v. Hollow*, 747 F.2d 481, 482 (8th Cir. 1984). "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; *United States v. Webster*, 620 F.2d 640, 641-42 (7th Cir. 1980)

Final Instructions: Elements of Offenses

6.18.152A BANKRUPTCY FRAUD (Concealment of Assets) (18 U.S.C. § 152(1))

The crime of bankruptcy fraud has four essential 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*.)

Committee Comments

See Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) at 86, et seq. (1997).

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).

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), *cert. denied*, 471 U.S. 1014 (1985); *United States v. Porter*, 842 F.2d 1021, 1024 (8th Cir. 1988).

Final Instructions: Elements of Offenses

6.18.152B BANKRUPTCY FRAUD (Making a False Statement) (18 U.S.C. § 152(2-4))

The crime of bankruptcy fraud has four essential 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.), *cert. denied*, 506 U.S. 833 (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.

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 essential 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*.)

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 25.01-25.12 (4th ed. 1990); White Collar Crime: Bribery, 18 Am. Crim. L. Rev. 240-45 (1980). *See generally Vinyard v. United States*, 335 F.2d 176, 181-83 (8th Cir.), *cert. denied*, 379 U.S. 930 (1964).

This offense requires that the defendant have acted "corruptly." *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 822 (9th Cir.), *cert. denied*, 471 U.S. 1139 (1985); *United States v. Strand*, 574 F.2d 993, 996 (9th Cir. 1978); *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976).

"Corruptly" has been defined as offering anything of value "for the purpose of influencing official action." Seventh Circuit Federal Jury Instructions: Criminal at 141 (1999).

The court in *Strand* defined "corruptly" as follows:

> An act is "corruptly" done, if done voluntarily and intentionally, and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.
>
> The motive to act "corruptly" is ordinarily a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit or benefit to another.

United States v. Strand, 574 F.2d at 996. *See also* Committee Comments, Instruction 6.18.1503A, *infra*, for a discussion of "corruptly" in 18 U.S.C. § 1503.

There should be some connection between the offer and the official's duties. *United States v. Seuss*, 474 F.2d 385 (1st Cir.), *cert. denied*, 412 U.S. 928 (1973). However, it is immaterial that the public official lacked the legal authority to take the action sought by the defendant. *Vinyard v. United States*, 335 F.2d at 182; *see also United States v. Gjieli*, 717 F.2d 968, 971-75 (6th Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984). This section is violated even though the official offered the bribe is not corrupted or the object of the bribe cannot be obtained. *United States v. Jacobs*, 431 F.2d 754, 759-760 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971).

It is no defense that, even without the bribe, the public official would have taken the same action or reached the same decision that the defendant wanted him to take. *United States v. Jannotti*, 673 F.2d 578, 601 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982). Nor is the illegality of the arrest a viable defense in a prosecution for bribery of the arresting officer. *Vinyard v. United States*, 335 F.2d 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.), *cert. denied*, 411 U.S. 935 (1973). It is not necessary that a person be formally employed or under contract with the United States to be a public official if he possesses some degree of official responsibility for carrying out a federal program or policy. *Dixson v. United States*, 465 U.S. 482, 498-99 (1984).

"Official act" is defined in section 201(a)(3). This definition has been variously construed. Compare, *United States v. Muntain*, 610 F.2d 964, 967-69 (D.C. Cir. 1979); *United States v. Carson*, 464 F.2d 424 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); *United States v. Dobson*, 609 F.2d 840 (5th Cir.), *cert. denied*, 446 U.S. 955 (1980).

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* No. 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. *United States v. Crutchfield*, 547 F.2d 496, 500 (9th Cir. 1977); *United States v. Brewster*, 506 F.2d 62, 78-79 (D.C. Cir. 1974). Where intent is not in dispute, the lesser included offense instruction should be withheld. *United States v. Harary*, 457 F.2d 471, 477 (2d Cir. 1972).

Final Instructions: Elements of Offenses

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 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. *See* Seventh Circuit Federal Jury Instructions: Criminal at 141 (1999).

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 essential 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*.)

Committee Comments

See United States v. Strand, 574 F.2d 993, 996 (9th Cir. 1978). *See also* Committee Comments, No. 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). Receipt of a bribe under this section requires a promise of a future act in exchange for something of value given to the public official. *E.g.*, *United States v. Williams*, 705 F.2d 603, 621 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983); *United States v. Strand*, 574 F.2d at 995-96. However, this section may be violated where the official has already acted, but leads the person he is soliciting to believe that he has not yet acted. *United States v. Arroyo*, 581 F.2d 649 (7th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

This offense requires corrupt intent and in that important respect differs from the offense under section 201(c)(1)(B), which punishes the receipt of a gratuity paid "for or because of performance of a future or past official act." *United States v. Myers*, 692 F.2d 823, 841 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983). *See also United States v. Brewster*, 506 F.2d 62, 71 (D.C. Cir. 1974).

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 at 842.

Receiving an illegal gratuity is a lesser included offense of receiving a bribe. *See* No. 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. *United States v. Crutchfield*, 547 F.2d 496, 500 (9th Cir. 1977); *United States v. Brewster*, 506 F.2d 62, 78-79 (D.C. Cir. 1974). Where intent is not in dispute the lesser included offense instruction should be withheld. *United States v. Harary*, 457 F.2d 471, 477 (2d Cir. 1972).

Notes on Use

1. By phrasing the instruction in this manner, the court avoids having to further instruct that a person holding 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. *See* Seventh Circuit Federal Jury Instructions: Criminal at 141 (1999).

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 essential 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's) testimony] [(name of witness) to absent himself from the proceeding described].

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

Committee Comments

See Committee Comments, Instructions 6.18.201A-B, *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. *See* Seventh Circuit Federal Jury Instructions: Criminal at 141 (1999).

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 essential 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*.)

Committee Comments

See Committee Comments, Instructions 6.18.201A-C, *supra*; *United States v. Busch*, 758 F.2d 1394 (10th Cir. 1985).

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. *See* Seventh Circuit Federal Jury Instructions: Criminal at 141 (1999).

Final Instructions: Elements of Offenses

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 essential 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 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*.)

Committee Comments

See United States v. Johnson, 647 F.2d 815 (8th Cir. 1981); *United States v. Standefer*, 610 F.2d 1076 (3d Cir. 1979), *aff'd*, 447 U.S. 10 (1980)

The subsections to section 201(c) prohibit illegal gratuities. The essential difference between a bribe and an illegal gratuity is that bribery requires the defendant to have acted "corruptly." *United States v. Johnson*, 647 F.2d 815, 818 (8th Cir. 1981). In order to constitute bribery, the thing of value given to the public official must be intended as a *quid pro quo* for a specific official act, decision, or course of conduct. In contrast, an illegal gratuity must be given on account of the recipient's performance of his official duties but need not be intended to influence any official act or decision. *See United States v. Patel*, 32 F.3d 340, 344-45 (8th Cir. 1994); *United States v. Niederberger*, 580 F.2d 63, 68-69 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978); *United States v. Raborn*, 575 F.2d 688, 690-92 (9th Cir. 1978); *United States v. Evans*, 572 F.2d 455, 479-82 (5th Cir.) *cert. denied*, 439 U.S. 870 (1978); *United States v. Crutchfield*, 547 F.2d 496, 500 (9th Cir. 1977); *United States v. Brewster*, 506 F.2d 62, 68-74 (D.C. Cir. 1974); *United States v. Irwin*, 354 F.2d 192, 196 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). 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, 115 S. Ct. 1003 (1995).

Giving an illegal gratuity is a lesser included offense of bribery. *United States v. Johnson*, 647 F.2d at 818. *See also* No. 6.18.201A, *supra*.

Final Instructions: Elements of Offenses

Notes on Use

1. "Illegal gratuity" is used to describe a violation of this section in Ninth Cir. Crim. Jury Instr. 8.3.1 (1997), as well as in the cases cited in the Committee Comments. The words "illegal gratuity" are used as 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 can 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. By phrasing the instruction in this manner, the court avoids having to further instruct that a person holding defendant's particular position is a "public official." However, the court should make such a finding on the record.

Final Instructions: Elements of Offenses

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 essential 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 to be performed by (name of official).

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

Committee Comments

See Committee Comments , Instruction 6.18.201E, *supra*. *See generally United States v. Niederberger*, 580 F.2d 63, 68-70 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978); *United States v. Raborn*, 575 F.2d 688, 690-91 (9th Cir. 1989); *United States v. Brewster*, 506 F.2d 62, 68-74 (D.C. Cir. 1974). *United States v. Evans*, 572 F.2d 455, 479-81 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978). *United States v. Dobson*, 609 F.2d 840 (5th Cir.), *cert. denied*, 446 U.S. 955 (1980).

Receiving an illegal gratuity is a lesser included offense of receiving a bribe. *United States v. Brewster*.

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 this section in Ninth Cir. Crim. Jury Instr. 8.3.1 (1997), as well as in the cases cited in the Committee Comments. The words "illegal gratuity" are used as a generally recognized substitute for the more cumbersome phraseology in the statute and should be defined in subsequent instructions. 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 can substitute the language in the statute.

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 defendant's particular position is a "public official." However, the court should make such a finding on the record.

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 essential 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* No. 3.09, *supra*.)

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 government agency alleged to have jurisdiction over it is also a question of law. *United States v. Catena*, 500 F.2d 1319, 1325 (3d Cir.), *cert. denied*, 419 U.S. 1047 (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 essential element of a section 287 offense. *United States v. Cook*, 586 F.2d 572, 574-75 (5th Cir. 1978), *reh. denied*, 589 F.2d 1114 (5th Cir.), *cert. denied*, 442 U.S. 909 (1979); *United States v. Beasley*, 550 F.2d 261, 270 n.12 (5th Cir.), *cert. denied*, 434 U.S. 938 (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 essential 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 essential 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), *cert. denied*, 460 U.S. 1081 (1983).

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 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 37.08 (4th ed. 1990); Seventh Circuit Federal Juiry Instructions: Criminal at 163-65 (1999); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 9 (1997); *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., *supra*, at pp. 283-84.

4. Materiality is an essential 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 essential 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, ___, ___, 115 S. Ct. 2310, 2311, 2320 (1995) (unanimous opinion).

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 essential 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*.)

Committee Comments

See Seventh Circuit Federal Jury Instructions: Criminal, at 169 (1999); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 12 (1997); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 29.01-29.13 (4th ed. 1990).

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 is found in *United States v. Lustig*, 159 F.2d 798, 802 (3d Cir. 1947); *rev'd on the other grounds*, 338 U.S. 74 (1949). The test is whether there is such a likeness 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 upright and honest. *See also United States v. Brunson*, 657 F.2d 110, 114 (7th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982) (same definition used) and 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 29.12 (4th ed. 1990), which provides:

"The term 'counterfeit' means made in order to bear such a likeness or resemblance to something genuine that it is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and using care when dealing with a person who is presumed to be honest and upright."

Should a fact issue exist as to whether the instrument meets this test, a separate instruction should be submitted.

Notes on Use

1. *See* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 16.07 (4th ed. 1992) and Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 12 (1997) (intent to defraud). The definition of "intent to defraud," for financial gain, is noted with approval in *United States v. Speaks*, 453 F.2d 966, 969 n.9 (1st Cir.), *cert. denied*, 405 U.S. 1971 (1972).

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 essential 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 defendant or another. It is not necessary, however, to prove that the United States or anyone else was in fact defrauded.[2]

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

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 29.06 (4th ed. 1990); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 12 (1997); Ninth Cir. Crim. Jury Instr. 8.6.2 (1997); Seventh Circuit Federal Jury Instructions: Criminal at 170 (1999). *See also United States v. Tucker*, 820 F.2d 234, 236 (7th Cir. 1987).

An intent to defraud unknown third parties is sufficient. *United States v. Pitts*, 508 F.2d 1237, 1240 (8th Cir. 1974), *cert. denied*, 421 U.S. 967 (1975). The cases do not require that the recipient think that the bills are true and genuine. Thus, 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), *cert. denied*, 372 U.S. 945 (1963).

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 a counterfeit is found in *United States v. Lustig*, 159 F.2d 798, 802 (3d Cir. 1947), *rev'd on other grounds*, 338 U.S. 74 (1949). The test is whether there is such

a likeness to genuine currency as is calculated to deceive an honest, sensible, and unsuspecting person supposed to be upright and honest. *See also United States v. Brunson*, 657 F.2d 110, 114 (7th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982) [same definition used] and 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 29.12 (4th ed. 1990), which provides:

> The term "counterfeit" means made in order to bear such a likeness or resemblance to something genuine that it is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and using care when dealing with a person who is presumed to be honest and upright.

Knowledge of the counterfeit character of the obligation is an essential 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. Berry*, 599 F.2d 267, 268-69 (8th Cir.), *cert. denied*, 444 U.S. 862 (1979). A mere attempt to pass a bill does not support an inference that the defendant knew it was counterfeit. *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. A critical factor concerning the issue of guilty knowledge is whether the defendant is in possession of or has passed more than one counterfeit obligation. *See United States v. Olson*, 697 F.2d 273, 275 (8th Cir. 1983). The naked act of possessing and passing counterfeit money, without knowledge that it is counterfeit, does not establish the requisite knowledge essential to the crime of passing or the requisite intent to defraud. *United States v. Bishop*, 534 F.2d 214 (10th Cir. 1976).

"Passing" and "uttering" are sometimes treated as synonymous. *See* Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 12 (1997): "To 'pass' or 'utter' a counterfeit note includes any attempt to spend the note or otherwise place it in circulation." However, "passing" does not require any declaration that the note is good or any attempt to circulate. "Uttering" may require either or both of these additional elements. *See* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 29.06 (4th ed. 1990); Committee Comments, Instruction 6.18.495B, *infra*. This question was left open in *United States v. DeFilippis*, 637 F.2d 1370, 1373-74 (9th Cir. 1981), an unusual case on the facts in which the defendants exchanged "raised" notes for good ones with merchants, claiming the merchants had mistakenly given them altered currency in change. In that case the court held that the evidence supported "passing" and uttering instructions were not appropriate since there was no declaration that the raised note was good nor any attempt to circulate it.

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.), *cert. denied*, 406 U.S. 908 (1972)

(citing *Rader v. United States*, 288 F.2d 452, 453 (8th Cir.), *cert. denied*, 368 U.S. 851 (1961)), a forgery case under 18 U.S.C. § 500.

Notes on Use

1. 18 U.S.C. § 472 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).

2. *See* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 16.07 (4th ed. 1992) and Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 13.1 (1997). The definition of "intent to defraud," for financial gain, is noted with approval in *United States v. Speaks*, 453 F.2d 966, 969 n.9 (1st Cir.), *cert. denied*, 405 U.S. 1071 (1972).

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 essential 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 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*.)

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 29.01-29.13 (4th ed. 1990); Seventh Circuit Federal Jury Instructions: Criminal at 175 (1999).

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), *cert. denied*, 454 U.S. 1157 (1982); *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.), *cert. denied*, 368 U.S. 851 (1961); *United States v. Price*, 655 F.2d 958, 960 (9th Cir. 1981). In appropriate cases, the

jury may be so instructed. *See* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 29.11 (4th ed. 1990).

Notes on Use

1. The first paragraph of § 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. Speakes*, 453 F.2d 966, 969 n.9 (1st Cir.), *cert. denied*, 405 U.S. 1071 (1972) for this definition of "intent to defraud."

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 essential 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, 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 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*.)

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 29.01-29.13 (4th ed. 1990) and Seventh Circuit Federal Jury Instructions: Criminal at 175 (1999).

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.), *cert. denied*, 389 U.S. 882 (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.), *cert. denied*, 368 U.S. 851 (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.), *cert. denied*, 429 U.S. 847 (1976).

The distinction between "falsely made" and "forged" is addressed in *United States v. Hagerty*, 561 F.2d 1197 (5th Cir. 1977).

Final Instructions: Elements of Offenses

The Devitt and Blackmar definition of "forgery," former § 53.05 (*see* now 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 29.12 (4th ed. 1990)), was held adequate in *United States v. Mercer*, 853 F.2d 630, 633 (8th Cir.), *cert. denied*, 488 U.S. 996 (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.

Notes on Use

1. *See United States v. Speakes*, 453 F.2d 966, 969 n.9 (1st Cir.), *cert. denied*, 405 U.S. 1071 (1972) for a definition of "intent to defraud" under this statute.

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 essential 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*.)

Committee Comments

See Fifth Circuit Pattern Jury Instructions: Criminal § 2.33 (1997); *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).

Final Instructions: Elements of Offenses

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 Morisette v. United States*, 342 U.S. 246, 267-69 n.28, 72 S. Ct. 240, 253 n.28 (1952).

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), *cert. denied*, 429 U.S. 1038 (1977) (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. 1987) (statute applied to unauthorized disclosures of classified information).

Final Instructions: Elements of Offenses

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 essential 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 $100.00;[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 defendant or another.][8]

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

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 30.01-30.06 (4th ed. 1990); Ninth Cir. Crim. Jury Instr. 8.11.1, 8.11.2 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 19 (1997); *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).

Final Instructions: Elements of Offenses

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), *cert. denied*, 430 U.S. 916 (1977), or by improperly structuring a loan to third parties for 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.), *cert. denied*, 452 U.S. 943 (1981). A check kiting scheme can constitute misapplication. *United States v. Young*, 618 F.2d 1281 (8th Cir.), *cert. denied*, 449 U.S. 844 (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 essential 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.), *cert. denied*, 439 U.S. 868 (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.), *cert. denied*, 469 U.S. 843 (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

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 $100.00. 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 $100.00 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.), *cert. denied*, 452 U.S. 943 (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.), *cert. denied*, 379 U.S. 823 (1964); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 30.04 (4th ed. 1990).

6. *See United States v. Moraites*, 456 F.2d 435 (3d Cir.), *cert. denied*, 409 U.S. 891 (1972); *United States v. Bevans*, 496 F.2d 494 (8th Cir. 1974); *United States v. Beran*, 546 F.2d 1316 (8th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 30.05 (4th ed. 1990). 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).

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 essential 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 $100.00;[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*.)

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 31.01-31.08 (4th ed. 1990); Fifth Circuit Pattern Jury Instructions: Criminal § 2.36 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 20.1 (1997).

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.), *cert. denied*, 326 U.S. 756 (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), *cert. denied*, 476 U.S. 1119 (1986); *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.), *cert. denied*, 338 U.S. 848 (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).

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 $100.00, 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.), *cert. denied*, 404 U.S. 912 (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 $100.00 at the time of the alleged offense.

4. *United States v. Crum*, 663 F.2d 771 (8th Cir. 1981); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 31.05, 31.07 (4th ed. 1990); Fifth Circuit Pattern Jury Instructions: Criminal § 2.36 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 20.1 (1997).

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.), *cert. denied*, 435 U.S. 955 (1978). *See further* Committee Comments, Instruction 4.13,*supra*, relating to instructions on statutory inferences. *See also* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 31.05, 31.07 (4th ed. 1990); Fifth Circuit Pattern Jury Instructions: Criminal § 2.36 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 20.1 (1997).

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).

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 essential 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 $100.00;[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*.)

