Chapter 3.00

CONSPIRACY

Table of Instructions

3.01A CONSPIRACY TO COMMIT AN OFFENSE--BASIC ELEMENTS

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

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

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

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

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

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

Use Note

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

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

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

Committee Commentary 3.01A
(current through December 31, 2007)

The Committee made no change in the instruction.

As the 1991 Commentary states, some statutes contain their own separate conspiracy provisions that do not require an overt act. *See, e.g.,* Salinas v. United States, 522 U.S. 52 (1997)(RICO conspiracy under 18 U.S.C. § 1962(d) does not require an overt act); United States v. Shabani, 513 U.S. 10 (1994)(controlled substances conspiracy under 21 U.S.C. § 846 does not require an overt act); United States v. Hayter Oil Co., 51 F.3d 1265 (6th Cir. 1995)(antitrust conspiracy to fix prices under § 1 of the Sherman Act, 15 U.S.C. § 1, does not require an overt act). In such cases, paragraph (2)(C) should be deleted, along with all references in other

instructions to the subject of overt acts.

1991 Edition

The Supreme Court has long recognized that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." E.g., Pinkerton v. United States, 328 U.S. 640, 643, 66 S.Ct. 1180, 1181, 90 L.Ed. 1489 (1946). As stated by the Sixth Circuit in United States v. Van Hee, 531 F.2d 352, 357 (6th Cir.1976), "a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy." An equally well-settled corollary is that to convict a defendant of conspiracy does not require proof that the object of the conspiracy was achieved. E.g., United States v. Fruehauf Corp., 577 F.2d 1038, 1071 (6th Cir.), cert. denied, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978). "The gist of the crime of conspiracy is the agreement to commit an illegal act, not the accomplishment of the illegal act." Id.

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

Some federal statutes contain their own separate conspiracy provision that does not require the commission of an overt act. See, e.g., 21 U.S.C. s 846. In such cases paragraph (2)(C) should be deleted, along with all references in other instructions to the subject of overt acts. See, e.g., United States v. Schultz, 855 F.2d 1217, 1222 (6th Cir.1988) ("conviction of conspiracy under 21 U.S.C. section 846 does not require proof of an overt act"). See also United States v. Nelson, 922 F.2d 311, 317-318 (6th Cir.1990) (No instruction on overt acts is necessary even if the indictment lists overt acts committed in furtherance of the conspiracy).

Generally speaking, the government need not prove any special mens rea beyond the degree of criminal intent required for the object offense in order to convict a defendant of conspiracy. United States v. Feola, 420 U.S. 671, 686-696, 95 S.Ct. 1255, 1264-1270, 43 L.Ed.2d 541 (1975). See also Committee Commentary 3.05 (no instruction on bad purpose or corrupt motive recommended). Instruction 3.03, which requires the government to prove that the defendant knew the conspiracy's main purpose, and voluntarily joined it "intending to help advance or achieve its goals," should suffice in most cases, particularly where the object offense is also charged and defined elsewhere in the instructions.

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

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

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

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

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

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

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

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

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

Use Note

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

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

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

Committee Commentary 3.01B

(current through December 31, 2007)

The Committee made no change in the instruction.

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

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

1991 Edition

The general federal conspiracy statute, 18 U.S.C. § 371, prohibits two distinct types of conspiracies. The first is any conspiracy to "commit any offense" against the United States. The second is any conspiracy to "defraud the United States or any agency thereof." See generally United States v. Levinson, 405 F.2d 971, 977 (6th Cir.1968), cert. denied, 395 U.S. 958, 89 S.Ct. 2097, 23 L.Ed.2d 744 (1969). This instruction is designed for use in connection with indictments charging a conspiracy to defraud the United States. It should be followed by Instructions 3.02 through 3.04, plus those of instructions 3.05 through 3.14 as are appropriate given the facts of the particular case. Appropriate "to defraud the United States" language should be substituted in Instructions 3.02 through 3.14 in place of the "to commit the crime of" language that appears in those instructions.

Bracketed paragraph (4) should be included when there is evidence that the defendants intended to accomplish the fraud by going through or manipulating a third party. In Tanner v. United States, 483 U.S. 107, 129- 132, 107 S.Ct. 2739, 2752-2754, 97 L.Ed.2d 90 (1987), the Supreme Court accepted the government's argument that a conspiracy to defraud the United States under s 371 may be committed indirectly by the use of third parties. "The fact that a false claim passes through the hands of a third party on its way ... to the United States" does not relieve the defendants of criminal liability. Id. at 129, 107 S.Ct. at 2752. The Supreme Court remanded in Tanner for consideration of whether the evidence supported the government's theory that the defendants conspired to manipulate a third party in order to cause that third party to make misrepresentations to a federal agency. Id. at 132, 107 S.Ct. at 2754. See also United States v. Gibson, 881 F.2d 318, 321 (6th Cir.1989) ("a conspiracy (to defraud) could be directed at the

United States as a target and yet be effected through a third party such as a private business").