Committee Comments

See Fifth Circuit Pattern Jury Instructions: Criminal § 2.37 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 20.2 (1997); *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*.

Final Instructions: Elements of Offenses

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), *cert. denied*, 416 U.S. 971 (1974); *Winer v. United States*, 228 F.2d 944, 947 (6th Cir.), *cert. denied*, 351 U.S. 906 (1956); *United States v. Gollin*, 166 F.2d 123, 125 (3d Cir.), *cert. denied*, 338 U.S. 848 (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), *cert. denied*, 381 U.S. 911 (1965). 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), *cert. denied*, 459 U.S. 1222 (1983); *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).

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 $100.00, 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.), *cert. denied*, 404 U.S. 912 (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 $100.00 at the time of the alleged offense.

4. *United States v. Crum*, 663 F.2d 771 (8th Cir. 1981); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 31.05, 31.07 (4th ed. 1990); Fifth Circuit Pattern Jury Instructions: Criminal § 2.37 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 20.2 (1997)

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.), *cert. denied*, 435 U.S. 955 (1978). *See further* Committee Comments, Instruction 4.13, *supra*, relating to instructions on statutory inferences. *See also* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 31.05, 31.07 (4th ed. 1990); Fifth Circuit Pattern Jury Instructions: Criminal § 2.37 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 20.2 (1997).

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).

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 essential 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]

["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]

Final Instructions: Elements of Offenses

[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*.)

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), 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 30.05 *Notes* (4th ed. 1990)

"The language in Section 666 is clear that it is not an essential 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.), *cert. denied*, 488 U.S. 820 (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), *cert. denied*, 507 U.S. 946 (1993).

"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).

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 No. 11.02; Instruction No. 6.18.1341, *Notes on Use* No. 2; and Instruction No. 6.18.1951, *Notes on Use* No. 4. 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 No. 6.18.641.

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 No. 6.18.641. This definition should be used if the term "embezzled" is used in Element Two.

6. *See* Instruction No. 6.18.659A; *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 No. 6.18.1341. This definition should be used if the term "obtained by fraud" is used in Element Two.

8. *See* 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 16.03 (4th ed. 1992). 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, 113 S. Ct. 716 (1993).

10. *See* Instruction No. 6.18.656; *United States v. Urlacher*, 979 F.2d 935, 938 (2d Cir. 1992); Instruction No. 6.18.2314; *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.

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 essential 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).

[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*.)

Final Instructions: Elements of Offenses

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.), *cert. denied*, 510 U.S. 880 (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), *cert. denied*, 516 U.S. 1049 (1996).

"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, 117 S. Ct. 1079 (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 § 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 § 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, 117 S. Ct. 1079 (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 instructed the jury 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 168; *see also* Committee Comments to Instruction No. 6.18.201B 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), *cert. denied*, 507 U.S. 946 (1993).

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.

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 US. 194, 113 S. Ct. 716 (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 No. 6.18.641.

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 No. 6.18.201B.

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), *cert. denied*, 510 U.S. 1095 (1994); *United States v. Biaggi*, 909 F.2d 662, 683 (2d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991). ("[A] valid purpose that partially motivates a transaction does not insulate participants in an unlawful transaction from criminal liability.")

6. *See* Instruction No. 6.18.641, *Notes on Use* No. 7; *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir.), *cert. denied*, 498 U.S. 821 (1990). Where the evidence establishes that intangible property rights were illegally usurped by the defendant, the jury instructions should be modified accordingly.

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 essential 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*.)

Committee Comments

See Committee Comments in Instruction No. 6.18.666(a)(1)(B).

Final Instructions: Elements of Offenses

Notes on Use

1. A definition of the term "value" can be found in Eighth Circuit Instruction No. 6.18.641.

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 No. 6.18.201A and Committee Comments to Instruction No 6.18.201A 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), *cert. denied*, 510 U.S. 1095 (1994); *United States v. Biaggi*, 909 F.2d 662, 683 (2d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991). ("[A] valid purpose that partially motivates a transaction does not insulate participants in an unlawful transaction from criminal liability.")

5. *See* Instruction No. 6.18.641, *Notes on Use* No. 7; *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir.), *cert. denied*, 498 U.S. 821 (1990). Where the evidence establishes that intangible property rights were illegally usurped by the defendant, the jury instructions should be modified accordingly.

Final Instructions: Elements of Offenses

6.18.751 ESCAPE FROM CUSTODY (18 U.S.C. § 751)

The crime of escape from custody, as charged in [Count _ of] the indictment, has three essential 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) by reason of (describe the authority for the custody, e.g., a felony conviction, an arrest for a misdemeanor, etc.); and

Two, the defendant left custody without authorization; and

Three, in so doing, the defendant knew that he was leaving custody without authorization.

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

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 32.01-32.07 (4th ed. 1990); S. Saltzburg & H. Perlman, FEDERAL CRIMINAL JURY INSTRUCTIONS § 53.01 (1985).

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.), *cert. denied*, 429 U.S. 986 (1976). The defendant cannot raise the invalidity or impropriety of his confinement as a defense. *Id.* at 732; *see also United States v. Smith*, 534 F.2d 74, 75 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977) (invalidity of underlying conviction is no defense).

This instruction differs from the Ninth Circuit's former pattern instruction by omitting the words "and with the intention of avoiding confinement" from the second element. And, unlike the former Devitt and Blackmar instructions, there is no reference to a requirement that the defendant acted "willfully." 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.

Final Instructions: Elements of Offenses

As the Supreme Court noted in *Bailey*, 444 U.S. at 409-413, 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 is upon the Government to disprove the defense beyond a reasonable doubt. *See generally* Instruction 9.02, *infra*.

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.

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 essential 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 defendant knew it was false;[2] and

Three, 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*.)

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 35.01-35.06 (4th ed. 1990) *See generally United States v. Robbins*, 613 F.2d 688 (8th Cir. 1979); *United States v. Parker*, 699 F.2d 177 (4th Cir.), *cert. denied*, 464 U.S. 836 (1983).

An "intent to defraud" is no longer an element of this offense; 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).

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 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 35.04 (4th ed. 1990).

3. Use this language if 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* 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 first bracketed matter set forth in Element *Three* is a mental-state requirement, not a causation requirement. The Committee does not believe that *Robbins* intended to create a new causation requirement for this statute.

4. Use this language if the charge is that 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.), *cert. denied*, 423 U.S. 843 (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).

Final Instructions: Elements of Offenses

6.18.922 FELON IN POSSESSION OF FIREARM (18 U.S.C. § 922(g))

The crime of being a felon[1] in possession of a firearm, as charged in [Count __ of] the indictment, has three essential elements, which are:

One, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year;

Two, the defendant thereafter 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 stipulated, that is, 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 essential 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*.)

Committee Comments

See Scarborough v. United States, 431 U.S. 563 (1977); *Barrett v. United States*, 423 U.S. 212, 215 n.4 (1976); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 36.07-36.115 (4th ed. 1990).

Final Instructions: Elements of Offenses

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, 115 S. Ct. 1624 (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.2d 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, 118 S. Ct. 2007 (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*, 118 S. Ct. at 2011. 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).

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In *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644 (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*, 117 S. Ct. at 658 (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.

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, § 924.

3. Crimes included are defined in section 921.

4. Adapted generally from the instruction used in *Barrett v. United States*, *see* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 36.14 (4th ed. 1990).

5. This definition is taken from 18 U.S.C. § 921(a)(3). Other portions of this definition should be used where appropriate.

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6.18.924C FIREARMS - CRIME OF VIOLENCE/ DRUG TRAFFICKING (18 U.S.C. § 924(c)) *

The crime of [using] [carrying] a firearm[1] during and in relation to a [crime of violence][2] [drug trafficking crime][3], as charged in Count _____ of the indictment has [two] [three] essential elements, which are:

One, the defendant committed the crime[s] of (describe crime[s]);[4]

Two, during and in relation to[5] the commission of [that] [those] crime[s], the defendant knowingly[6] [used][7] [carried][8] [a] firearm[s][9][.][; 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.).][10]

[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).][11]

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

* This statute was revised in 1998. This instruction is to be used for offenses committed prior to November 13, 1998.

Committee Comments

See generally United States v. Lyman, 892 F.2d 751 (8th Cir. 1989), *cert. denied*, 498 U.S. 810 (1990); *United States v. Matra*, 841 F.2d 837 (8th Cir. 1988). *Cf. Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793 (1994); *United States v. Barr*, 32 F.3d 1320 (8th Cir. 1994) (both cases applying an enhanced scienter requirement for prosecutions under 26 U.S.C. § 5861(d) for possession of the types of weapons, e.g., sawed-off shotguns, which under 18 U.S.C. § 924(c) carry more than the five-year penalty).

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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) as amended effective November 18, 1988, 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), as amended effective September 13, 1994, 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.

2. Currently defined by 18 U.S.C. § 924(c)(3); *see also* 18 U.S.C. § 16.

3. Defined by 18 U.S.C. § 924(c)(2) as amended by the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181, 4360 § 6212 (eff. Nov. 18, 1988). For crimes committed between November 15, 1986, and November 18, 1988, consistent with the 1988 amendment, applicable case law interpreted "drug trafficking crime" to include conspiracy to distribute and possession with intent to distribute controlled substances -- but not simple misdemeanor possession, *e.g.*, 21 U.S.C. § 844. *See United States v. Matra*, 841 F.2d at 843. Note, however, that where simple possession is in excess of five grams of cocaine base, that possession is a felony (21 U.S.C. § 844) and thus is a "drug trafficking crime" under section 924(c)(2).

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. The "in relation to" element must be included in the instructions. *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir. 1985), *cert. denied*, 484 U.S. 867 (1987). The term may be further defined, *see United States v. Brockington*, 849 F.2d 872, 875-76 (4th Cir. 1988), but failure to do so is not error where a further definition would not have changed the result. *United States v. Ramos*, 861 F.2d 228, 231 (9th Cir. 1988).

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, 113 S. Ct. 2050, 2060 (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 v. United States*, 516 U.S. 137, ___, 116 S. Ct. 501, 507 (1995).

6. Section 924(c) as written does not require that the use or carrying of a weapon be done "knowingly." Section 924(c) is not a specific intent offense. *United States v. Coyle*, 998 F.2d 548, 551 (8th Cir. 1993), *cert. denied sub nom.*, *Swedzinski v. United States*, 510 U.S. 1095, 114 S. Ct. 928 (1994). The Fifth Circuit has held that "knowledge of the facts constituting the offense" is the requisite scienter element of this statute. *United States v. Wilson*, 884 F.2d 174, 178-79 (5th Cir. 1989) (rejecting defendant's argument that under section 924(a)(1) the required scienter was "willfully"). That opinion went on to hold that the scienter element need not be expressly set out in the indictment if it can be fairly imported from the charge in the indictment. *Id.*, 884 F.2d at 180-81. *Accord United States v. Santeramo*, 45 F.3d 622 (2d Cir. 1995). It has been the policy of this Committee not to use words such as "knowingly" in the elements instructions unless they appear in the statute, *see* Section 7.00, *infra*, or are clearly required by case law. The Committee believes, however, the safer practice is to include "knowingly" in the elements.

7. The United States Supreme Court, in *Bailey*, has determined that "the language, context, and history of § 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.*

8. "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), *cert. denied*, 519 U.S. 1140 (1997). "Carries," within the meaning of section 924(c)(1), includes carrying a weapon in a vehicle. *United States v. Nelson*, *supra*; *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 defendant carried the weapon. *Bailey v. United States*, 516 U.S. 137, ___, 116 S. Ct. 501, 507 (1995) (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 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, 113 S. Ct. 2050 (1993); *United States v. White*, 81 F.3d 80 (8th Cir. 1996); *United States v. Willis*, 89 F.3d at 1379.

9. 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).

Where the firearm is of a type which triggers an enhanced penalty, it can be argued the enhancement may be so great that due process requires that the jury find beyond a reasonable doubt that the firearm was a particular type. *See McMillian v. Pennsylvania*, 477 U.S. 79, 88 (1986) (implied disapproval of a sentencing factor "tailored" by the legislature to be "a tail which wags the dog of the substantive offense"). *But see United States v. Galloway*, 976 F.2d 414, 426 (8th Cir. 1992) (*en banc*) (tripled sentencing range based on uncharged conduct did not require clear and convincing evidence, let alone beyond a reasonable doubt); *United States v. Luciano-Mosquera*, 63 F.3d 1142 (1st Cir. 1995) (in a machine gun prosecution it was not plain error for the court to instruct that an essential element was that "the defendant [ ] knowingly carried a firearm").

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 instruction of using a firearm with no silencer).

10. The third element is applicable 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. *See United States v. Rodriguez*, 841 F. Supp. 79 (E.D.N.Y. 1994) (whether firearm was "equipped" with a silencer within meaning of statute was an issue for the jury), *aff'd*, 53 F.3d 545, 546 (2d Cir. 1995).

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. Although it may be argued that the rationale of *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464, 465 (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, 114 S. Ct. 1793 (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.), *cert. denied*, 506 U.S. 932 (1992). Employing the same analysis the Supreme Court later used in *Staples*, the D.C. Circuit concluded that 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. 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 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 the government must prove 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)), *cert. denied*, 502 U.S. 949 (1991). 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 defendants were indicted as aiders and abettors), *cert. denied sub nom*., *Roberson v. United States*, 506 U.S. 944, 113 S. Ct. 387 (1992).

11. In *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501 (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."

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 essential 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*.)

Committee Comments

See Seventh Circuit Federal Jury Instructions: Criminal at 239-47 (1999); *United States v. Swaim*, 757 F.2d 1530, 1533 (5th Cir.), *cert. denied*, 474 U.S. 825 (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), *cert. denied*, 429 U.S. 1041 (1977).

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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.), *cert. denied*, 486 U.S. 1058 (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), *cert. denied*, 455 U.S. 1016 (1982). Whether 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.), *cert. denied*, 477 U.S. 908 (1986).

In *Hubbard v. United States*, 514 U.S. 695, 115 S. Ct. 1754, 1765 (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, 75 S. Ct. 504 (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*.

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 essential 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, ___, ___, 115 S. Ct. 2310, 2311, 2320 (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 essential element. *Id.* at ____, 115 S. Ct. 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.

4. The statutory requirement that the matter be "within the jurisdiction" of any department or agency of the United States appears to be an essential 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 ___, 115 S. Ct. at 2313 (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).

Final Instructions: Elements of Offenses

6.18.1001B FALSE STATEMENT TO GOVERNMENTAL AGENCY (18 U.S.C. § 1001)

The crime of making a [false] [fictitious] [fraudulent] material [statement] [representation] in a matter within the jurisdiction of a governmental agency, as charged in [Count _____ of] the indictment, has three essential elements which are:

One, the defendant knowingly, voluntarily and intentionally made a [false] [fictitious] [fraudulent] [statement] [representation] in (describe matter within agency jurisdiction, e.g., a U.S. customs declaration);[1]

Two, the [statement] [representation] was material[2] to the (name agency, e.g., U.S. Customs Service); and

Three, the (describe matter, e.g., U.S. customs declaration) was a matter within the jurisdiction of (name agency, e.g., U.S. Customs Service)[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., "collecting duties on goods entering the United States").

[A statement is "false" or "fictitious," if untrue when made, and then known to be untrue by the person making it or causing it to be made.] [A statement or representation is "fraudulent," if known to be untrue, and made or caused to be made with the intent to deceive the governmental agency to whom it was submitted.][4]

A [statement] [representation] is "material," if it has a natural tendency to influence, or is capable of influencing, the decision of the agency. [However, whether a [statement] [representation] 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*.)

Committee Comments

See United States v. Whitaker, 848 F.2d 914, 917 (8th Cir. 1988); *United States v. Gilbertson*, 588 F.2d 584, 589 (8th Cir. 1978); *United States v. Lanier*, 578 F.2d 1246, 1250-52 (8th Cir.), *cert. denied*, 439 U.S. 856 (1978); *United States v. Chandler*, 752 F.2d 1148, 1150 (6th Cir. 1985); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 37.05-

37.08 (4th ed. 1990); Seventh Circuit Federal Jury Instructions: Criminal at 239-47 (1999); *See generally White Collar Crime: False Statements*, 18 Am. Crim. L. Rev. 273 (1980).

Most courts set out the essential elements as this circuit did in *Whitaker*, as follows: (1) a statement; (2) which is false; (3) and material; (4) made knowingly and willingly and (5) within the government jurisdiction. 848 F.2d at 917; *United States v. Lichenstein*, 610 F.2d 1272, 1276 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980); *United States v. Godwin*, 566 F.2d 975, 976 (5th Cir. 1978) (per curiam). *See also United States v. Johnson*, 937 F.2d 392, 396 (8th Cir. 1991) (same elements in different order).

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.), *cert. denied*, 412 U.S. 928 (1973) and cases cited therein.

In *Hubbard v. United States*, 514 U.S. 695, 115 S. Ct. 1754, 1765 (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, 75 S. Ct. 504 (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*.

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.), *cert. denied*, 506 U.S. 878 (1992). Nor must the intended victim of the deceit be the federal government. *Yermian*, 468 U.S. at 69.

While materiality is not an explicit requirement of the second clause of section 1001, the Supreme Court has assumed that it is and has held that it is a constitutional violation and reversible error to refuse to submit the issue to the jury. *United States v. Gaudin*, 515 U.S. 506, ___, ___, 115 S. Ct. 2310, 2311, 2320 (1995) (Rehnquist, C.J., concurring and noting and that the Court did not resolve the conflict among the circuits but merely assumed that materiality is an element of the false statement clause of section 1001).

The acts must be done "knowingly and willfully." "Knowingly" under this clause of the statute has been generally defined as "with knowledge" and "willfully" as "deliberately" or "deliberately with knowledge." *McBride v. United States*, 225 F.2d 249, 253-55 (5th Cir. 1955), *cert. denied*, 350 U.S.

934 (1956); *Neely v. United States*, 300 F.2d 67, 72-73 (9th Cir.), *cert. denied*, 369 U.S. 864 (1962); *United States v. Mekjian*, 505 F.2d 1320, 1324-25 (5th Cir. 1975).

> As to the element of knowingly, it is reasonable for the court to inform the jury that they must attempt to view this element by looking at whether the evidence showed that the *defendant knew* he filled out the form falsely.

United States v. Cox, 696 F.2d 1294, 1297 (11th Cir.), *cert. denied*, 464 U.S. 827 (1983). "Knowingly" includes knowledge of the falsity. *United States v. Lanier*, 578 F.2d at 1252.

Knowledge of falsity also arises under this clause of section 1001 in the definition of "false" and "fictitious." "False" and "fictitious" are standardly defined as in this instruction.

"Willfully" is construed as requiring that the conduct be intentional, i.e., that statements in the invoices be intentionally false. *United States v. Richmond*, 700 F.2d at 1191-92. Such intent can be shown by proving intent to defraud. *Id.* at 1194. However, "intent to defraud--that is the intent to deprive someone of something by means of deceit" is not required by section 1001. *United States v. Lichenstein*, 610 F.2d at 1277; *United States v. Godwin*, 566 F.2d at 976. Intent under section 1001 passes an intent to deceive, *id.*, an intent or design to induce belief in the falsity or an intent to mislead, *Lichenstein*, 610 F.2d at 1277, or an intent to disrupt agency functions by false statements. *Id.*, 610 F.2d at 1278.

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. "Fraudulent" is standardly defined as in this instruction.

In one opinion in this circuit, *United States v. Martin*, 772 F.2d 1442 (8th Cir. 1985), the court indicated "intent to deceive" may be an element. The Committee has examined this opinion and does not believe that it is authority for adding this concept as an additional essential element, but that "intent to deceive" is relevant in analyzing the element of willfulness and in defining "fraudulent."

Specifically, in *United States v. Martin*, the defendant raised the issue of "intent to deceive" by arguing that his claim was not "fraudulent." Both parties agreed "intent to deceive" was an issue, and the court addressed "intent to deceive" as an element when it should have been treated as part of the definition of "fraudulent." 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 essential element of 18 U.S.C. § 1001 as dicta and not controlling. *See United States v. Marvin*, 687 F.2d 1221, 1225 (8th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983).

Final Instructions: Elements of Offenses

Notes on Use

1. Attention must be paid to sufficiently describing the matter within federal jurisdiction. The example given in Element *One* of 6.18.1001A, *supra*, suggests a way to characterize a matter involving a document submitted to a local non-federal agency. The examples given in Element *One* of this instruction and Element *One* of 6.18.1001C, *infra*, suggest a way to characterize a matter involving a statement made directly to a federal agency.

2. Contrary to long-standing Circuit holdings, the issue of materiality is an essential element of the offense which must be decided by the jury. *See* Committee Comments, *supra*, and *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995).

3. The statutory requirement that the matter be "within the jurisdiction" of any department or agency of the United States appears to be an essential 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).

4. Definitions of "false," "fictitious" and "fraudulent" should be given. *See* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 37.08 (4th ed. 1990); Seventh Circuit Federal Jury Instructions: Criminal at 243 (1999) on which this instruction is based.

5. "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 at 916 (citing *United States v. Popow*, 821 F.2d 483 (8th Cir. 1987) (citing *United States v. Richmond*, 700 F.2d at 1188)). *See also United States v. Voorhees*, 593 F.2d 346, 349 (8th Cir.), *cert. denied*, 441 U.S. 936 (1979). *Gaudin* did not disturb this well-recognized definition. 515 U.S. at ___; 115 S. Ct. at 2313. *See also 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"). Actual reliance by the government or success of the attempted deception is not

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).

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 essential 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*.)

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 37.09-37.12 (4th ed. 1990); *United States v. Hicks*, 619 F.2d 752, 754 (8th Cir. 1980); *Ebeling v. United States*, 248 F.2d 429, 438 (8th Cir.), *cert. denied*, 355 U.S. 907 (1957); Seventh Circuit Federal Jury Instructions: Criminal at .241 (1999).

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 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 17.02 (4th ed. 1992)) 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, ___, 115 S. Ct. 1754, 1765 (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, 75 S. Ct. 504 (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*.

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 essential 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, ___, ___, 115 S. Ct. 2310, 2311, 2320 (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 essential 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 essential 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).

4. The definition of "false and fictitious" is not given because the definition contains nothing that is not already in the essential elements. *See* Instruction 6.18.1001B, *supra*. "Fraudulent" is defined. *See* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 37.12 (4th ed. 1990); Seventh Circuit Federal Jury Instructions: Criminal at 243 (1999).

5. *See United States v. Gaudin*, 515 U.S. at ___, 115 S. Ct. at 2313 (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).

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 essential elements, which are:

One, that 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 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

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 50.09 (Cum. Supp. 1997); Fifth Circuit Pattern Jury Instructions: Criminal § 2.31 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 33 (1997); Federal Judicial Center, Pattern Criminal Jury Instructions § 81 (1988). *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), *cert. denied*, 435 U.S. 917 (1978).

"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.), *cert. denied*, 452 U.S. 943 (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.), *cert. denied*, 452 U.S. 943 (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), *cert. denied*, 444 U.S. 1082 (1980); *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 essential 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.), *cert. denied*, 464 U.S. 833 (1983). Although materiality is not statutorily required, some circuits have imposed the requirement. *See* cases cited in Note 2, *infra*. 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).

Notes on Use

1. The Federal Judicial Center Pattern Jury Instructions list as an essential 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, 115 S. Ct. 2310 (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.), *cert. denied*, *Miller v. United States*, 479 U.S. 839 (1986); 91 Harv. L. Rev. 499 (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 ___, 115 S. Ct. at 2313 (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).

Final Instructions: Elements of Offenses

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] essential 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 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

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. 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, *infra*. 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).

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, 115 S. Ct. 2310 (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 essential 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 ___, 115 S. Ct. at 2313 (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).

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] essential 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 defendant or another.

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

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).

Final Instructions: Elements of Offenses

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*.

Notes on Use

1. 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.

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, as charged in [Count _____ of] the indictment, has three essential elements, which are:[1]

One, the defendant knowingly made a false statement (describe the alleged false statement, e.g., that 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[2].

A statement is "false" if untrue when made.

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

Committee Comments

See Fifth Circuit Pattern Jury Instructions: Criminal § 2.52 (1997). *Williams v. United States*, 458 U.S. 279, 284 (1982); *United States v. Concemi*, 957 F.2d 942, 951 (1st Cir. 1992); *United States v. Haddock*, 956 F.2d 1534, 1549 (10th Cir. 1992); *United States v. Huntress*, 956 F.2d 1309, 1317 (5th Cir. 1992); *United States v. Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981), *cert. denied*, 455 U.S. 951 (1982).

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. Bonnette*, 663 F.2d at 498. Materiality, likewise, is not an element of section 1014. *United States v. Wells*, 519 U.S. 482, 117 S. Ct. 921 (1997).

A number of false statements in a single document constitutes only one violation of section 1014. *United States v. Sue*, 586 F.2d 70 (8th Cir. 1978).

Notes on Use

1. In *United States v. Wells*, 519 U.S. 482, 117 S. Ct. 921 (1997), the Supreme Court held that materiality is not an element of section 1014, and remanded the case. On remand, the court of appeals held that "in light of the Supreme Court decision in this case, any reference to materiality in the jury instruction

is unnecessary and has the potential to cause confusion." *United States v. Wells*, No. 93-3924, slip op. at 6 (8th Cir. Oct. 14, 1997). This revised instruction removes all references to materiality.

2. In *United States v. Carlisle*, 118 F.3d 1271, 1274 (8th Cir. 1997), the court noted the importance of proof of federal relation **at the time of the offense**.

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 four essential 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;

Three, it was reasonably foreseeable that [the mail] [a private interstate carrier] [a commercial interstate carrier][4] would be used; and

Four, [the mail] [a private interstate carrier] [a commercial interstate carrier] was used in furtherance of some essential step in the scheme.

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.[5]

A statement or representation is "false" when it is untrue when made or effectively conceals or omits a material fact.

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. [However, whether a [fact] [falsehood] [representation] [promise] is "material" does not depend on whether the person was actually deceived.]

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.[6] [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.][7]

[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.][8]

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.[9]

[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.][10]

[Each separate use of [the mail] [an interstate carrier] in furtherance of the scheme to defraud constitutes a separate offense.][11]

[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.][12]

[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.]][13]

[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.][14]

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

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 40.01-40.17 (4th ed. 1990); Seventh Circuit Federal Jury Instructions: Criminal at 259 (1999); *United States v. Leyden*, 842 F.2d 1026, 1028 (8th Cir. 1988); *United States v. Pintar*, 630 F.2d 1270, 1280 (8th Cir. 1980); *Carpenter v. United States*, 484 U.S. 19 (1987); *Pereira v. United States*, 347 U.S. 1, 8-9 (1954).

The crime of mail fraud is very broad in scope. As the Eighth Circuit restated in *United States v. Bishop*, 825 F.2d 1278 (8th Cir. 1987) (quoting *United States v. States*, 488 F.2d 761, 764 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974) and *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967)):

> 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."

Bishop, 825 F.2d at 1280.

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 (N.D. Iowa 1907). The court states in that case:

> 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.

154 F.2d at 896.

The scheme must be one "reasonably calculated to deceive persons of ordinary prudence and comprehension." *Silverman v. United States*, 213 F.2d 405, 407 (5th Cir.), *cert. denied*, 318 U.S. 828 (1954), and must employ material falsehoods. *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (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.), *cert. denied*, 479 U.S. 858 (1986). A scheme to defraud may also involve the concealment of material facts. *Blachly v. United States*, 380 F.2d 665 (5th Cir. 1967); *United States v. Bessesen*, 433 F.2d 861, 863, 864 (8th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971).

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), *cert. denied*, 429 U.S. 1051 (1977). 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. Scherer*, 653 F.2d 334, 337 (8th Cir.), *cert. denied*, 454 U.S. 1034 (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), *cert. denied*, 476 U.S. 1104 (1986) and *United States v. Wilkinson*, 460 F.2d 725 (5th Cir. 1972). *See* Instruction 9.08, *infra*, for good faith instructions. *See also* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 40.14 (4th ed. 1990)

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.), *cert. denied*, 444 U.S. 855 (1979); *United States v. West*, 549 F.2d 545, 549-553 (8th Cir.), *cert. denied*, 430 U.S. 956 (1977); *United States v. Gross*, 416 F.2d 1205, 1209-1210 (8th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970). *But see United States v. Bryant*, 766 F.2d 370 (8th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986).

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), *cert. denied*, 471 U.S. 1115 (1985); *United States v. Calvert*, 523 F.2d 895, 914 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

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), *cert. denied*, 322 U.S. 736 (1944). 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), *cert. denied*, 439 U.S. 820 (1978).

Notes on Use

1. Depriving another of the intangible right of honest services is covered by the mail fraud statute where the offense occurs after November 18, 1988. 18 U.S.C. § 1346. The Eighth Circuit has held that 18 U.S.C. § 1346 effectively overruled the opinion in *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875 (1987). *United States v. Blumeyer*, 114 F.3d 758 (8th Cir. 1997). In *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996), the court held that in a 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. For a discussion of the extent of 18 U.S.C. § 1346, *see* 25 Am. Crim. L. Rev. 743 (1988).

2. The proper mail fraud theory charged in the indictment should be selected. If more than one theory is submitted to the jury, the jury should 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.), *cert. denied sub nom., Miller v. United States*, 479 U.S. 839 (1986); 91 Harv. L. Rev. 499 (1977).

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. After September 13, 1994, 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. "Intent to defraud" and "scheme to defraud" should be defined in the instruction. The definitions of "scheme to defraud" and "intent to defraud" are taken essentially from 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 40.13, 40.14 (4th ed. 1990) and the materiality requirement has been added consistent with *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999) and *United States v. Gaudin*, 515 U.S. 506, ___, 115 S. Ct. 2310, 2313 (1995). Similar definitions of “intent to defraud” and “scheme to defraud” are contained in Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 41.1 (1997) and Fifth Circuit Pattern Jury Instructions: Criminal § 2.60 (1997).

6. Since the decision of the Supreme Court in *v. McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875 (1987), it is important to instruct the jury in a mail fraud case, where the offense occurs prior to November 18, 1988, that a scheme to defraud have as its object or effect the deprivation of money or property rights from the victim of the fraud. The Court in *McNally* reversed a long line of cases which held that the mail fraud statute proscribed schemes to defraud citizens of their intangible right to honest and

impartial government. The Court stated, "The mail fraud statute clearly protects property rights, but does not refer to the intangible rights of citizenry to good government." 483 U.S. at 356, 107 S. Ct. at 2879.

The Court did state that the meaning of the phrase "scheme and artifice to defraud" should be interpreted broadly as to the meaning of property rights.

7. *See* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 47.04 (4th ed. 1990), third paragraph. 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.

8. After November 18, 1988 a scheme to deprive another of the intangible right of honest services is covered. 18 U.S.C. § 1346. It will not be necessary to define property rights in a case where it is apparent that the object of the scheme is money or tangible property.

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).

9. *See* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 47.10 (4th ed. 1990); *Pereira v. United States*, 347 U.S. 1, 8-9 (1954), which holds as follows:

Final Instructions: Elements of Offenses

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. 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), *cert. denied*, 420 U.S. 926 (1975) (citation omitted).

In *United States v. Boyd*, 606 F.2d 792 (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.

606 F.2d at 794. *See also United States v. Rabbitt*, 583 F.2d 1014, 1022-23 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

In *United States v. Brown*, 540 F.2d 364 (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.

540 F.2d at 376.

10. *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, 109 S. Ct. 1443, 1449 (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.

11. 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 47.18 (4th ed. 1990); *Atkinson v. United States*, 344 F.2d 97 (8th Cir.), *cert. denied*, 382 U.S. 867 (1965); *United States v. Calvert*, 523 F.2d 895, 903 n.6, 914 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

12. *Reistroffer v. United States*, 258 F.2d 379, 395 (8th Cir. 1958), *cert. denied*, 358 U.S. 927 (1959); *United States v. Porter*, 441 F.2d 1204, 1211 (8th Cir.), *cert. denied*, 404 U.S. 911 (1971).

13. *See* Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 41.1 (1997); Fifth Circuit Pattern Jury Instructions: Criminal § 2.60 (1997); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 47.08, 47.09 (4th ed. 1990); Seventh Circuit Federal Jury Instructions: Criminal at 260 (1999); *United States v. Joyce*, 499 F.2d 9 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974). *United States v. West*, 549 F.2d 545, 552 (8th Cir.), *cert. denied*, 430 U.S. 956 (1977); *United States v. Gross*, 416 F.2d 1205, 1210 (8th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970); *Atkinson v. United States*, 344 F.2d 97, 98 (8th Cir.), *cert. denied*, 382 U.S. 867 (1965); *United States v. Calvert*, 523 F.2d 895, 912 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976) (use of mail need not be specifically nor exclusively intended).

14. *United States v. Shyres*, 898 F.2d 647, 658 (8th Cir. 1990); *United States v. Cady*, 567 F.2d 771, 775 (8th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978); *United States v. Minkin*, 504 F.2d 350, 352-53 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975); *United States v. Joyce*, 499 F.2d 9, 17 (7th Cir.), *cert. denied*, 419 U.S. 1031 (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* Model Instruction 4.13, *supra*, on specific inferences.

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 essential elements, which are:

One, the defendant knowingly [executed] [attempted to execute] [participated in] a scheme [to defraud a financial institution] [to obtain [monies] [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 [chartered by the United States Government] [insured by the United States Government][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.[5]

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*.)

Committee Comments

See United States v. Stone, 890 F.2d 418 (8th Cir. 1989); *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987); *United States v. Swearingen*, 858 F.2d 1555, 1556-57 (11th Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989). *See also United States v. Bales*, 813 F.2d 1289, 1293 (4th Cir. 1987). [Brought under sections 1004 and 1344.]

Final Instructions: Elements of Offenses

The legislative history of the 1984 bank fraud statute indicates that Congress intended that it be afforded the same broad application as the mail fraud statute. *United States v. Rimell*, 21 F.3d 281, 287 (8th Cir. 1994); *United States v. Bonallo*, 858 F.2d 1427, 1432 (9th Cir. 1988). Since the bank fraud statute was patterned after the mail and wire fraud statutes, cases interpreting those statutes may apply to the bank fraud provisions. *See, e.g.*, *United States v. Greene*, 670 F. Supp. 337, 340 (M.D. Fla. 1987).

In *United States v. Stone*, this Circuit held that the element of "knowingly" supplied the required mens rea for a violation of 18 U.S.C. § 1344.

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. Goldblatt*, 813 F.2d at 624-25.

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 at 1557. *See also United States v. Whitty*, 688 F. Supp. 48, 54-55 (D. Me. 1988).

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), *cert. denied*, 485 U.S. 1029 (1988).

See also United States v. Taggatz, 831 F.2d 1355 (7th Cir. 1987) (check-kiting). *United States v. Robichaux*, 698 F. Supp. 107, 110-11 (E.D. La. 1988) (conspiracy). *United States v. Spambanato*, 687 F. Supp. 46 (D. Conn. 1988) (restitution). *United States v. Carroll*, 663 F. Supp. 210 (D. Md. 1986) (Federal Rules of Evidence).

Notes on Use

1. The statute also covers "assets, securities or other property." 18 U.S.C. § 1344(a)(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." This provision became effective November 18, 1988.

2. Section 1344(b) lists five types of financial institutions which can be a "federally chartered or insured financial institution."

3. The materiality element and definition are added consistent with *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999) and *United States v. Gaudin*, 515 U.S. 506, ___, 115 S. Ct. 2310, 2313 (1995).

Final Instructions: Elements of Offenses

6.18.1503A CORRUPTLY INFLUENCING A JUROR (18 U.S.C. § 1503)

The crime of corruptly influencing a juror[1], as charged in [Count _____ of] the indictment, has three essential 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[3] endeavored[4] to [influence] [intimidate] [impede] (name of juror) in the discharge of his duty as a [grand] juror.

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

Committee Comments

See Fifth Circuit Pattern Jury Instructions: Criminal § 2.67 (1997); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 41.03 (4th ed. 1990); *United States v. Fasolino*, 586 F.2d 939 (2d Cir. 1978); *United States v. Jackson*, 607 F.2d 1219, 1222 (8th Cir. 1979), *cert. denied*, 444 U.S. 1080 (1980); *United States v. Capo*, 791 F.2d 1054, 1070 (2d Cir. 1986).

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.), *cert. denied*, 479 U.S. 923 (1986); *United States v. Johnson*, 605 F.2d 729, 730 (4th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980). A grand jury proceeding is included. *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), *reh. denied*, 726 F.2d 168 (5th Cir. 1984). *See also United States v. Nelson*, 852 F.2d 706, 709-11 (3d Cir.), *cert. denied*, 488 U.S. 909 (1988).

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.), *cert. denied*, 475 U.S. 1141 (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 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* Essential Element *Two*, *supra*.

Success is not a prerequisite to conviction under any of the clauses of section 1503. All that must be proved is that the defendant "endeavored" to obstruct justice. *United States v. Aguilar*, 515 U.S. 593, ___, 115 S. Ct. 2357, 2362 (1995); *United States v. Russell*, 255 U.S. 138, 143 (1921); *United States v. Jackson*, 607 F.2d at 1222-23; *United States v. McCarty*, 611 F.2d 220, 224 (8th Cir. 1979), *cert. denied*, 445 U.S. 930 (1980); *United States v. Ogle*, 613 F.2d 233, 239 (10th Cir. 1979), *cert. denied*, 449 U.S. 825, *reh. denied*, 449 U.S. 1026 (1980); *United States v. Neiswender*, 590 F.2d 1269, 1275 (4th Cir.), *cert. denied*, 441 U.S. 963 (1979). It does not matter if the result intended by the defendant was impossible to obtain. *United States v. Nicosia*, 638 F.2d 970, 975 (7th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).

In *United States v. Russell*, the Court held:

> The 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). "[A]n 'endeavor' under § 1503 does not require proof that would support a charge of attempt, i.e., an 'endeavor' is less than an attempt." *United States v. Buffalano*, 727 F.2d 50, 53 (2d Cir. 1984). *See also United States v. Fasolino*, 586 F.2d 939, 940-41 (2d Cir. 1978).