In prosecutions under the conspiracy to defraud clause of 18 U.S.C. s 371, the United States must be the target of the conspiracy. Tanner v. United States, supra, 483 U.S. at 128-132, 107 S.Ct. at 2751-2754. Accord United States v. Minarik, 875 F.2d 1186, 1191 (6th Cir.1989). In prosecutions brought under the conspiracy to commit an offense clause of s 371, the United States need not be the target. United States v. Gibson, supra, 881 F.2d at 321.

The term "defraud" has a broader meaning than simply cheating the government out of property or money. United States v. Minarik, supra, 875 F.2d at 1190. It includes "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government," Tanner v. United States, supra, 483 U.S. at 128, 107 S.Ct. at 2751, by "deceit, craft, or trickery, or at least by means that are dishonest." Minarik, supra at 1190- 1191, quoting Hammerschmidt v. United States, 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924). See also United States v. Shermetaro, 625 F.2d 104, 109 (6th Cir.1980); United States v. Levinson, supra, 405 F.2d at 977.

3.02 AGREEMENT

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

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

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

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

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

Use Note

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

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

Committee Commentary 3.02
(current through December 31, 2007)

The Committee made no change in the instruction.

The Sixth Circuit continues to recognize that the agreement required for conspiracy need not be a formal agreement; rather, a tacit agreement or mutual understanding is sufficient. United States v. Maliszewski, 161 F.3d 992, 1006 (6th Cir. 1998), *quoting* United States v. Lloyd, 10 F.3d 1197, 1210 (6th Cir. 1993). *See also* United States v. Ledezma, 26 F.3d 636, 640 (6th Cir. 1994), *citing* United States v. Pearce, 912 F.2d 159, 161 (6th Cir. 1990)(a tacit or *material* understanding

is sufficient)(emphasis added).

A defendant cannot be convicted of conspiracy merely because she associated with members of the conspiracy. United States v. Ledezma, *supra*, *citing* United States v. Lee, 991 F.2d 343, 348 (6th Cir. 1993).

In United States v. Watkins, 1994 WL 464193, 1994 U.S. App. LEXIS 23886 (6th Cir. 1994)(unpublished), a panel of the court quoted the third sentence of paragraph (2) of the instruction with approval. In that case, the district court gave the pattern instruction, and a panel of the Sixth Circuit found no error in the district court's refusal to give a supplemental instruction stating that mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient. The panel described the pattern instruction as "thorough and adequate." United States v. Watkins, *supra*, 1994 WL at 3, 1994 LEXIS at 7, *quoting* the third sentence of paragraph (2).

Bracketed paragraph (5) applies to cases where a single conspiracy count includes multiple objects. Recent Supreme Court cases on unanimity and multiple means of committing a single crime are discussed in detail in the 2005 Committee Commentary to Instructions 8.03A and 8.03B.

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

On the question of whether a general verdict of guilty on a multi-object conspiracy count can stand when one of the objects is disqualified as a basis for the conviction, see Griffin v. United States, 502 U.S. 46 (1991). In *Griffin*, the Court held that the validity of the general verdict depends on the reason that one of the objects was disqualified. If the object was disqualified as unconstitutional or not legally sufficient (for example, due to a statute of limitations), the verdict had to be set aside. *Griffin*, 502 U.S. at 52-56, *citing inter alia* Yates v. United States, 354 U.S. 298 (1957); Stromberg v. California, 283 U.S. 359 (1931); Williams v. North Carolina, 317 U.S. 287 (1942); and Bachellar v. Maryland, 397 U.S. 564 (1970). On the other hand, if one of the objects in a multi-object conspiracy count was disqualified not because it

was held unconstitutional or illegal but merely because it was supported by insufficient evidence, the verdict can stand (assuming the evidence is sufficient for any one of the objects charged). *Griffin*, 502 U.S. at 56. The Court distinguished between objects disqualified by legal error (a mistake about the law) which require the verdict to be set aside, and objects disqualified by insufficiency of proof (a mistake concerning the weight or factual import of the evidence) which allow the verdict to stand. *Id.* at 56-59.