In *United States v. Cioffi*, 493 F.2d 1111, 1119 (2d Cir.), *cert. denied*, 419 U.S. 917 (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.

See subsection “c.” of these Comments for a further discussion of *Silverman*.

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). This instruction 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.

No consistent definition of "corruptly" as used in this statute has developed in case law, and for this reason, no definition is suggested here. Courts have defined the mental state required by the word "corruptly" within at least four different, but often overlapping, categories: a. wicked or evil purpose; b. intent to influence or obstruct justice; c. intent to do the act which results in obstruction; and d. "per se" corruption.

a. *Wicked or Evil Purpose*. Several cases have held that "corruptly" means that a defendant acted with an improper motive or with an evil or wicked purpose. *See United States v. Partin*, 552 F.2d 621, 641 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977); *United States v. Ryan*, 455 F.2d 728, 734 (9th Cir. 1971); *United States v. Haldeman*, 559 F.2d 31, 115 n.229 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933, *reh. denied*, 433 U.S. 916 (1977). "'Corruptly' applies to the ends of an actor's conduct rather than the means, so that any act, whether lawful or unlawful on its face, may abridge § 1503 if performed with a corrupt motive." *United States v. Cintolo*, 818 F.2d 980, 991-93 (1st Cir.), *cert. denied*, 484 U.S. 913 (1987).

The Eighth and Tenth Circuits have held that a trial court properly denied a defendant's request to have corruptly defined for the jury in terms of improper motive or bad, evil or wicked purpose. *United States v. Jackson*, 607 F.2d 1219, 1221-22 (8th Cir. 1979), *cert. denied*, 444 U.S. 1080 (1980); *United States v. Ogle*, 613 F.2d at 242.

In the cases which have approved such a definition of "corruptly," the definition has often been further modified to fall within one of the other categories. In *Partin*, the instruction defining "corruptly" further stated: "Any endeavor to influence or intimidate or impede a witness falls within the meaning of the word corruptly." 552 F.2d at 641. Likewise, in *Haldeman*, the instruction defining "corruptly" further stated:

> In terms of proof, in order to convict any Defendant of obstruction of justice, you must be convinced beyond a reasonable doubt that the Defendant made some effort to impede or obstruct the Watergate investigation or the trial of the original Watergate defendants.
>
> If you find, for example, that a Defendant participated in the payment of money to the original Watergate defendants *for the purpose of keeping them quiet*, you would be justified in finding that a corrupt endeavor to obstruct the due administration of justice occurred.

559 F.2d at 115 n.229.

In *Ryan*, it was further held: "Specific intent to impede the administration of justice is an essential element of the offense." 455 F.2d at 734.

b. *Intent to Influence or Obstruct*. The act must be done with the intent to influence judicial or grand jury proceedings. *United States v. Aguilar*, 515 U.S. at ___, 115 S. Ct. at 2362. In an obstruction case, "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Id.* However, 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; *United States v. Buffalano*, 727 F.2d at 53-54; *United States v. Petzold*, 788 F.2d 1478, 1485 (11th Cir. 1986).

Many jurisdictions define "corruptly" in terms of acting with a "purpose" to influence a juror or obstruct justice or otherwise bring about a prohibited result.

"We hold that the word 'corruptly' as used in the statute means that the act must be done with the purpose of obstructing justice." *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982). *See also United States v. Jeter*, 775 F.2d 670, 679 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986); *United States v. Machi*, 811 F.2d 991, 997 (7th Cir. 1987). *See also Haldeman*, 559 F.2d at 115 n.229, quoted above.

See also United States v. Ogle, *supra*, which held:

> [T]he term "corruptly" does not superimpose a special and additional element on the offense such as a desire to undermine the moral character of a juror. Rather, it is directed at an effort to bring about a particular result such as affecting the verdict . . . .

613 F.2d at 238.

The use of the word "purpose" is a good substitute for the use of the phrase "specific intent" which the Committee is recommending no longer be used in jury instructions. *See* Instruction 7.01, *infra*. "Specific intent" is found in many definitions of "corruptly," including one approved by this 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).

2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 41.04 (4th ed. 1990) provides the following definition:

> To 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.

c. *Intent to do an Act which Results in Obstruction.* Some courts have moved away from a two-step analysis of intent, in which the jury is charged first with finding an intent to obstruct and second that such intent can be inferred from certain circumstances, to a one-step approach which defines the required intent as an intent to do an act with knowledge that obstruction will result. *See United States v. Neiswender, supra*. That case recognized that the same result would be arrived at by either approach, but preferred to shift the analysis away from one which involved making inferences.

> Thus we hold that a defendant who intentionally undertakes an arrangement, the reasonable foreseeable consequence of which is to obstruct justice, violates § 1503 even if his hope is that the judicial machinery will not be seriously impaired.

590 F.2d at 1274.

Likewise the Eleventh Circuit has held that a requirement that the jury find an intent to obstruct is "too demanding":

> One violates section 1503 by knowingly and purposefully undertaking an act, the natural and probable consequences of which is to influence, obstruct or impede due administration of justice.

United States v. Silverman, 745 F.2d 1386, 1396 (11th Cir. 1984).

And in *Knight v. United States*, 310 F.2d 305 (5th Cir. 1962), it was held: "This specific intent [to violate § 1503] must be to do some act or acts which tend to impede or influence, obstruct or impede the due administration of justice." 310 F.2d at 307.

d. *"Per se" corruption.* Although it is generally held that the question of whether an endeavor is corrupt is for the jury, *United States v. Fasolino*, 586 F.2d at 941; *Knight v. United States*, 310 F.2d at 307-08, in many of these cases, the court has further instructed the jury or held that any endeavor to obstruct is "per se" corrupt. *See United States v. Partin*, as quoted in these Comments; *United States v. Ogle, supra*, in which the court held "corruptly":

> really means unlawful . . . . [A]n endeavor to influence a juror in the performance of his or her duty or to influence, obstruct or impede the due administration of justice is per se unlawful and is tantamount to doing the act corruptly.

613 F.2d at 242. *See also United States v. Cioffi*, 493 F.2d 1111, 1119 (2d Cir. 1974) in which the trial court instructed the jury that any endeavor, as defined, was corrupt. The definition given for endeavor in that case could be construed to encompass intent.

In other cases, courts have instructed the jury that particular conduct charged was corrupt. In *United States v. Fasolino*, the court instructed the jury that it could find appellant's intent to be corrupt if it determined that appellant knew that an attorney (Messina) had no personal knowledge about a defendant (Quaranta) or information relevant to his sentencing and that appellant "knew or thought that Mr. Messina had some friendship or special relationship or special association with Judge Curtin which [appellant] thought would, by itself, be persuasive with Judge Curtin." 586 F.2d at 941.

Most often, bribery or other payment of money has been defined as corrupt. *See United States v. Haldeman*, in which the court first defined "corruptly," then instructed the jury that the payment of money to persons to keep them quiet would be corrupt. *See* language quoted previously in these Comments. Such instructions are consistent with the cases which have held as a general rule that bribery is corrupt. *See, e.g., United States v. Rasheed*, 663 F.2d at 852.

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.), *reh. denied*, 726 F.2d 168 (5th Cir. 1984).

3. The jury should be instructed on the meaning of "corruptly" in this statute. As the discussion in the Committee Comments, *supra*, 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).

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, supra*. 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 7.01-7.03, *infra*.

4. The jury should be instructed on the meaning of "endeavor." *See* the Committee Comments, *supra*, for possible definitions.

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 essential elements, which are:

One, (name of juror) was a [grand] juror in (describe judicial proceeding);[2]

Two, 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].

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

Committee Comments

See Fifth Circuit Pattern Jury Instructions: Criminal § 2.67 (1997) and Committee Comments, Instruction 6.18.1503A, *supra*.

Proof of direct threats is not required. A communication can be threatening where it contains veiled threats by references to other persons or situations sufficient to frighten or intimidate the listener. *United States v. Cioffi*, 493 F.2d 1111, 1118 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974).

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. *See United States v. Vesich*, 724 F.2d 451, 454 (5th Cir.), *reh. denied*, 726 F.2d 168 (5th Cir. 1984).

3. The jury should be instructed on the meaning of "endeavor." *See* Committee Comments, Instruction 6.18.1503A, *supra*, for possible definitions.

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 essential elements, which are:

One, defendant (describe conduct and judicial proceeding[2], e.g., destroyed documents which had been subpoenaed in an investigation by a federal grand jury);

Two, defendant knew that (describe judicial proceeding) was pending; and

Three, by (describe conduct, e.g., destroying said documents), the defendant corruptly[3] endeavored[4] to [influence] [obstruct] [impede] the due administration of justice.

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

Committee Comments

See United States v. McKnight, 799 F.2d 443, 446 (8th Cir. 1986); *United States v. Silverman*, 745 F.2d 1386, 1392 (11th Cir. 1984). *See generally United States v. Cintolo*, 818 F.2d 980, 990-97 (1st Cir.), *cert. denied*, 484 U.S. 913 (1987).

See Committee Comments, Instruction 6.18.1503A, *supra*.

Interference with the due administration of justice is "conduct designed to interfere with the process of arriving at an appropriate judgment in a pending case and which would disturb the ordinary and proper functions of the court." *Haili v. United States*, 260 F.2d 744, 746 (9th Cir. 1958). *See further United States v. Rasheed*, 663 F.2d 843, 851-52 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982). *See also* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 41.03 (4th ed. 1990).

The omnibus clause of section 1503 still applies to witnesses and prospective witnesses where there is a pending judicial proceeding. *United States v. Riskin*, 788 F.2d at 1367-68 (8th Cir.), *cert. denied*, 479 U.S. 923 (1986); *United States v. Shannon*, 836 F.2d 1125, 1128 (8th Cir.), *cert. denied*, 486 U.S. 1058 (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. 593 ___, 115 S. Ct. 2357, 2363 (1995), 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.

Final Instructions: Elements of Offenses

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. *See United States v. Vesich*, 724 F.2d 451, 454 (5th Cir.), *reh. denied*, 726 F.2d 168 (5th Cir. 1984).

3. The jury should be instructed on the meaning of "corruptly" 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. at ___, 115 S. Ct. at 2362. The Committee recommends that in formulating a definition of "corruptly," words such as "knowingly," "willfully" and "specific intent" not be used in favor of words which precisely describe the mental state involved. *See* Instructions 7.01-7.03, *infra*.

4. The jury should be instructed on the meaning of "endeavor." *See* Committee Comments, Instruction 6.18.1503A, *supra*, for possible definitions.

Final Instructions: Elements of Offenses

6.18.1510A 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 essential 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, 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, 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*.)

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.), *cert. denied*, 488 U.S. 932 (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 defendant had knowledge of an actual criminal investigation. *See United States v. Leisure*, *supra*, and Note 1, *infra*. 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), *cert. denied*, 511 U.S. 1142 (1994) (citing *United States v. Daly*, 842 F.2d 1380, 1390-91 (2d Cir.), *cert. denied*, 488 U.S. 821 (1988), *Leisure*, *supra*, and *United States v. Carzoli*, 447 F.2d 774, 779 (7th Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972) ("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, ___, 115 S. Ct. 2357, 2362 (1995) (not a violation of 18 U.S.C. § 1503 to give false information to an FBI agent without proof that defendant knew his actions were likely to affect a grand jury proceeding).

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.), *cert. denied*, 488 U.S. 932 (1988).

2. 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.), *cert. denied*, 411 U.S. 936 (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 United States v. Jackson*, 444 U.S. 1080 (1980). An "endeavor" to obstruct can be less than an "attempt." *See* discussion in *United States v. Leisure*, *supra*, 844 F.2d at 1366.

4. If the evidence shows that 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).

Final Instructions: Elements of Offenses

6.18.1512 TAMPERING WITH A WITNESS (18 U.S.C. § 1512(b)(1)(A))

The crime of tampering with a witness, as charged in [Count _ of] the indictment, has two essential elements, which are:

One, the defendant knowingly used [intimidation] [physical force][1] 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).[2]

[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 use "physical force" against someone means to take physical action against another and includes confinement.][3]

[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*.)

Committee Comments

See Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 47.2 (1997).

See sections 1512(d)(e)(f) and (g) and 1515 for provisions which define or modify this statute.

Before 1982, tampering with and retaliation against federal witnesses was covered exclusively by section 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.), *cert. denied*, 479 U.S. 923 (1986) for an extensive analysis and comparison of the respective scopes of sections 1503 and 1512.

Success is not a prerequisite to conviction under section 1512. Nor must the government show that the defendant intended to carry out the threat. All that must be proved is that the defendant intended

to impermissibly influence the witness. *United States v. Maggit*, 784 F.2d 590, 593-94 (5th Cir. 1986); *United States v. Wilson*, 796 F.2d 55, 57 (4th Cir. 1986), *cert. denied*, 479 U.S. 1039 (1987); *United States v. Murray*, 751 F.2d 1528, 1534 (9th Cir.), *cert. denied*, 474 U.S. 979 (1985).

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]; *United States v. Wilson*, 796 F.2d at 57 n.4 [excused witness]; *United States v. DiSalvo*, 631 F. Supp. 1398, 1402 (E.D. Pa. 1986) [potential witness].

Notes on Use

1. Title 18 U.S.C. § 1512 is quite broad, and covers a variety of things: knowingly threatening or attempting to threaten another person, by intimidation or physical force, or engaging in misleading conduct toward another person, with intent to influence that person's testimony in an official proceeding, or with intent to cause that person to withhold testimony or do a variety of other things related to an official proceeding; hindering, delaying or preventing communication with federal law enforcement officials or judges regarding federal offenses, probation violations, etc.; or harassing another person with the effect of hindering, delaying, preventing, etc., that person from testifying in an official proceeding or from reporting federal crimes, making federal arrests, etc.

The form chosen for this model instruction deals only with one particular form of violation under the statute. Where other types of violations are involved, it will obviously be necessary to change the form of the elements, and it may be necessary to add other elements as well.

Additional definitions are contained in 18 U.S.C. § 1515.

2. "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(c)(1) and (f)(1).

3. "Physical force" is defined in 18 U.S.C. § 1515(a)(2).

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 essential 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*.)

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), *cert. denied*, 475 U.S. 1021 (1986). Definitions are contained in 18 U.S.C. § 1515.

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. Under common law "tangible property" is that which may be felt or touched, and is necessarily corporeal, although it may be either real or personal. *H.D. & J.K. Crosswell, Inc., v. Jones*, 52 F.2d 880, 883 (E.D.S.C. 1931).

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 essential 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*.)

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 43.01-43.12 (4th ed. 1990); Ninth Cir. Crim. Jury Instr. 8.29.1 (1997).

> 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 essential 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, 115 S. Ct. 2310 (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, *cert. denied*, 423 U.S. 1015 (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*, *supra*; *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.), *cert. denied*, 426 U.S. 935 (1976). *See* Eleventh Circuit Pattern Jury Instruction: Criminal (Offense) § 50 (1997); Fifth Circuit Patten Jury Instructions: Criminal § 2.69 (1997); Seventh Circuit Federal Jury Instructions: Criminal, at 276-80 (1999) for possible instructions.

In a section 1621 prosecution, the defendant must have acted knowingly and willfully. *United States v. Edwards*, 443 F.2d 1286, 1294 (8th Cir.), *cert. denied*, 404 U.S. 944 (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.

2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 43.05 (4th ed. 1990); Ninth Cir. Crim. Jury Instr. 8.29.1 (1997).

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), *cert. denied*, 372 U.S. 942 (1963).

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.), *cert. denied*, 400 U.S. 822 (1970); *United States v. Dilworth*, 524 F.2d 470 (5th Cir. 1975); *Arena v. United States*, 226 F.2d 227, 236 (9th Cir. 1955), *cert. denied*, 350 U.S. 954 (1956); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 43.03 (4th ed. 1990).

2. The Committee doubts that intent to deceive the court or jury is an element. Neither 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 43.03 (4th ed. 1990) 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*, *infra*, 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, 115 S. Ct. 2310 (1995). *See also United States v. Swink*, 21 F.3d 852, 857 (8th Cir. 1994).

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 essential 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*.)

Committee Comments

See Committee Comments, Instruction 6.18.1621, *supra*.

A perjury is an essential element of this offense. *Segal v. United States*, 246 F.2d 814, 816 (8th Cir.), *cert. denied*, 355 U.S. 894 (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.), *cert. denied*, 423 U.S. 924 (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.

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, 115 S. Ct. 2310 (1995). A definition of "material" from either Instruction 6.18.1621 or Instruction 6.18.1623 should be inserted after this sub-element.

Final Instructions: Elements of Offenses

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 essential 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*.)

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.), *cert. denied*, 305 U.S. 614 (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), *cert. denied*, 419 U.S. 1125 (1975).

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.), *cert. denied*, 474 U.S. 821 (1985); *United States v. Williams*, 552 F.2d 226, 230 (8th Cir. 1977); *United States v. Phillips*, 540 F.2d 319,

328 (8th Cir.), *cert. denied*, 429 U.S. 1000 (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.

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.), *cert. denied*, 400 U.S. 822 (1970); *United States v. Dilworth*, 524 F.2d 470 (5th Cir. 1975); *Arena v. United States*, 226 F.2d 227, 236 (9th Cir. 1955), *cert. denied*, 350 U.S. 954 (1956); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 43.08 (4th ed. 1990).

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, 115 S. Ct. 2310 (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.), *cert. denied*, 422 U.S. 1044 (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.), *cert. denied*, 449 U.S. 995 (1980).

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 essential elements, which are:

One, the [letter] [postal card] [package] [bag] [mail] was in [the United States mail] [(describe authorized depository for U.S. mail matter)];[1] and

Two, the defendant voluntarily [stole] [took][2] it from the [mail] [(describe authorized depository)]; 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*.)

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 44.01-44.05 (4th ed. 1990); Seventh Circuit Federal Jury Instructions: Criminal at 284-85 (1999); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 52.1 (1997). *See generally United States v. Hopping*, 668 F.2d 398, 399-40 (8th Cir. 1982); *United States v. Lampson*, 627 F.2d 62, 66 (7th Cir. 1980).

Theft of mail includes the element of intent to steal at the time the mail is taken. *United States v. Lampson*, 627 F.2d at 66; *United States v. Hopping*, 688 F.2d at 399-40; *Walker v. United States*, 342 F.2d 22, 25 (5th Cir.), *cert. denied*, 382 U.S. 859 (1965). 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. *United States v. Matzker*, 473 F.2d 408 (8th Cir. 1973). On the other hand the protection extended by section 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

Notes on Use

1. The statute lists specific depositories for mail. Other authorized depositories are established by regulations of the Postmaster General. If one of these is involved, it should be named in the elements.

2. The statute also includes obtaining or attempting to obtain mail by fraud. In such a case, this language should be used.

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 essential elements, which are:

One, (describe letter, mail, etc. or article or thing contained therein) was stolen[1] from (describe authorized depository for mail matter);

Two, the defendant thereafter [bought] [received] [concealed] [unlawfully had in his possession] such mail matter with knowledge that it 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 knew it had been stolen.