1991 Edition

18 U.S.C. § 371 states that "two or more persons" must conspire in order to establish a conspiracy. This statute has been consistently interpreted to require proof of an agreement between the defendant and at least one other person as "an absolute prerequisite" to a conspiracy conviction. E.g., United States v. Bouquett, 820 F.2d 165, 168 (6th Cir.1987). Accord United States v. Phillips, 630 F.2d 1138, 1146-1147 (6th Cir.1980); United States v. Sandy, 605 F.2d 210, 215 (6th Cir.), cert. denied, 444 U.S. 984, 100 S.Ct. 490, 62 L.Ed.2d 412 (1979); United States v. Williams, 503 F.2d 50, 54 (6th Cir.1974). It is "clear that the crime of conspiracy cannot be committed by an individual acting alone since, by definition, conspiracy is a group offense." United States v. Sachs, 801 F.2d 839, 845 (6th Cir.1986). See also United States v. Bostic, 480 F.2d 965, 968 (6th Cir.1973) ("There must be at least two participants in a conspiracy ... (o)ne man cannot conspire with himself.").

Sixth Circuit decisions have repeatedly defined the nature of the agreement that the government must prove as "an agreement between two or more persons to act together in committing an offense." E.g., United States v. Reifsteck, 841 F.2d 701, 704 (6th Cir.1988); United States v. Butler, 618 F.2d 411, 414 (6th Cir.), cert. denied, 447 U.S. 927, 100 S.Ct. 3024, 65 L.Ed.2d 1121 (1980); United States v. Richardson, 596 F.2d 157, 162 (6th Cir.1979); United States v. Williams, 503 F.2d 50, 54 (6th Cir.1974). See also United States v. Bostic, supra, 480 F.2d at 968 ("(a)n agreement or understanding between two or more of the defendants whereby they become definitely committed to cooperate for the accomplishment of the (criminal) object").

Because conspirators "do not usually make oral or written agreements of their illegal plans with exactitude," United States v. Duff, 332 F.2d 702, 705 (6th Cir.1964), it is well-established that the government does not have to prove that there was any formal written or spoken agreement. Id. Accord United States v. Frost, 914 F.2d 756, 762 (6th Cir.1990); Blue v. United States, 138 F.2d 351, 360 (6th Cir.1943), cert. denied, 322 U.S. 736, 64 S.Ct. 1046, 88 L.Ed. 1570 (1944). Nor must the government prove that there was agreement on all the details of how the crime would be carried out. E.g., United States v. Schultz, 855 F.2d 1217, 1221 (6th Cir.1988).

Pattern instructions from other circuits commonly include language that mere association, discussion of common interests or similar conduct does not necessarily prove, or is not enough, standing alone, to prove a criminal agreement. See Fifth Circuit Instruction 2.21, Eighth Circuit Instruction 5.06B, Ninth Circuit Instruction 8.05A and Eleventh Circuit Offense Instruction 4.1. See also United States v. Davenport, 808 F.2d 1212, 1218 (6th Cir.1987) (quoting instructions that "mere association ..., similarity of conduct ..., assembl(y) ... and discuss(ion) (of) common aims" does not necessarily establish the existence of a conspiracy).

What the government must prove "is that the members in some way or manner ... positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan." United States v. Duff, supra, 332 F.2d at 706. A "tacit or mutual understanding" among the parties will suffice. E.g., United States v. Pearce, 912 F.2d 159, 161 (6th Cir.1990); United States v. Hughes, 891 F.2d 597, 601 (6th Cir.1989); United States v. Ellzey, 874 F.2d 324, 328 (6th Cir.1989); United States v. Bavers, 787 F.2d 1022, 1026 (6th Cir.1985).

It is well-established that the government does not have to present direct evidence of an agreement. E.g., United States v. Thompson, 533 F.2d 1006, 1009 (6th Cir.), cert. denied, 429 U.S. 939, 97 S.Ct. 353, 50 L.Ed.2d 308 (1976); United States v. Levinson, 405 F.2d 971, 985-986 (6th Cir.1968), cert. denied, 395 U.S. 958, 89 S.Ct. 2097, 23 L.Ed.2d 744 (1969); Windsor v. United States, 286 Fed. 51, 53 (6th Cir.), cert. denied, 262 U.S. 748, 43 S.Ct. 523, 67 L.Ed. 1212 (1923). The rationale for this rule is that "(s)ecrecy and concealment are essential features of (any) successful conspiracy," United States v. Webb, 359 F.2d 558, 563 (6th Cir.), cert. denied, 385 U.S. 824, 87 S.Ct. 55, 17 L.Ed.2d 61 (1966), so that "it is a rare case in which (direct) evidence may be found." United States v. Richardson, supra, 596 F.2d at 162. Accord United States v. Miller, 358 F.2d 696, 697 (6th Cir.1966). An agreement "may be inferred from circumstantial evidence that can reasonably be interpreted as participation in a common plan," United States v. Ellzey, supra, 874 F.2d at 328; United States v. Reifsteck, supra, 841 F.2d at 704; United States v. Bavers, supra, 787 F.2d at 1026, or "from acts done with a common purpose." United States v. Frost, 914 F.2d 756, 762 (6th Cir.1990); United States v. Ayotte, 741 F.2d 865, 867 (6th Cir.), cert. denied, 469 U.S. 1076, 105 S.Ct. 574, 83 L.Ed.2d 514 (1984).