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

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 44.01-44.05 (4th ed. 1990); Fifth Circuit Pattern Jury Instructions: Criminal § 2.71 (1997); Ninth Cir. Crim. Jury Instr. 8.38.1 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 52.2 (1997).

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.), *cert. denied*, 412 U.S. 951 (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).

Final Instructions: Elements of Offenses

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 United States v. Bloom*, 482 F.2d at 1165-66 and *Barnes v. United States*, 412 U.S. 837 (1973). *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).

None of the published instructions cited in the first paragraph above uses the word "unlawfully" to modify possession. The Committee believes "unlawfully" is required by the statute which proscribes the "unlawful" possession of stolen mail. The Committee did not find a useful definition of "unlawfully." 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), *cert. denied*, 420 U.S. 961 (1975). 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), *cert. denied*, 416 U.S. 944 (1974), *cf.*, *United States v. Mavrick*, 601 F.2d 921, 926-27 (7th Cir. 1979) [construing 18 U.S.C. § 659].

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.

Final Instructions: Elements of Offenses

6.18.1709 EMBEZZLEMENT OF MAIL (18 U.S.C. § 1709) (First Clause)

The crime of embezzling mail, as charged in [Count _____ of] the indictment, has three essential elements, which are:

One, the defendant was a United States Postal Service [officer] [employee] at the time stated in the indictment;

Two, in his position with the Postal Service,[1] the defendant had possession of (describe the mail matter) that was intended to be conveyed by mail; and

Three, the defendant [took] [removed] the (describe the mail matter) with the intent to convert it to his own use.

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

Committee Comments

See Seventh Circuit Federal Jury Instructions: Criminal at 290-91 (1999); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 53 (1997); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 44.06-44.10 (4th ed. 1990).

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; *United States v. Trevino*, 491 F.2d 74, 75 (5th Cir. 1974). 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. Dollard*, 780 F.2d 1118, 1122 (4th Cir. 1985). In a case arising under the second clause, the instruction would have to be modified.

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.), *cert. denied*, 426 U.S. 923 (1976).

Final Instructions: Elements of Offenses

Notes on Use

1. In *United States v. Selwyn*, 998 F.2d 556 (8th Cir. 1993), the Eighth Circuit has taken a very strict common-law view of embezzlement as used in this statute. In any case arising under Clause 1 of section 1709, embezzlement should be defined in the instructions. *See, e.g.*, 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 44.09 (4th ed. 1990). As with other criminal statutes setting out violations in the disjunctive, this case offers an instructive example of the importance of choosing a theory of prosecution that closely tracks the language of the particular section of the statute the defendant's behavior violates.

Final Instructions: Elements of Offenses

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 essential 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] commerce in some way or degree.

["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.][2]

[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.][3]

[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.][4]

[You may find an [obstruction] [delay] [effect] on commerce has been proven if you find and believe from the evidence beyond a reasonable doubt: (describe effects on commerce alleged in the indictment on which proof was offered at trial, 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.)[5]]

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

Final Instructions: Elements of Offenses

Committee Comments

See United States v. Brown, 540 F.2d 364 (8th Cir. 1976); Fifth Circuit Pattern Jury Instructions: Criminal § 2.73 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 56 (1997).

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.), *cert. denied*, 449 U.S. 956 (1980); *United States v. Jannotti*, 673 F.2d 578, 595 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982).

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.), *cert. denied*, 379 U.S. 947 (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.), *cert. denied*, 429 U.S. 819 (1976); Seventh Circuit Federal Jury Instructions: Criminal at 297 (1999).

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, and the effect can be merely probable or potential, not actual. *United States v. Brown*; *United States v. Smith*, 631 F.2d 103, 105 (8th Cir. 1980); *United States v. Whitt*, 718 F.2d 1494 (10th Cir. 1983).

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), *cert. denied*, 435 U.S. 968 (1978). The actual generation of fear is unnecessary. *United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973).

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.), *cert. denied*, 423 U.S. 1014 (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."

Notes on Use

1. The proper theory of extortion charged in the indictment should be selected in the second element of the instruction. This type of element instruction is also used in 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 56.04 (4th ed. 1990), Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 56 (1997) and Fifth Circuit Pattern Jury Instructions: Criminal § 2.74 (1997). In all of the remaining instructions, only those instructions pertinent to the facts of a particular case should be used.

2. "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* Seventh Circuit Federal Jury Instructions: Criminal

at 297 (1999); *United States v. Brown*, 540 F.2d 364, 373 n.6 (8th Cir. 1976); *Nick v. United States*, 122 F.2d 660 (8th Cir.), *cert. denied*, 314 U.S. 687 (1941); *United States v. Margiotta*, 688 F.2d 108, 133-35 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

3. If possible, the instruction should be made to specifically relate 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.), *cert. denied*, 429 U.S. 819 (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.

4. 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.), *cert. denied*, 409 U.S. 914 (1972); *United States v. Rabbitt*, 583 F.2d 1014, 1027 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *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.

5. This instruction is one which was used in *United States v. Addonizio*, 451 F.2d 49, 75-76 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972). This instruction represents an approach to interstate commerce adopted by Devitt & Blackmar, the Fifth Circuit and the Eleventh Circuit in their published instructions. 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 United States v. Hyde*, 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972). *See generally Hulahan v. United States*, 214 F.2d 441, 445, 446 (8th Cir. 1954), *cert. denied*, 348 U.S. 856 (1954); *United States v. Rabbitt*, 583 F.2d 1014, 1023 (8th Cir. 1978); *United States v. French*, 628 F.2d 1069, 1078 (8th Cir.), *cert. denied*, 449 U.S. 956 (1980).

Final Instructions: Elements of Offenses

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 essential 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 defendant and the other bookmaker as being members of the same gambling business.][5]

[It is not necessary to prove [that anyone other than 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*.)

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 47.01-47.10 (4th ed. 1990); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 59 (1997); Fifth Circuit Pattern Jury Instructions: Criminal § 2.75 (1997).

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.), *cert. denied*, 440 U.S. 982 (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), *cert. denied*, 475 U.S. 1095 (1986); *United States v. Quarry*, 614 F.2d 245 (10th Cir. 1980) (citing *United States v. Crockett*, 506 F.2d 759, 761 (5th Cir.), *cert. denied*, 423 U.S. 824 (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.), *cert. denied*, 421 U.S. 947 (1975).

"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

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.), *cert. denied*, 429 U.S. 843 (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); *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 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.), *cert. denied*, 484 U.S. 986 (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 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.

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 essential elements, which are:

One, on or about (date),[1] the 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]

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.][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*.)

Committee Comments

See Ninth Cir. Crim. Jury Instr. 8.33.1 (1997). *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), *cert. denied*, 506 U.S. 1082 (1993); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513, 114 S. Ct. 1747 (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.), *cert. denied*, 502 U.S. 929 (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), *cert. denied*, 493 U.S. 1032 (1990). *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.

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 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) (essential 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, 114 S. Ct. 1747 (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.) (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), *cert. denied*, 502 U.S. 929 (1991). *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 essential 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 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.

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. 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*.

Final Instructions: Elements of Offenses

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 essential elements, which are:

One, on or about (date),[1] the 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 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*.)

Committee Comments

See Ninth Cir. Crim. Jury Instr. 8.33.2 (1997). *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), *cert. denied*, 506 U.S. 1082 (1993); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513, 114 S. Ct. 1747 (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.), *cert. denied*, 502 U.S. 929 (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), *cert. denied*, 493 U.S. 1032 (1990). *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.

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 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) (essential 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, 114 S. Ct. 1747 (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.) (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), *cert. denied*, 502 U.S. 929 (1991). *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 essential 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), *cert. denied*, 493 U.S. 1032 (1990)), *cert. denied*, 502 U.S. 846 (1991) *with United States v. Sutera*, 933 F.2d 641, 648 (8th Cir. 1991) (money laundering statute did not require that 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) (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, 114 S. Ct. 1747 (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), *cert. denied*, 487 U.S. 1222 (1988)). If there is evidence a defendant actually believed that the transaction was for an innocent purpose, *see* Instruction 7.04, notes 3 and 4, *infra*. 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. Instruction 7.04 note 5, *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).

Final Instructions: Elements of Offenses

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*.

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 essential elements, which are:

One, on or about (date),[1] the 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 defendant[s] [(name)] 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*.)

Committee Comments

See Ninth Cir. Crim. Jury Instr. 8.33.2 (1997). *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), *cert. denied*, 506 U.S. 1082 (1993); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513, 114 S. Ct. 1747 (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.), *cert. denied*, 502 U.S. 929 (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), *cert. denied*, 493 U.S. 1032 (1990). *See also* U.S. Dept. of Justice, *Money Laundering Federal Prosecution Manual* (Feb. 1992).

Final Instructions: Elements of Offenses

See Instruction 6.18.1956J, *infra*, for additional instructions which should be given in most cases.

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 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) (essential 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, 114 S. Ct. 1747 (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.) (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), *cert. denied*, 502 U.S. 929 (1991). *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 essential 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 (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, 114 S. Ct. 655 (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), *cert. denied*, 487 U.S. 1222 (1988)). If there is evidence a defendant actually believed that the transaction was for an innocent purpose, *see* Instruction 7.04, notes 3 and 4, *infra*. 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. Instruction 7.04 note 5, *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*.

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 essential elements which are:

One, on or about (date),[1] the defendant[s] [(name)] 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*.)

Committee Comments

See Ninth Cir. Crim. Jury Instr. 8.33.3 (1997). *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), *cert. denied*, 506 U.S. 1082 (1993); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513, 114 S. Ct. 1747 (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.), *cert. denied*, 502 U.S. 929

(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), *cert. denied*, 493 U.S. 1032 (1990). *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.

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 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* Instruction 6.18.1956A, Note 2, *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), *cert. denied*, 503 U.S. 971 (1992).

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* Instruction 6.18.1956A, Notes 6 and 12, *supra*, and 6.18.1956J(7) (Specified Unlawful Activity), *infra*.

7. *See* Instruction 8.01, *infra*.

8. *See* Instruction 6.18.1956A, Note 11, *supra*.

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 essential elements which are:

One, on or about (date),[1] the defendant[s] [(name)] 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 defendant[s] [(name)] 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*.)

Final Instructions: Elements of Offenses

Committee Comments

See Ninth Cir. Crim. Jury Instr. 8.33.4 (1997). *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), *cert. denied*, 506 U.S. 1082 (1993); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513, 114 S. Ct. 1747 (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.), *cert. denied*, 502 U.S. 929 (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), *cert. denied*, 493 U.S. 1032 (1990). *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.

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(___). 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 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* Instruction 6.18.1956A, Note 2, *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), *cert. denied*, 503 U.S. 971 (1992).

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* Instruction 6.18.1956A, Note 8, *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, 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* Instruction 6.18.1956B, Note 12, *supra* (situations where instruction 7.04, *infra*, on willful blindness is appropriate).

7. *See* Instruction 6.18.1956J(3) (Funds), *infra*.

8. *See* Instruction 6.18.1956A, Note 7, *supra*, and 6.18.1956J(7) (Specified Unlawful Activity), *infra*.

9. *See* Instruction 6.18.1956B, Note 8. *supra*.

10. *See* Instruction 8.01, *infra*.

11. *See* Instruction 6.18.1956A, Note 11, *supra*.

12. *See* Instruction 6.18.1956B, Note 12, *supra*.

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 essential elements which are:

One, on or about (date),[1] the defendant[s] [(name)] 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 defendant[s] [(name)] 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*.)

Committee Comments

See Ninth Cir. Crim. Jury Instr. 8.33.4 (1997). *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), *cert. denied*, 506 U.S. 1082 (1993); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513, 114 S. Ct. 1747 (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.), *cert. denied*, 502 U.S. 949 (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), *cert. denied*, 493 U.S. 1032 (1990). *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.

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 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* Instruction 6.18.1956A, Note 2, *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), *cert. denied*, 503 U.S. 971 (1992).

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* Instruction 6.18.1956A, Note 8, *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* Instruction 6.18.1956B, Note 12, *supra* (situations where Instruction 7.04, *infra*, on willful blindness is appropriate).

7. *See* Instruction 6.18.1956J(6) (Proceeds), *infra*.

8. *See* Instruction 6.18.1956A, Note 7, *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* Instruction 6.18.1956C, Notes 8, 12-15, *supra*, and text preceding them.

10. *See* Instruction 8.01, *infra*.

11. *See* Instruction 6.18.1956A, Note 11, *supra*.

12. *See* Instruction 6.18.1956C, Note 12, *supra*.

13. *See* Instruction 6.18.1956C, Note 13, *supra*.

14. *See* Instruction 6.18.1956C, Note 14, *supra*.

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 essential elements, which are:

One, on or about (date),[1] the 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.]

Final Instructions: Elements of Offenses

[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*.)

Committee Comments

See Ninth Cir. Crim. Jury Instr. 8.33.1 (1997). *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), *cert. denied*, 506 U.S. 1082 (1993); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513, 114 S. Ct. 1747 (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.), *cert. denied*, 502 U.S. 929 (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), *cert. denied*, 493 U.S. 1032 (1990). *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.

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 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) (essential 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, 114 S. Ct. 1747 (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.) (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), *cert. denied*, 502 U.S. 929 (1991). *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 essential 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). 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*.

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 essential elements, which are:

One, on or about (date),[1] the 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 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*.)

Committee Comments

See Ninth Cir. Crim. Jury Instr. 8.33.2 (1997). *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), *cert. denied*, 506 U.S. 1082 (1993); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513, 114 S. Ct. 1747 (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.), *cert. denied*, 502 U.S. 929 (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), *cert. denied*, 493 U.S. 1032 (1990). *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.

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 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) (essential 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, 114 S. Ct. 1747 (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.) (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), *cert. denied*, 502 U.S. 929 (1991). *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 essential 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), *cert. denied*, 493 U.S. 1932 (1990)), *cert. denied*, 502 U.S. 846 (1991) *with United States v. Sutera*, 933 F.2d 641, 648 (8th Cir. 1991) (money laundering statute did not require that 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) (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, 114 S. Ct. 1747 (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, supra*.

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*.

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 essential elements, which are:

One, on or about (date),[1] the 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.

Final Instructions: Elements of Offenses

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*.)

Committee Comments

See Ninth Cir. Crim. Jury Instr. 8.33.2 (1997). *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), *cert. denied*, 506 U.S. 1082 (1993); *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513, 114 S. Ct. 1747 (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.), *cert. denied*, 502 U.S. 929 (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), *cert. denied*, 493 U.S. 1032 (1990). *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.

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 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) (essential 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, 114 S. Ct. 1747 (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.) (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), *cert. denied*, 502 U.S. 929 (1991). *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 essential 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).

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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, 114 S. Ct. 655 (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*.

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)] actually intended or anticipated an effect on interstate or foreign commerce, or that commerce was actually affected. All that is necessary is that the natural and probable consequences of [the defendant's] [defendants'] (name's/s') actions would be to affect interstate or foreign commerce no matter how minimal.][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] [defendants'] (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 acquires or retains as a result of the commission of (describe the specified unlawful activity).[20] [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.][21] [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.][21]

[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][22] 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.][23]

[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.[24] [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.][25]

[The Government need not prove that all of the property involved in the [transaction] [transportation, transmission or transfer][22] 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 essential elements).][27]

(8) KNOWLEDGE

[The phrase "knew the (describe property) represented the proceeds of some form of unlawful activity," means that [the defendant] [defendant[s] (name)] 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.[28] 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.]]

Committee Comments

See Instructions 6.18.1956A through I (Committee Comments and Notes on Use), *supra*.

Notes on Use

Final Instructions: Elements of Offenses

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), *cert. denied*, 493 U.S. 1032 (1990). 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* Instruction 6.18.1956A, Note 1, *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) (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, Note 1, *supra*; *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"); Fifth Circuit Criminal Instructions 1.37 - 1.39 (West 1991). 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. The actual, potential or threatened effect on commerce need only be minimal. The Commerce Clause authorizes Congress to punish any criminal activity bearing even a *de minimis* relation to interstate commerce. 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) *construed in United States v. Gallo*, 927 F.2d 815, 822-23 (5th Cir. 1991) (transfer of box of currency between cars). *See also Perez v. United States*, 402 U.S. 146, 154 (1971) (loan sharking); *United States v. Kelley*, 929 F.2d 582, 585-86 (10th Cir. 1991) (purchase of a car from a dealer who will use proceeds of sale to buy more inventory in interstate commerce); *United States v. Voss*, 787 F.2d 393, 397 (8th Cir. 1986) (citing *Perez*, in an attempted arson case); *United States v. Stillwell*, 900 F.2d 1104, 1111 (7th Cir.) (relevant statutory inquiry for the court is whether Congress had any rational basis for finding that a regulated activity affects interstate commerce), *cert. denied*, 498 U.S. 838 (1990); Instruction 6.18.1951 Committee Comment at 270 (West 1992) (only minimal, probable or potential effect required to establish jurisdiction).

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. "Proceeds" is not a term defined in 18 U.S.C. § 1956(c)(1)-(8). In defining criminally derived property, 18 U.S.C. § 1957(f)(2) refers to "any property *constituting*, or derived from, proceeds obtained from a criminal offense . . ." (emphasis added). This is virtually identical to the scope of property subject to criminal forfeiture set forth in 21 U.S.C. § 853(a)(1): "any property *constituting*, or derived from any proceeds the person obtained, directly or indirectly, as the result of such [predicate drug] violation;" (emphasis added). Thus in the closest analogous statutes, property and proceeds may be the same when the property *constitutes* proceeds. For purposes of section 853, "property" includes: "(1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims and securities." 21 U.S.C. § 853(b).

The limited case law construing the term, specifically as applied to section 1956, holds that "proceeds" "can include 'property' other than money or cash equivalents, even if that 'property' has not been purchased with the monetary 'proceeds' of unlawful activity." *United States v. Werber*, 787 F. Supp. 353, 357 (S.D.N.Y. 1992). In *Werber*, defendants allegedly uttered counterfeit bank cashier's checks to purchase automobiles and then sold those automobiles. The financial transaction was the sale of the automobiles which, the government alleged, represented the "proceeds" of the uttered counterfeit checks. Defendants argued unsuccessfully that "proceeds" was restricted to money or cash equivalents. 787 F. Supp. at 356. Other courts have held that "proceeds" is a term susceptible of finding an "ordinary, contemporary, common meaning." *United States v. Gleave*, 786 F. Supp. 258, 270 (W.D.N.Y. 1992). In *Gleave*, the specified unlawful activity was concealment of funds from the Trustee and creditors in bankruptcy; the financial transactions included wire transfer and the use of monetary instruments. 786 F.

Supp. at 269. Similarly, in *United States v. Ortiz*, 738 F. Supp. 1394, 1400 (S.D. Fla. 1990), the court found that a hot water heater full of money was clearly proceeds within the commonly accepted meaning of the word. *Id.* Drawing upon a dictionary, law dictionary, and Supreme Court case law, the district court, in dicta, provided an expansive definition which includes the sum, amount or value of property sold or converted into money or other property, not necessarily only cash or money. *Id.*

Prior to the above cases, at least one commentator argued for a narrower definition, based on a construction of the legislative history. *See* G. Richard Strafer, *Money Laundering: The Crime of the '90's*, 27 Amer. Crim. L. Rev. 149, 182-85 (1989). In *Werber*, the Court rejected defendant's reliance on legislative history. The Court found that the express language of the statute (section 1956(a)(1)) was clear without citation to dictionaries, that there was no clear legislative history contradicting the plain meaning of the word "proceeds" and that Congress' failure to mention factual situations such as the counterfeit cashier's check and subsequent sale of automobiles scheme did not preclude the automobiles from being proceeds. 787 F. Supp. at 356-57. In a typical case where the proceeds are cash or a monetary instrument, the Committee recommends the use of the definition shown. More complex situations may require briefing by the parties to update this evolving area of the law.