Bracketed paragraph (5) should be included when the indictment alleges multiple object offenses. A single conspiracy may involve multiple object offenses. Braverman v. United States, 317 U.S. 49, 52-54, 63 S.Ct. 99, 101- 102, 87 L.Ed. 23 (1942). But proof that the defendants conspired to commit only one offense is sufficient to convict. See 18 U.S.C. s 371 (prohibiting two or more persons from conspiring to commit "any" offense).

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

Of the circuits that have drafted pattern instructions, only the Eighth and Eleventh Circuits explicitly require the jury to reach unanimous agreement on the same object offense. See Eighth Circuit Instruction 5.06F and Eleventh Circuit Offense Instruction 4.2. Both circuits rely on United States v. Ballard, 663 F.2d 534, 544 (5th Cir.1981), as authority for the proposition that

such an instruction is required.

Related to this is the problem posed by cases where the jury is instructed on multiple object offenses, and returns a general verdict of guilty, but there was insufficient evidence to support one of the object offenses. See Yates v. United States, 354 U.S. 298, 311-312, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957) (a general verdict of guilty on a multi-object count must be set aside when the verdict is "supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"). See also United States v. Beverly, 913 F.2d 337 (7th Cir.1990), cert. granted sub nom. Griffin v. United States, ___ U.S. ___, 111 S.Ct. 951, 112 L.Ed.2d 1039 (1991) (No. 90- 6352) (same issue).

In United States v. Schultz, supra, 855 F.2d at 1221, the Sixth Circuit approvingly cited the First Circuit's decision in United States v. Anello, 765 F.2d 253, 262-263 (1st Cir.), cert. denied, 474 U.S. 996, 106 S.Ct. 411, 88 L.Ed.2d 361 (1985), for the proposition that a conditional agreement to purchase controlled substances if the quality is adequate is sufficient to support a conspiracy conviction. The Sixth Circuit then went on to hold that a failure to complete the substantive object offense as a result of disagreements among the conspirators over the details of performance did not preclude the existence of a conspiratorial agreement.

In United States v. S & Vee Cartage Company, Inc., 704 F.2d 914, 920 (6th Cir.), cert. denied, 464 U.S. 935, 104 S.Ct. 343, 78 L.Ed.2d 310 (1983), a corporate defendant and two of its officers were convicted of making and conspiring to make false pension and welfare fund statements, in violation of 18 U.S.C. s 1027 and 18 U.S.C. s 371. On appeal, the three defendants argued that their conspiracy convictions should be reversed on the theory that a criminal conspiracy cannot exist between a corporation and its officers acting as agents of the corporation. The Sixth Circuit rejected this argument, and held that in criminal cases a corporation may be convicted of conspiring with its officers. In doing so, the Sixth Circuit rejected agency principles that treat the acts of corporate officers as the acts of the corporation as a single legal entity. Accord United States v. Ames Sintering Co., 927 F.2d 232 (6th Cir.1990); United States v. Mahar, 801 F.2d 1477, 1488 (6th Cir.1986).

It is settled that "proof of an agreement between a defendant and a government agent or informer will not support a conspiracy conviction." United States v. Pennell, 737 F.2d 521, 536 (6th Cir.1984), cert. denied, 469 U.S. 1158, 105 S.Ct. 906, 83 L.Ed.2d 921 (1985). Where important given the facts of the particular case, specific instructions on this point may be required. United States v. Nunez, 889 F.2d 1564, 1568-1570 (6th Cir.1989).

Wharton's Rule, which may require proof that more than two persons conspired together, only applies to federal crimes that by definition require voluntary concerted criminal activity by a plurality of agents. See Iannelli v. United States, 420 U.S. 770, 777-786, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975). And it does not apply at all if there is legislative intent to the contrary. Id. See also United States v. Finazzo, 704 F.2d 300, 305-306 (6th Cir.), cert. denied, 463 U.S. 1210, 103 S.Ct. 3543, 77 L.Ed.2d 1392 (1983).