21. 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).

22. Use with Instructions 6.18.1956D, E & F (18 U.S.C. § 1956(a)(2)).

23. *See United States v. Atterson*, 926 F.2d 649, 656 (7th Cir. 1991) (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) (defendant issued false paycheck in return for cash received from person who said he was a drug dealer).

24. 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)).

25. 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).

26. 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 defendant's drug operations and evidence that his expenses far exceeded his income), *cert. denied*, 506 U.S. 1082 (1993). *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 defendant and that the money was the product of drug transactions).

27. 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* Instruction 6.18.1956A, 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. *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*.

28. 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).

Final Instructions: Elements of Offenses

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 essential 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*.)

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.

Notes on Use

1. *See* Instruction 6.18.1956A, Note 1, *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* Instruction 6.18.1956A, Note 4, *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* Instruction 6.18.1956J, Note 27, *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 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.

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.

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 essential 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 essential elements beyond a reasonable doubt [as to that defendant]; otherwise you must find [that] [the] defendant not guilty.[9]

Committee Comments

See Fifth Circuit Pattern Jury Instructions: Criminal § 2.72 (1997); Ninth Circ. Crim. Jury Instr. 8.34.3, 8.34.4 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal § 61.1 (1997); Modern Federal Jury Instructions, Criminal, 52-21; 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 48.03 (4th ed. 1990); Federal Criminal Jury Instructions § 60.06; *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (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), *cert. denied*, 516 U.S. 870 (1995); *United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994), *cert. denied*, 513 U.S. 1177 (1995); *United States v. DiSalvo*, 34 F.3d 1204 (3d Cir. 1994); *United States v. Aucoin*, 964 F.2d 1492 (5th Cir. 1992), *cert. denied*, 506 U.S. 1023 (1992); *United States v. Tripp*, 782 F.2d 38 (6th Cir.), *cert. denied*, 475 U.S. 1128 (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.), *cert. denied*, 479 U.S. 937 (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), *cert. denied*, 464 U.S. 1008 (1983); *Moss v. Morgan Stanley Inc.*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *Schact v. Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (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), *cert. denied*, 452 U.S. 961 (1981). 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. Darden*, 70 F.3d 1507 (8th Cir. 1995), *cert. denied*, 517 U.S. 1149 (1996); *United States v. Bledsoe*, 674 F.2d 647 (8th Cir.), *cert. denied*, 459 U.S. 1040 (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), *cert. denied*, 511 U.S. 1076 (1994); *United States v. Masters*, 924 F.2d 1362 (7th Cir.), *cert. denied*, 500 U.S. 919 (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.), *cert. denied*, 479 U.S. 937 (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), *cert. denied*, 464 U.S. 1008 (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's affairs. *Handeen v. Lemaire*, 112 F.3d 1339, 1347 (8th Cir. 1997). An attorney or other professional does not conduct an enterprise's 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), *cert. denied*, 465 U.S. 1005 (1984). 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 Inv., 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), *cert. denied*, 504 U.S. 955 (1992). 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 Fin. 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), *cert. denied*, 475 U. S. 1098 (1986) (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); D & B. 48.06.

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, *supra*.

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), *cert. denied*, 489 U.S. 1067 (1989); *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.), *cert. denied*, 454 U.S. 857 (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.), *cert. denied*, 488 U.S. 890 (1988); *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

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 867 (5th Cir. 1981); *United States v. Starnes*, 644 F.2d 673 (7th Cir.), *cert. denied*, 454 U.S. 826 (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);. No. 3.09.

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 essential 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 essential elements beyond a reasonable doubt [as to that defendant]; otherwise you must find [that] [the] defendant not guilty.[8]

Committee Comments

Eleventh Circuit Pattern Jury Instructions: Criminal § 61.2 (1997); Modern Federal Jury Instructions, Criminal 52.29; 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 48.11 (4th ed. 1990); Federal Criminal Jury Instructions § 60.12; *United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir. 1995).

See Committee Notes, No. A, *supra*.

Final Instructions: Elements of Offenses

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, ___, 118 S. Ct. 469, 476 (1997); *United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984); *United States v. Barton*, 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857 (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 ____, 118 S. Ct. at 476. 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.), *cert. denied*, 479 U.S. 939 (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. 52, ___, 118 S. Ct. 469, 471 (1997; *United States v. Bennett*, 44 F.3d 1364 (8th Cir. 1995) (it is not necessary that 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.), *cert. denied*, 488 U.S. 932 (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. 52, ___, 118 S. Ct. 469, 471 (1997). 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*, 118 S. Ct. at 473. *United States v. Alonso*, 740 F.2d 862 (11th Cir.), *cert. denied*, 469 U.S. 1166 (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.), *cert. denied*, 484 U.S. 948 (1987); *see also Hyde v. United States*, 225 U.S. 347 (1912)

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), *cert. denied*, 489 U.S. 1067 (1988); *R.A.G.S. Couture, Inc. v. Hyatt Co.*, 774 F.2d 1350 (5th Cir. 1985); *United States v. Barton*, 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857 (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.), *cert. denied*, 488 U.S. 890 (1988); *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

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); No. 3.09.

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]

Committee Comments

Final Instructions: Elements of Offenses

See Model Federal Jury Instructions, Criminal 52-31, 32; *Salinas v. United States*, 522 U.S. 52, ___, 118 S. Ct. 469, 477 (1997); *United States v. Bennett*, 44 F.3d 1364 (8th Cir.), *cert. denied*, 515 U.S. 1123 (1995); *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (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), *cert. denied*, 460 U.S. 1022 (1983); *United States v. Melton*, 689 F.2d 1120 (1st Cir. 1981); *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981), *cert. denied*, 460 U.S. 1001 (1983). 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), *cert. denied*, 517 U.S. 1149 (1996). Simple possession cannot serve as a predicate act under the RICO statute. *Id.* at 1525.

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), *cert. denied*, 500 U.S. 915 (1991).

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, ___, 118 S. Ct. 469, 477 (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, ___, 118 S. Ct. 469, 477 (1997).

4. For purposes of a RICO prosecution an enterprise may only be comprised of 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), *cert. denied*, 465 U.S. 1107 (1984).

Final Instructions: Elements of Offenses

6.18.1952D ENTERPRISE - DEFINITION

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]

Committee Comments

See Fifth Circuit Pattern Jury Instructions: Criminal § 2.78 (1997); Ninth Cir. Crim. Jury Instr. 8.34.3; 8.34.4 (1997); Modern Federal Jury Instructions; Criminal 52.22; 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 48.04 (4th ed. 1990); Federal Criminal Jury Instructions § 60.02.

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), *cert. denied*, 468 U.S. 1217 (1984). 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), *cert. denied*, 441 U.S. 933 (1979).

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. Nabors*, 45 F.3d 238 (8th Cir. 1995); *see also United States v. Perholtz*, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988); *United States v. Mazaei*, 700 F.2d 85 (2d Cir.), *cert. denied*, 461 U.S. 945 (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.), *cert. denied*, 488 U.S. 890 (1988); *United States v. Kauble*, 706 F.2d 1322 (5th Cir.), *cert. denied*, 465 U.S. 1005 (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), *cert. denied*, 464 U.S. 1008 (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.), *cert. denied*, 459 U.S. 1040 (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.), *cert. denied*, 488 U.S. 821 (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), *cert. denied*, 455 U.S. 1016 (1986); *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), *cert. denied*, 464 U.S. 1008 (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).

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). *See also* Seventh Circuit Federal Jury Instructions: Criminal at 315-23 (1999). 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), *cert. denied*, 468 U.S. 1217 (1984). 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), *cert. denied,* 489 U.S. 1030 (1989).

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.), *cert. denied,* 488 U.S. 932 (1988); *United States v. Lemm*, 680 F.2d 1193 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983).

Final Instructions: Elements of Offenses

6.18.1962E CONDUCT/PARTICIPATION -DEFINITION

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.

Committee Comments

See Seventh Circuit Federal Jury Instructions: Criminal at 321 (1999); Eleventh Circuit Pattern Jury Instructions: Criminal § 61.1 (1997); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 48.04 (4th ed. 1990); *Reves & Ernst & Young*, 507 U.S. 170 (1993); *United States v. Darden*, 70 F.3d 1507 (8th Cir.), *cert. denied*, 517 U.S. 1149 (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's 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.

Notes on Use

Final Instructions: Elements of Offenses

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's 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's 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's 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.

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 defendant's ongoing legitimate business].[5]

Committee Comments

See Fifth Circuit Pattern Jury Instructions: Criminal § 2.78 (1997); Ninth Cir. Crim. Jury Instr. 8.34.7 (1997); Modern Federal Jury Instructions, Criminal, 52.7; 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 48.07 (4th ed. 1990); *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 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 Fin. 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 Inv. Seven v. PHP Healthcare*, 986 F.2d 1208 (8th Cir. 1993) (continuity over a closed period is not met when predicate act extends less than one year); *UniQuality, 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, Inv., Seven v. PHP Healthcare*, 986 F.2d 1208, 1215 (8th Cir. 1993); *Aldridge v. Lily-Tulip, Inc. Salary Requirement Plan Benefits Committee*, 953 F.2d 587, 593 (11th Cir.), *reh'g denied*, 961 F.2d 224 (11th Cir. 1992) (six months to a year insufficient), *cert. denied*, 516 U.S. 1009 (1995).

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, Thorton 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 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.

6.18.1962G SAMPLE VERDICT FORM - RICO (18 U.S.C § 1962(c))

We, the jury, find the 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

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 1374 (8th Cir. 1988); *see also United States v. Ham,* 58 F.3d 78 (4th Cir.), *cert. denied,* 516 U.S. 986.

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, ___, 114 S. Ct. 783, 792 (1994).

Final Instructions: Elements of Offenses

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.

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 essential 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*.)

Committee Comments

See Seventh Circuit Federal Jury Instructions: Criminal at 325 (1999).

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* Fifth Circuit Pattern Jury Instructions: Criminal § 2.79 (1997); Seventh Circuit Federal Jury Instructions: Criminal at 325 (1999); 2 Edward J. Devitt, et al.,

FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 49.10 (4th ed. 1990). 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

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 essential 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*.)

Committee Comments

See Seventh Circuit Federal Jury Instructions: Criminal at 325 (1999).

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 in Fifth Circuit Pattern Jury Instructions: Criminal § 2.79 (1997), Eleventh Circuit Pattern Jury

Instructions: Criminal (Offense) § 62.2 (1997) and 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 49.07 and 49.08 (4th ed. 1990) 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), *cert. denied*, 475 U.S. 1053 (1986).

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), *cert. denied*, 484 U.S. 1074 (1988). 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).

Final Instructions: Elements of Offenses

6.18.2119A[1] CARJACKING (No Serious Bodily Injury or Death) (18 U.S.C. § 2119(1))

The crime of carjacking has four essential 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]. [The intent to kill or cause serious bodily injury if necessary to steal the vehicle is sufficient.][3]

"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].

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.

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), *cert. denied*, 484 U.S. 1075 (1988)).

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.), *cert. denied*, 513 U.S. 1050 (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), *cert. denied*, 514 U.S. 1113 (1995); *United States v. Williams*, 51 F.3d 1004, 1008-09 (11th Cir. 1995).

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, 119 S. Ct. 1215 (1999).

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 § 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 (or, alternatively, if unnecessary to steal the car)." *Holloway v. United States*, 526 U.S. 1, 119 S. Ct. 966 (1999).

Final Instructions: Elements of Offenses

6.18.2119B [2] CARJACKING (Serious Bodily Injury) (18 U.S.C. §2119(2))

The crime of carjacking has five essential 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]. [The intent to kill or cause serious bodily injury if necessary to steal the vehicle is sufficient.][3]

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).[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].

["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].]

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).

Final Instructions: Elements of Offenses

Sexual abuse is defined in 18 U.S.C. § 2242. Aggravated sexual abuse is defined in 18 U.S.C. § 2241.

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.

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 § 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 (or, alternatively, if unnecessary to steal the car)." *Holloway v. United States*, 526 U.S. 1, 119 S. Ct. 966 (1999).

4. The court should, if requested by a party, give 6.18.2119A as a lesser included offense instruction. If a lesser include offense instruction is given, the format in Instruction No. 3.10 should be used.

Final Instructions: Elements of Offenses

6.18.2119C [1] CARJACKING (Death Resulting) (18 U.S.C. § 2119(3))

The crime of carjacking has five essential 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]. [The intent to kill or cause serious bodily injury if necessary to steal the vehicle is sufficient.].[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].

Committee Comments

See comments for 6.18.2119A.

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 § 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 (or, alternatively, if unnecessary to steal the car)." *Holloway v. United States*, 526 U.S. 1, 119 S. Ct. 966 (1999).

4. The court should, if requested by a party, give 6.18.2119A, 6.18.2119B, or both, as lesser included offense instructions. If lesser included offense instructions are given, the format in Instruction No. 3.10 should be used.

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 essential 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.), *cert. denied*, 412 U.S. 907 (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), *cert. denied*, 469 U.S. 1162 (1985); *United States v. Martinez*, 694 F.2d 71, 72 (5th Cir. 1982).

Final Instructions: Elements of Offenses

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 essential 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*.)

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 50.06 (4th ed. 1990); *United States v. Brady*, 425 F.2d 309, 311 (8th Cir. 1970); Seventh Circuit Federal Jury Instructions: Criminal at 359 (1999). *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.), *cert. denied*, 439 U.S. 1051 (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 essential 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), *cert. denied*, 434 U.S. 849 (1977). 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 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), *reh. denied*, 549 F.2d 204 (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).

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).

Final Instructions: Elements of Offenses

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 essential 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 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*.)

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 50.09 (4th ed. 1990). *See generally Gay v. United States*, 408 F.2d 923, 926-29 (8th Cir.), *cert. denied*, 396 U.S. 823 (1969); Seventh Circuit Federal Jury Instructions: Criminal at 362 (1999).

See Committee Comments, Instructions 6.18.2312 and 6.18.2313, *supra*.

Knowledge that the property was stolen or taken by fraud is an essential 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.), *cert. denied*, 431 U.S. 942 (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), *cert. denied*, 423 U.S. 1076 (1976).

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).

Final Instructions: Elements of Offenses

"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.), *cert. denied*, 461 U.S. 947 (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), *cert. denied*, 484 U.S. 955 (1987); *Schaffer v. United States*, 362 U.S. 511 (1960). In such a case, Element *Two* should be modified to include "total value."

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, Instruction 6.18.2314, *supra*.

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 essential 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 of the (describe substance, e.g., cocaine) to another person.

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

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 54.01-54.18 (4th ed. 1990); *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).

The element of "possession" ordinarily does not need to be defined. *Johnson v. United States*, 506 F.2d 640, 643 (8th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975). 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* Ninth Cir. Crim. Jury Instr. 9.4.1 (1997); 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 16.05 (4th ed. 1992); *United States v. Haynes*, 653 F.2d 332, 333 (8th Cir. 1981); *United States v. Rojas*, 537 F.2d 216, 220-21 (5th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977); *United States v. Weisser*, 737 F.2d 729, 732 (8th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985).

"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.*

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.), *cert. denied*, 423 U.S. 1031 (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 (8th Cir. 1976).

Notes on Use

1. The Anti-Drug Abuse Act of 1986 provides for progressively enhanced sentences for possession of certain quantities of controlled substances. This Circuit has held that the judge and not the jury should factually determine the quantity of a controlled substance in a particular case at the defendant's sentencing. This Circuit so held in a 2-1 decision as follows:

> Our review of the language, structure and legislative history of 21 U.S.C. § 841(b)(1)(A)(ii) and case law deciding the additional element of the offense/sentencing factor claims, . . . convinces us that Congress has merely deemed a particular fact relevant to sentencing and has dictated the enhancement available if the sentencing judge determines the offense so warrants.
>
> * * * Having concluded that Congress intended that the quantity of cocaine was to be treated under Section 841(b)(1)(A)(ii) as a sentencing consideration, and not as an element of any offense, we need only mention that there is no constitutional right to jury sentencing, even where the sentence turns upon specific findings of fact.

United States v. Wood, 834 F.2d 1382, 1390 (8th Cir. 1987).

In a very similar context, in *United States v. Rush*, 840 F.2d 574 (8th Cir. *en banc*), *cert. denied*, 487 U.S. 1238 (1988), this Circuit determined that a defendant's prior record of convictions, which required that his sentence be enhanced under the Armed Career Criminal Act of 1984 should be determined by the district judge at sentencing, and not submitted to the jury. Four members of the Court joined in a dissenting opinion.

Four other circuits agree with this Circuit, and hold that the prior record should be determined by the Court. *See United States v. Gregg*, 803 F.2d 568 (10th Cir. 1986), *cert. denied*, 480 U.S. 920 (1987); *United States v. Hawkins*, 811 F.2d 210 (3d Cir.), *cert. denied*, 484 U.S. 833 (1987); *United States v. Jackson*, 824 F.2d 21 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1013 (1988); *United States v. West*, 826 F.2d 909 (9th Cir. 1987).

The Fifth Circuit has determined that the sentencing provisions of the Armed Career Criminal Act of 1984 create a new offense, and hold that the defendant's prior record therefore must be submitted to the jury for its determination of the defendant's record. *United States v. Davis*, 801 F.2d 754 (5th Cir. 1986).

Given the current state of law, the Committee makes no recommendation as to whether special interrogatories should be submitted to the jury on the quantity of a controlled substance, if enhanced punishment is sought by the Government. Because of the split in the circuits on the sentencing issue under the Armed Career Criminal Act, it appears that the Supreme Court will make the final determination in this matter. However, in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999), dealing with a carjacking offense under 18 U.S.C. § 2119, the 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." If the quantity of drugs will affect the maximum punishment authorized, the safest approach would be to specify the quantity in the indictment and require the jury to find the quantity necessary to justify the enhanced punishment beyond a reasonable doubt.

2. The defendant need not know what the controlled substance is if he knows he has possession of some controlled substance. *See, e.g., United States v. Gonzalez*, 700 F.2d 196, 200-01 (5th Cir. 1983); *United States v. Morales*, 577 F.2d 769, 776 (2d Cir. 1978); *United States v. Jewell*, 532 F.2d 697, 698 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976). 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

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 essential 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*.)

Committee Comments

See Ninth Cir. Crim. Jury Instr. 9.43 (1997); *see also United States v. Jardan*, 552 F.2d 216, 219 (8th Cir.), *cert. denied*, 433 U.S. 912 (1977) (government must show that transfer was intentional).

See Committee Comments, Instruction 6.21.841A, *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. The Anti-Drug Abuse Act of 1986 provides for progressively enhanced sentences for possession of certain quantities of controlled substances. This Circuit has held that the judge and not the jury should factually determine the quantity of a controlled substance in a particular case at the defendant's sentencing. This Circuit so held in a 2-1 decision as follows:

> Our review of the language, structure and legislative history of 21 U.S.C. § 841(b)(1)(A)(ii) and case law deciding the additional element of the offense/sentencing factor claims, . . . convinces us that Congress has merely deemed a particular fact relevant to sentencing and has dictated the enhancement available if the sentencing judge determines the offense so warrants . . . . Having concluded that Congress intended that the quantity of cocaine was to be treated under section 841 (b)(1)(A)(ii) as a sentencing consideration, and not as an element of any offense, we need only mention that there is no constitutional right to jury sentencing, even where the sentence turns upon specific findings of fact.

United States v. Wood, 834 F.2d 1382, 1390 (8th Cir. 1987).

In a very similar context, in *United States v. Rush*, 840 F.2d 574 (8th Cir. *en banc*), *cert. denied*, 487 U.S. 1238 (1988), this Circuit determined that a defendant's prior record of convictions, which required that his sentence be enhanced under the Armed Career Criminal Act of 1984, should be determined by the district judge at sentencing, and not submitted to the jury. Four members of the Court joined in a dissenting opinion.

Four other circuits agree with this Circuit, and hold that the prior record should be determined by the court. *See United States v. Gregg*, 803 F.2d 568 (10th Cir. 1986), *cert. denied*, 480 U.S. 920 (1987); *United States v. Hawkins*, 811 F.2d 210 (3d Cir.), *cert. denied*, 484 U.S. 833 (1987); *United States v. Jackson*, 824 F.2d 21 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1013 (1988); *United States v. West*, 826 F.2d 909 (9th Cir. 1987).

Two circuits have determined that the sentencing provisions of the Armed Career Criminal Act of 1984 create a new offense, and hold that the defendant's prior record therefore must be submitted to the jury for its determination of the defendant's record. *See United States v. Brewer*, 841 F.2d 667 (6th Cir. 1988); *United States v. Davis*, 801 F.2d 754 (5th Cir. 1986).

Given the current state of law, the Committee makes no recommendation as to whether special interrogatories should be submitted to the jury on the quantity of a controlled substance, if enhanced punishment is sought by the Government. Because of the split in the circuits on the sentencing issue under the Armed Career Criminal Act, it appears that the Supreme Court will make the final determination in this matter. However, in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999), dealing with a carjacking offense under 18 U.S.C. § 2119, the 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." If the quantity of drugs will affect the maximum punishment authorized, the safest approach would be to specify the quantity in the indictment and require the jury to find the quantity necessary to justify the enhanced punishment beyond a reasonable doubt.

3. The defendant need not know what the controlled substance is if he knows he has possession of some controlled substance. *See, e.g.*, *United States v. Gonzalez*, 700 F.2d 196, 200-01 (5th Cir. 1983); *United States v. Morales*, 577 F.2d 769, 776 (2d Cir. 1978); *United States v. Jewell*, 532 F.2d 697, 698 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976). The alternative language which best fits the case should be used.

Final Instructions: Elements of Offenses

6.21.843 CONTROLLED SUBSTANCES - USE OF A COMMUNICATIONS FACILITY (21 U.S.C. § 843(b))

The crime of use of a communication facility to [commit] [facilitate the commission of] another controlled substance offense has two essential elements, which are:

One, the defendant knowingly used a "communication facility"; and

Two, the defendant did so with the intent to [commit] [facilitate the commission of] the offense of (describe the offense, e.g., attempted possession of cocaine with intent to distribute).

The term "communication facility" includes (specify means alleged, e.g., mail, telephone, wire, radio, and all other means of communication).[1]

[To "facilitate" the commission of an offense means to make easier or less difficult or to assist or aid.][2] [It is sufficient if a defendant's use of the (specify communication facility, e.g., telephone) facilitates either the defendant's own or another person's commission of the offense.]

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

Committee Comments

See Fifth Circuit Pattern Jury Instructions: Criminal § 2.88 (1997); Ninth Cir. Crim. Jury Instr. 9.4.5 (1997).

Notes on Use

1. 21 U.S.C. § 843(b) 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 . . . ." Ordinarily, it should not be necessary to distinguish between public or private facilities or set forth the complete definition.

2. Ordinarily it should not be necessary to define facilitate. 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. Unit B 1981), *cert. denied, sub nom. Meinster v. United States*, 457 U.S. 1136 (1982); *Myers v. United States*, 457 U.S. 1136 (1982); and *Platshorn v. United States*, 459 U.S. 906 (1982).

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 essential 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 essential 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, 115 S. Ct. 382 (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 may affect the maximum punishment authorized for the offense. In *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999), dealing with a carjacking offense under 18 U.S.C. § 2119, the 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." If the quantity of drugs will affect the maximum punishment authorized, the safest approach would be to specify the quantity in the indictment and require the jury to find the quantity necessary to justify the enhanced punishment beyond a reasonable doubt.

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); *see also United States v. Clark*, 67 F.3d 1154, 1163 (5th Cir. 1995). 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.

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 essential elements, which are:

One, defendant intended to (describe conduct, e.g., distribute methamphetamine to another person);

Two, defendant knew the material he then intended to distribute was [a controlled substance] [(describe substance, e.g., methamphetamine)]; and

Three, 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 the Government's burden of proof here; *see* Instruction 3.09, *supra*.)

Committee Comments

See Instructions 6.21.841A and 6.21.841B, *supra*, and Instruction 8.01, *infra*; *see also* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 21.01-21.03 (4th ed. 1990). The penalty for an attempt under 21 U.S.C. § 846 is the same as for the substantive offense committed. Thus, the quantity of the drugs involved may affect the maximum punishment authorized for the offense. In *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999), dealing with a carjacking offense under 18 U.S.C. § 2119, the 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." If the quantity of drugs will affect the maximum punishment authorized, the safest approach would be to specify the quantity in the indictment and require the jury to find the quantity necessary to justify the enhanced punishment beyond a reasonable doubt.

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 essential 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 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]

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The [indictment charges] [Government contends] that the [violations charged in Counts _____ and _____] [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 essential element No. Two has been proved.][5]

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

Committee Comments

See Ninth Cir. Crim. Jury Instr. 9.4.12 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 76.1 (1997); *United States v. Lewis*, 759 F.2d 1316, 1331 (8th Cir.), *cert. denied*, 474 U.S. 994 (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), *cert. denied*, 480 U.S. 907 (1987); *United States v. Becton*, 751 F.2d 250, 255 (8th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985), 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 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 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.), *cert. denied*, 419 U.S. 831 (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.), *cert. denied*, 449 U.S. 960 (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.), *cert. denied*, 434 U.S. 930 (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), *cert. denied*, 465 U.S. 1038 (1984). *But see United States v. Baker*, 905 F.2d 1100, 1104 (7th Cir.) ("continuing series" requirement is met by two substantive offenses), *cert. denied*, 498 U.S. 876 (1990). 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.), *cert. denied*, 444 U.S. 825 (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).

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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*.

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), *cert. denied*, 472 U.S. 1018 (1985).

Final Instructions: Elements of Offenses

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 essential 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 essential elements instruction for that count.)

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.

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 Instruction 6.21.848A, Note .4, *supra*.

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 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 a preponderance 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 a preponderance 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 preponderance 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. Preponderance 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:

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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 _____, 19_____.

_____

Foreperson

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.

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), *cert. denied*, 465 U.S. 1005 (1984); *United States v. Jenkins*, 904 F.2d 549 (10th Cir. 1990); *United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989); *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.

Property Subject to Criminal Forfeiture

(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 a preponderance of the evidence that--

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

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 preponderance of the evidence. *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994); *United States v. Smith*, 966 F.2d 1045 (6th Cir. 1992); *United States v. Herrero*, 893 F.2d 1512 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990); *United States v. Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990); *United States v. Sandini*, 816 F.2d 869 (3d Cir. 1987). A sixth court has held that the burden is preponderance in matters involving "proceeds" of drug transactions. *United States v. Elgersma*, 971 F.2d 690 (11th Cir. 1992) (*en banc*). Other jurisdictions adhere to the reasonable doubt standard. *United States v. Monsanto*, 852 F.2d 1400, 1412 n.1 (2d Cir. 1988); *United States v. Nichols*, 841 F.2d 1485, 1500 (10th Cir. 1988); *United States v. Dunn*, 802 F.2d 646, 647 (2d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987); *United States v. Cauble*, 706 F.2d 1322, 1347-

48 (5th Cir 1983), *cert. denied*, 465 U.S. 1005 (1984); *United States v. Pryba*, 674 F. Supp. 1518, 1520-21, *aff'd*, 900 F.2d 748 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990). The Supreme Court has not directly addressed this issue.

The Committee recommends following the clear pronouncement of the Eighth Circuit in *United States v. Bieri*, *supra*, that preponderance 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), Federal Rules of Criminal Procedure, requires that "special verdicts" be used in all criminal forfeiture matters.

Final Instructions: Elements of Offenses

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 essential 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 defendant in the National Firearms Registration and Transfer Record.[6]

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

Committee Comments

See generally Staples v. United States, 511 U.S. 600, 114 S. Ct. 1793 (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* West "Internal Revenue" Key # 5265 or Westlaw 220k5265. *See also* Federal Judicial Center, Pattern Criminal Jury. Instructions § 113 (1988); Ninth Cir. Crim. Jury Instr. 9.5.1, 9.5.2 (1997); West "Internal Revenue" Key ## 5265 and 2410 or Westlaw 220k5265k2410; Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 80.l (1997); Seventh Circuit Federal Jury Instructions: Criminal at 405 (1999); and 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 59 (4th ed. 1990).

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), *cert. denied*, 457 U.S. 1133 (1982).

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.), *cert. denied*, 409 U.S. 896 (1972); *United States v. Greer*, 588 F.2d 1151 (6th Cir.), *cert. denied*, 440 U.S. 983 (1979); *Burchfield v. United States*, 544 F.2d 922, 924 (7th Cir. 1976); *United States v. Oba*, 448 F.2d 892, 894 (9th Cir.), *cert. denied*, 405 U.S. 935 (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.

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, ___, 114 S. Ct. 1793, 1804 (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.) (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), *cert. denied*, 508 U.S. 914 (1993)), *cert. denied*, 513 U.S. 933 (1994).

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.), *cert. denied*, 444 U.S. 847 (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.

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 essential 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*.)

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 56.03, 56.04, 56.08, 56.24 (4th ed. 1990); *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.), *cert. denied*, 439 U.S. 970 (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), *cert. denied*, 353 U.S. 912 (1957), 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.), *reh. denied*, 660 F.2d 449 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) [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* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 56.21 (4th ed. 1990). *United States v. Renfro*, 600 F.2d 55 (6th Cir.), *cert. denied*, 444 U.S. 941 (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 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.), *cert. denied*, 472 U.S. 1029 (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), *cert. denied*, 442 U.S. 909 (1979) 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 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.

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); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 35.03 (4th ed. 1990).

4. *United States v. Smith*, 335 F.2d 898, 900-01 (7th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965).

5. *See United States v. Calderon*, 348 U.S. 160, 167 (1954); *Swallow v. United States*, 307 F.2d 81, 83 (10th Cir. 1962); *cert. denied*, 371 U.S. 950 (1963).

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 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 56.22 (4th ed. 1990); *United States v. Wainwright*, 413 F.2d 796, 802 n.3 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); *United States v. Brink*, 648 F.2d 1140 (8th Cir.),*cert. denied*, 454 U.S. 1031 (1981); *United States v. Cashio*, 420 F.2d 1132, 1135 (5th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970).

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.

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 essential 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*.)

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 56.11, 56.12 (4th ed. 1990); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 82 (1997).

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), *cert. denied*, 451 U.S. 942 (1981).

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).

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 of this Manual, *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.

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 essential 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

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.), *cert. denied*, 409 U.S. 875 (1972); and *United States v. Oggoian*, 678 F.2d 671, 673 (7th Cir.), *cert. denied*, 459 U.S. 1018 (1982).

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.), *cert. denied*, 409 U.S. 875 (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), *cert. denied*, 469 U.S. 1218 (1985). Presumably, materiality is now a question of fact for the jury to decide under *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (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), *cert. denied*, 450 U.S. 965 (1981); 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), *cert. denied*, 449 U.S. 1124 (1981). 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), *cert. denied*, 397 U.S. 1007

(1970). *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), *cert. denied*, 451 U.S. 942 (1981). 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), *cert. denied*, 414 U.S. 1162 (1974). 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.), *cert. denied*, 454 U.S. 829 (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.), *cert. denied*, 374 U.S. 809 (1963); *Schuermann v. United States*, 174 F.2d 397, 398 (8th Cir.), *cert. denied*, 338 U.S. 831 (1949).

Good faith is a theory of defense in false return cases. Where 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*.

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. 506 115 S. Ct. 2310 (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), *cert. denied*, 450 U.S. 965 (1981).]

7. *United States v. Ballard*, 535 F.2d 400, 404 (8th Cir.), *cert. denied*, 429 U.S. 918 (1976); *United States v. Miller*, 545 F.2d 1204, 1211 n.8 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977).

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* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 56.22 (4th ed. 1990); *United States v. Wainwright*, 413 F.2d 796, 802 n.3 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); *United States v. Brink*, 648 F.2d 1140 (8th Cir.), *cert. denied*, 454 U.S. 1031 (1981); *United States v. Cashio*, 420 F.2d 1132, 1135 (5th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970). *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, *supra*.

7. FINAL INSTRUCTIONS: CONSIDERATION OF MENTAL STATE (Introductory Comment)

The instructions in this section relate to the jury's consideration of 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). *See also* Ninth Cir. Crim. Jury Instr. 4.08 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 5.4 (1999); *United States v. Bailey*, 444 U.S. 394, 398-444 (1980); *United States v. Arambasich*, 597 F.2d 609, 611-13 (7th Cir. 1979). 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 and odometer fraud 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. 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 purpose 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). 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.

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). 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 Ninth Cir. Crim. Jury Instr. 5.6 (1997) which does not overlap with the definition of "willfully." The Ninth Circuit instruction reads as follows:

> 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. The government is not required to prove that the defendant knew that [his] [her] acts or omissions were unlawful. 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.

This wording 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 defendant knew he was violating the law. *See, e.g., United States v. Udofot*, 711 F.2d 831, 835-37 (8th Cir.), *cert. denied*, 464 U.S. 896 (1983) [18 U.S.C. § 922(e)]; *United States v. Fierros*, 692 F.2d 1291, 1293-94 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983) [18 U.S.C. § 1324(a)]; *United States v. Enochs*, 857 F.2d 491, 493 (8th Cir. 1988), *cert. denied*, 490 U.S. 1022 (1989) [18 U.S.C. § 511(a)]. Nor does it require knowledge of federal involvement. *United States v. Yermian*, 468 U.S. 63, 75 (1984) (18 U.S.C. § 1001).

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), *cert. denied*, 460 U.S. 1081 (1983) 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 defendant was violating the law. That 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.

In *Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793 (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. Also, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464 (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.

Where the offense requires that defendant have some particular knowledge, that knowledge should be included in the elements instruction. The elements instructions in Section 6, *supra*, were drafted with this purpose in mind.

Final Instructions: Consideration of Mental State

7.04 DELIBERATE IGNORANCE

You may find that the defendant [(name)][1] acted knowingly if you find beyond a reasonable doubt that the defendant [(name)] was aware of a high probability that _____[2] and that [he] [she] deliberately avoided learning the truth. The element of knowledge may be inferred if defendant [(name)] deliberately closed [his] [her] eyes to what would otherwise have been obvious to [him] [her].

You may not find that the defendant [(name)] acted knowingly, however, [if you find that the defendant [(name)] actually believed that _____,[3]] [4] [if you find that the defendant [(name)] was simply careless.] A showing of negligence, mistake, or carelessness is not sufficient to support a finding of knowledge.[5]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 14.09 (4th ed. 1992); Ninth Cir. Crim. Jury Instr. 5.7 (1997). *See generally* West Key # "Criminal Law" 20, 33, 761(6), 772 (5).

In *United States v. Kershman*, 555 F.2d 198, 200 (8th Cir.), *cert. denied*, 434 U.S. 892 (1977), this circuit joined the Second, Sixth, Seventh and Ninth Circuits in approving the use of an instruction in which the element of knowledge may be shown by deliberate ignorance where evidence has shown a conscious purpose to avoid enlightenment.

The instruction approved in *Kershman* had two aspects; first, it required the jury to find that the defendant deliberately and consciously closed his eyes and second, it instructed the jury that defendant's good faith belief in the matter in question would exonerate him. 555 F.2d at 201. The court found that the "if you find" language of the instruction prevented the instruction from assuming facts not in evidence. The court further found that the instruction did not permit the jury to convict on an objective rather than a subjective theory of knowledge requirements.

The analysis in *Kershman* is similar to that in *United States v. Jewell*, 532 F.2d 697 (9th Cir. *en banc*), *cert. denied*, 426 U.S. 951 (1976). In a footnote, the *Jewell* court stated that a deliberate ignorance instruction should say "(1) that the required knowledge is established if the accused is aware of a high probability of the existence of the fact in question (2) unless he actually believes it does not exist." *Id.* at 704 n.21. In *United States v. Valle-Valdez*, 554 F.2d 911, 914 (9th Cir. 1977), it was held reversible error to fail to include in the instruction element (1) of the *Jewell* footnote; specifically, the court

held that the instructions should have explained that "conscious purpose to avoid learning the truth" is culpable only where coupled with a subjective awareness of high probability of the "unknown" fact.

Subsequent to *Kershman*, Devitt and Blackmar former § 14.09 on the same subject matter was approved by this circuit in *United States v. Massa*, 740 F.2d 629, 643 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) and *United States v. Graham*, 739 F.2d 351, 352 (8th Cir. 1984):

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of a fact. It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

In *Graham*, this circuit adopted the reasons given in *Jewell* for the necessity of such an instruction as follows:

> The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable. The textual justification is that in common understanding one "knows" facts of which he is less than absolutely certain. To act "knowingly," therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, "positive" knowledge is not required.

739 F.2d at 353 (quoting from 532 F.2d at 700).

In both *Graham* and *Massa* the court found that the instruction did not allow the defendant to be convicted on the basis of negligence or mistake. *See also United States v. Bussey*, 942 F.2d 1241 (8th Cir. 1991).

In *Bussey*, this circuit again approved the giving of a willful blindness instruction in a tax fraud and false statement case where the defendant knew certain payments he received had income tax consequences but he specifically sought to avoid learning anything about the specifics of those consequences and did not provide his accountant or return preparer with any relevant information. The court noted that specific language in the instruction which informed the jury that negligence or mistake did not constitute willfulness or knowledge prevented the instruction from allowing the jury to find the defendant guilty based on simple negligence.

Final Instructions: Consideration of Mental State

The instruction as drafted by the committee attempts to combine the format of the instruction approved in *Kershman* with the language approved in Massa/Graham, covering the essential principles required by each of these cases.

Note that 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.), *cert. denied*, 439 U.S. 981 (1978).

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. State the fact as to which knowledge is in question (e.g., that "drugs were contained in his suitcase").

3. State the proposition in the negative (e.g., that "no drugs were contained in his suitcase"). *See, e.g., United States v. Bailey*, 955 F.2d 28 (8th Cir. 1992).

4. This clause must be included in an instruction if requested. *United States v. Esquer-Gamez*, 550 F.2d 1231, 1235-36 (9th Cir. 1977).

5. *This instruction should not be given* in every case where a defendant claims a lack of knowledge; rather, it is appropriate *only* in those cases where defendant claims a lack of guilty knowledge *and* there are facts in evidence which suggest deliberate ignorance. *United States v. Barnhart*, 979 F.2d 647 (8th Cir. 1992); *United States v. Regan*, 940 F.2d 1134 (8th Cir. 1991); *United States v. Hiland*, 909 F.2d 1114, 1130 (8th Cir. 1990); *United States v. White*, 794 F.2d 367, 371 (8th Cir. 1986). *Barnhart* contains a good discussion of when and under what circumstances such an instruction should be given. It should be consulted when such an instruction is requested. If there is no evidence indicating that the defendant had a conscious purpose to avoid learning the truth, the instruction should not be given. *United States v. White*, 794 F.2d at 371. *See also United States v. Rivera*, 926 F.2d 1564, 1570-73 (11th Cir. 1991). Likewise, if the evidence "points solely to either actual knowledge or no knowledge of the facts in question," the instruction should not be given. *Regan*; *Hiland*, 909 F.2d at 1130. If a statute requires actual knowledge of specific facts, this instruction should not be given. *Mattingly v. United States*, 924 F.2d 785, 791 (8th Cir. 1991) (26 U.S.C. § 6701).

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 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.]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 17.07 (4th ed. 1992); *United States v. Lawson*, 483 F.2d 535, 536 (8th Cir. 1973), *cert. denied*, 414 U.S. 1133 (1974). *See generally* West Key # "Criminal Law" 778(6), 784(4), 784(8).

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 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 17.07 (4th ed. 1992). *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 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 17.07 (4th ed. 1992) when instructing on this concept. *United States v. Bohlmann*, 625 F.2d 751, 753 (6th Cir. 1980).

Notes on Use

1. If 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*.

8. 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).

Committee Comments

See 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 21.03 (4th ed. 1990); Seventh Circuit Federal Jury Instructions: Criminal § 4.07 (1999); Ninth Cir. Crim. Jury Instr. 5.3 (1997). *See generally* West Key # "Criminal Law" 44.

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.), *cert. denied*, 449 U.S. 1112 (1981); *United States v. York*, 578 F.2d 1036 (5th Cir.), *cert. denied*, 439 U.S. 1005 (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), *cert. denied*, 435 U.S. 968 (1978), 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.

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).

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 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 16.05 (4th Ed. 1992); Fifth Circuit Pattern Jury Instructions: Criminal § 1.31 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Special) § 6 (1997); *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), *cert. denied*, 465 U.S. 1107 (1984) [definition of constructive possession].

9. FINAL INSTRUCTIONS: DEFENSES AND THEORIES OF DEFENSE
(Introductory Comment)

The instructions in this section cover matters raised by the defense. Instructions 9.01-9.04 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 insanity (Instruction 9.03) and withdrawal from conspiracy (Instruction 5.06H). As to the defenses dealt with in Instructions 9.01, 9.02 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 Instructions 9.01 (entrapment), 9.02 (coercion or duress) 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 insanity (9.03) is in issue, the final paragraph of the elements instruction should be modified as provided for in Note 2, Instruction 3.09, *supra*, and followed separately by Instruction 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 or withdrawal from conspiracy, or disproved by the Government, in the case of entrapment, coercion, or self-defense. A "theory of defense," on the other hand, is a denial of one of the original essential 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. If the defendant was entrapped, [he] [she] must be found not guilty. The Government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped.

If the defendant before contact with (describe law enforcement officer or agents by name and capacity)[2] did not have any intent or disposition to commit the crime charged and was induced or persuaded by (officer or agent)[2] to commit that crime, then [he] [she] was entrapped. On the other hand, if the defendant before contact with (officer or agent)[2] did have an intent or disposition to commit the crime charged, then [he] [she] was not entrapped, even though (officer or agent) provided a favorable opportunity to commit the crime or made committing the crime easier or even participated in acts essential to the crime.

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 19.04 (4th ed. 1992); Fifth Circuit Pattern Jury Instructions: Criminal § 1.28 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 6.04 (1999); Ninth Cir. Crim. Jury Instr. 6.2.1 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Special) § 12.1 (1997). *See generally* West Key # "Criminal Law" 37(1-8), 330, 569, 739.1(1), 772(6), 814(8), 815(5), 822(8), 823(6).

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 government 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 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).

Final Instructions: Defenses and Theories of Defense

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.

Notes on Use

1. When this instruction is submitted, the government's burden of proof that 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 government 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.

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.

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 19.02 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 56 (1988); Seventh Circuit Federal Jury Instructions: Criminal § 6.08 (1999); Ninth Cir. Crim. Jury Instr. 6.4.1 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Special) § 15 (1997). *See generally* West Key # "Criminal Law" 38, 330, 356, 569, 739(l), 772(6), 814(8), 815(5), 822(8), 823(6).

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 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 19.02 (4th ed. 1992). 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), *cert. denied*, 445 U.S. 918 (1980); *United States v. Saettele*, 585 F.2d 307, 309 (8th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979).

The defendant has the initial burden of introducing facts "sufficient to trigger consideration of the coercion defense." *United States v. Campbell*, 609 F.2d at 924. Once the accused offers evidence supporting a coercion defense, the prosecution must rebut the issues of coercion beyond a reasonable doubt. *Id.* at 925.

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). 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).

Notes on Use

1. When this instruction is submitted, the government's burden of proof that defendant was not coerced must be included in the elements instruction. *See* Instruction 3.09, *supra*. This instruction should immediately follow.

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]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 19.03 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal § 6.02 (1999); Ninth Cir. Crim. Jury Instr. 6.3 (1997). *See generally* West Key # "Criminal Law" 47-57, 331, 354, 474, 570(1-3), 723(22), 740, 773, 778(7), 782(14), 814(10), 815(5), 822(9), 823(7).

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 Fed. R. Evid. 704, 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 defendant incapable of forming the requisite intent. The case suggests that the instructions specifically or as a whole should permit 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).

Notes on Use

1. This instruction should be used with and follow the burden of proof instruction contained in Note on Use 3 to Instruction 3.09, *supra*.

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]

Committee Comments

See United States v. Walker, 817 F.2d 461, 463 (8th Cir.), *cert. denied*, 484 U.S. 863 (1987); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 38A.11-38A.15 (4th ed. 1990); Seventh Circuit Federal Jury Instructions: Criminal § 6.01 (1999); Ninth Cir. Crim. Jury Instr. 6.5 (1997). *See generally* West Key # "Criminal Law" 38, 330, 356, 739(l), 763(23), 772(6), 814(8), 815(5), 822(8), 823(6).

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.), *cert. denied*, 414 U.S. 1007 (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.), *cert. denied*, 433 U.S. 912 (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 kidnapped. Even though kidnapping 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

Notes on Use

1. When this instruction is submitted, the government's burden of proof that 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.

Final Instructions: Defenses and Theories of Defense

9.05 THEORY OF DEFENSE

[No model instruction provided] [1]

Committee Comments

See generally West "Criminal Law" Key # 770(2), 770(3), 772(6), 805(1), 811(1), 829(1), 1038.3.

See also 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.), *cert. denied*, 488 U.S. 996 (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 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 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 essential elements beyond a reasonable doubt. *United States v. Rabbitt*, 583 F.2d 1014, 1024 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *United States v. Shigemura*, 682 F.2d 699, 703-05 (8th Cir. 1982), *cert. denied*, 459 U.S. 1111 (1983).

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), *cert. denied*, 440 U.S. 945 (1979) [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 defendant's position. *United States v. Kabat*, 797 F.2d 580, 590-91 (8th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987).

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), *cert. denied*, 420 U.S. 926 (1975). 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.), *cert. denied*, 484 U.S. 948 (1987); *United States v. Bolts*, 558 F.2d 316, 323 (5th Cir.), *cert. denied*, 434 U.S. 930 (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 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), *cert. denied*, 412 U.S. 941 (1973) [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.

Notes on Use

1. As stated in the Introductory Comment, 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*.

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 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 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 19.05 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal § 6.09 (1999); Ninth Cir. Crim. Jury Instr. 6.06 (1997). *See generally* West Key # "Criminal Law" 53, 55, 57, 332, 355, 474, 570(1-3), 739(5), 774, 782(14), 814(10), 815(5), 822(9), 823(7).

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.), *cert. denied*, 449 U.S. 854 (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. Beautiful 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].

Final Instructions: Defenses and Theories of 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 defendant was present at the time and place of the alleged crime. If, after considering all the evidence, you have a reasonable doubt that defendant was present, then you must find [him] [her] not guilty.

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 19.07 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions. § 53 (1988); Seventh Circuit Federal Jury Instructions: Criminal § 6.03 (1999); Ninth Cir. Crim. Jury Instr. 6.1 (1997). *See generally* West Key # "Criminal Law" 333, 358, 572, 629, 739(2), 772(6), 775(1-6), 778(8), 782(15), 814(11).

See also Committee Comments, Instruction 9.05, *supra*; Committee Notes, Seventh Circuit Instruction 4.03.

"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 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.), *cert. denied*, 454 U.S. 1127 (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

9.08 GOOD FAITH (Income Tax and Fraud Cases)

One of the issues in this case is whether defendant acted in good faith. Good faith is a complete defense to the charge of (insert charge) if it is inconsistent with (insert mental state required by statute, e.g., intent to defraud or willfully)[1] which is an essential element of the charge.

[(Insert further instruction defining good faith in terms of the particular statute and requisite mental state, incorporating the specific factors on which defendant relies, if appropriate.)][2]

Evidence that defendant acted in good faith may be considered by you, together with all the other evidence, in determining whether or not [he] [she] acted (insert mental state required by statute, e.g., with intent to defraud or willfully).

Committee Comments

See Eleventh Circuit Pattern Jury Instructions: Criminal (Special) § 16, 17 (1997); *United States v. Ammons*, 464 F.2d 414, 417 (8th Cir.), *cert. denied*, 409 U.S. 988 (1972); *United States v. Kouba*, 822 F.2d 768, 771 (8th Cir. 1987); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 40.16, 56.26 (4th ed. 1990).

See also Introductory Comment, Section 9, and Committee Comments, Instruction 9.05, *supra*.

The same principles apply to the giving of a good faith instruction as apply to theory of defense instructions in general. *United States v. Brake*, 596 F.2d 337, 339 (8th Cir. 1979), holding:

> 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), *cert. denied*, 420 U.S. 926.
>
> 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.

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, adequate instructions on intent to defraud have been held sufficient to present the issue to the jury, especially where no good faith instruction was requested. *See, e.g., United States v. Scherer*, 653 F.2d 334, 338 (8th Cir.), *cert. denied*, 454 U.S. 1034 (1981). *But see United States v. Goss*, 650 F.2d 1336, 1344-45 (5th Cir. 1981) [reversible error to refuse a requested good faith instruction in mail fraud case; instruction requiring specific intent insufficient to direct jury's attention to good faith defense.]

The general good faith instruction for mail fraud cases approved in this circuit is found in *United States v. Ammons*, 464 F.2d at 417 and reads 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 judgement 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.

See also Casperson, 773 F.2d at 223, holding: "The *Ammons* instruction they proffered has previously been approved by this court and is an acceptable statement of the applicable law." *Casperson* went on to hold that the failure to give any good faith instruction was reversible error.

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), *cert. denied*, 420 U.S. 926 (1975). Both *Ammons* and *Nance* suggest but do not require that a good faith instruction incorporate the specific factors on which the appellant relied to show he acted in good faith. 464 F.2d at 417; 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. *Nance* found a proposed instruction which was long and verbose and contained a detailed description of the purported evidence and inferences drawn therefrom by defense counsel did not meet a standard of adequacy. 502 F.2d at 619. A good faith instruction is not required where it is not supported by the evidence. *United*

States v. Sherer, 653 F.2d at 337, [defendant doctor claimed to have actually treated patient, not that bills were the result of mistake or inadvertence.]

Good faith instructions in tax cases which have been found proper include *United States v. Kouba*, 822 F.2d at 771 and *United States v. Jerde*, 841 F.2d at 822. In both of those cases the court also defined "good faith" for the jury using or paraphrasing the definition from Black's Law Dictionary 623 (5th ed. 1979). *Kouba*, 822 F.2d at 771; *Jerde*, 841 F.2d at 822. *See also* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 56.26 (4th ed. 1990). The jury may also be instructed as to what is not included in a good faith defense. *United States v. Miller*, 634 F.2d 1134 (8th Cir. 1980), *cert. denied*, 451 U.S. 942 (1981). For an example of a good faith defense based on reliance on the Fifth Amendment in a tax case, see *United States v. Reed*, 670 F.2d 622, 624 (5th Cir.), *cert. denied*, 457 U.S. 1125 (1982).

It should be noted that "good faith" is only a defense where defendant's mental state is one of the essential elements of the offense.

Notes on Use

1. *See* Committee Comments, Instructions 7.01, 702, *supra*, and appropriate essential elements instruction from Section 6, *infra*. "Mental state" as used in this instruction refers to the intent required by the statute.

2. *See United States v. Ammons*, 464 F.2d 414, 417 (8th Cir.), *cert. denied*, 409 U.S. 988 (1972). Some examples of further definitions are as follows:

a. Willfulness - preparing a false return:

> 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 preparing or presenting, or causing to be prepared or presented, a false or fraudulent return.

See United States v. Kouba, 822 F.2d 768, 771 (8th Cir. 1987).

b. Willfulness - failure to file a return:

> If a person in good faith believes that he is not required to file an income tax return, then that person cannot be guilty of willfully failing to file a return.

See United States v. Jerde, 841 F.2d 818, 822 (8th Cir. 1988). This may be followed with a further explanation:

> In this connection, it is for you to decide whether the defendant acted in good faith -- that is, whether he sincerely misunderstood the requirements of the law -- or whether the defendant knew that he was required to file a return and did not do so. Mere disagreement with the law in and of itself does not constitute good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Also, a person's belief that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the requirements of the law. Furthermore, 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.

See United States v. Miller, 634 F.2d 1134, 1135 (8th Cir. 1980), *cert. denied*, 451 U.S. 942 (1981).

c. Intent to defraud:

> One who expresses an opinion honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent even though his opinion is erroneous or his belief is mistaken; and, similarly, 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.
>
> On the other hand, an honest belief on the part of the Defendant that a particular business venture was sound and would ultimately succeed would not, in and of itself, constitute "good faith" as used in these instructions if, in carrying out that venture, the Defendant knowingly made false or fraudulent representations to others with the specific intent to deceive them.

See Eleventh Circuit Pattern Jury Instructions: Criminal (Special) § 16 (1997); 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 47.13 (4th ed. 1990). *See also United States v. Ammons*, 464 F.2d 414, 417 (8th Cir.), *cert. denied*, 409 U.S. 988 (1972); *United States v. Casperson*, 773 F.2d 216, 222-24 (8th Cir. 1985).

d. Reliance on advise of counsel:

> Advice of counsel is not a defense to the crime. It is only a circumstance that may be considered in determining whether the defendant acted in good faith and lacked (insert mental state required by statute, e.g., intent to defraud or willfulness).

Defendant would not be acting (insert mental state required by statute, e.g., with intent to defraud or willfully) if, before taking any action with regard to the alleged offense, [he] [she] consulted in good faith an attorney whom [he] [she] considered competent, [and for the purpose of securing advice on the lawfulness of [his] [her] possible future conduct] made a full and accurate report to that attorney of all material facts of which [he] [she] had the means of knowledge, and then acted strictly in accordance with the advice given to [him] [her] by that attorney.

Whether the Defendant acted in good faith for the purpose of seeking advice concerning questions about which [he] [she] was in doubt, and whether [he] [she] made a full and complete report to that attorney, and whether [he] [she] acted strictly in accordance with the advice [he] [she] received, are all questions for you to determine.

Advice of counsel does not under all circumstances confer complete immunity on a defendant. No one can intentionally and knowingly violate the law and excuse [himself] [herself] from the consequences by claiming that [he] [she] followed advice of counsel.

See United States v. Poludniak, 657 F.2d 948, 958-59 (8th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982). Eleventh Circuit Pattern Jury Instructions: Criminal (Special) § 17 (1997). *See also* 2 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 56.26 (4th ed. 1990).

To be entitled to the advice of counsel theory of defense, the defendant must have disclosed all relevant facts. *United States v. Hecht*, 705 F.2d 976 (8th Cir. 1983).

10. 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 essential element of the crime charged.[1]]][2]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 20.07 (4th ed. 1992). *See also* West Key # Criminal Law 863(1) and (2).

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), *cert. denied*, 459 U.S. 1222 (1983). "[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).

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.

Supplemental Instructions

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 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).

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.

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 essential 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]

[Please go back now to finish your deliberations in a manner consistent with your good judgment as reasonable persons.][2]

Committee Comments

See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 20.08 (4th ed. 1992); Federal Judicial Center, Pattern Jury Criminal Instructions 10 (1988); Fifth Circuit Pattern Jury Instructions: Criminal § 1.43 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 7.06 (1999); Ninth Cir. Crim. Jury Instr. 7.1 (1997). *See generally* West Key # "Criminal Law" 768(3), 865(1), 1174(1).

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, supra*, *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, supra*; *United States v. Smith, supra*.

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, supra*. 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.), *cert. denied*, 360 U.S. 929 (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).

Notes on Use

1. A more expanded version of this instruction, 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 20.01 (4th ed. 1992), 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.

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 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 20.09 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal § 7.07 (1999); Ninth Cir. Crim. Jury Instr. 7.6 (1997).

Under Rule 31(d), Fed. R. Crim. P., 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), *cert. denied*, 465 U.S. 1036 (1984). 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*.

11. 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 the 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)

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.), *cert. denied*, 338 U.S. 848 (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).

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.

11.02 GENERAL VERDICT; WITH LESSER INCLUDED OFFENSE

VERDICT

We, the jury, find the 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. _____].

_____
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 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 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 the defendant (name) _____ of the crime of (insert brief
[guilty/not guilty]

description, e.g., "bank larceny") [as charged in Count _____ of the indictment] [under Instruction No. _____].

_____
Foreperson

Verdict Forms

_____
(Date)

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.), *cert. denied*, 484 U.S. 867 (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 Fed. R. Crim. P. 7(c)(1). *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 Brothers Aircraft, Inc.*, 966 F.2d 380, 384 (8th Cir. 1992), *cert. denied*, 506 U.S. 1049 (1993) (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).

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).

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 defendant "guilty," you must answer the following: [1]

Which of the following firearms do you find were used by 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 defendant used.)

_____
Foreperson

_____
(Date)

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 *United States v. Newman*, 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) (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 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 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 rehearing*, 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.] . . .

Verdict Forms

> 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.]

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 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).