3.03 DEFENDANT'S CONNECTION TO THE CONSPIRACY

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

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

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

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

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

Use Note

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

Committee Commentary 3.03

(current through December 31, 2007)

The Committee made no change in the instruction.

A panel of the Sixth Circuit has endorsed paragraph (2) of this instruction as an accurate statement of the law. In United States v. Gray, 1992 WL 56997, 1992 U.S. App. LEXIS 5619 (6th Cir. 1992)(unpublished), the district court gave an instruction on conspiracy under 21 U.S.C. § 846 with language almost identical to that in paragraph (2). The panel stated, "The instruction accurately stated the law (*citing* United States v. Betancourt, 838 F.2d 168 (6th Cir. 1988)). The language complained of is identical to that contained in this circuit's model jury instructions. ... We find that the instruction, considered in its entirety, did not likely mislead the jury regarding the burden of proof required." *Gray*, 1992 WL 56997 at 11, 1992 LEXIS at 33 (6th Cir. 1992).

Regarding the accuracy of paragraph (2), *see also* United States v. Ross, 190 F.3d 446 (6th Cir. 1999). In *Ross*, the court stated that, "The government need not show that a defendant participated in all aspects of the conspiracy; it need only prove that the defendant was a party to the general conspiratorial agreement. Although the connection between the defendant and the conspiracy need only be slight, an agreement must be shown beyond a reasonable doubt." *Id.* at 450, *citing* United States v. Avery, 128 F.3d 966, 971 (6th Cir. 1997).

A panel of the Sixth Circuit has also endorsed paragraph (3) of this instruction. In United States v. Chubb, 1993 WL 131922 (6th Cir. 1993)(unpublished), a defendant asked the trial court to instruct that "mere association" with the conspiracy was not enough to convict under 21 U.S.C. § 846, and the court failed to include this proffered instruction. A panel of the Sixth Circuit stated that the proffered instruction was a correct statement of the law and noted that it was similar to Pattern Instruction 3.03(3). The panel stated that the pattern instructions are not binding on district courts but are only a guide. *Chubb*, 1993 WL 131922 at 6 n.5. The panel concluded that failure to give the proffered instruction was not reversible error in this case based on the other instructions given and the defendant's theory of defense.

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

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

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

1991 Edition

In order to establish a defendant's connection to a conspiracy, the government must prove that he "knew of the conspiracy, and that he knowingly and voluntarily joined it." United States v. Christian, 786 F.2d 203, 211 (6th Cir.1986). Accord United States v. Bibby, 752 F.2d 1116, 1124 (6th Cir.1985) ("An essential part of any conspiracy conviction is a showing that a particular defendant knew of and adopted the conspiracy's main objective."), cert. denied, 475 U.S. 1010, 106 S.Ct. 1183, 89 L.Ed.2d 300 (1986). See also United States v. Hamilton, 689 F.2d 1262, 1275 (6th Cir.1982) ("the evidence here plainly shows that (the defendant) knew of the conspiracy and voluntarily became a participant in it"), cert. denied, 459 U.S. 1117, 103 S.Ct. 753, 74 L.Ed.2d 971 (1983); United States v. Mayes, 512 F.2d 637, 647 (6th Cir.) (defendant must join "with knowledge of the conspiracy and its purpose"), cert. denied, 422 U.S. 1008, 95 S.Ct. 2629, 45

L.Ed.2d 670 (1975); United States v. Levinson, 405 F.2d 971, 985 (6th Cir.1968) (defendant must "know of the conspiracy, associate himself with it and knowingly contribute his efforts in its furtherance"), cert. denied, 395 U.S. 958, 89 S.Ct. 2097, 23 L.Ed.2d 744 (1969).

To convict a defendant of conspiracy, "two different types of intent are generally required--the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy." United States v. United States Gypsum Co., 438 U.S. 422, 443 n. 20, 98 S.Ct. 2864, 2877 n. 20, 57 L.Ed.2d 854 (1978).

It is not uncommon for conspiracy instructions to require proof that the defendant "willfully" joined the conspiracy. See for example United States v. Davenport, 808 F.2d 1212, 1218 (6th Cir.1987); United States v. Piccolo, 723 F.2d 1234, 1240 (6th Cir.1983), cert. denied, 466 U.S. 970, 104 S.Ct. 2342, 80 L.Ed.2d 817 (1984). To the extent that the term "willfully" connotes some extra mental state beyond that required for conviction of the substantive offense that is the object of the conspiracy, it is inconsistent with the Supreme Court's decision in United States v. Feola, 420 U.S. 671, 686-696, 95 S.Ct. 1255, 1264-1270, 43 L.Ed.2d 541 (1975) (generally speaking, the government need not prove anything more than the degree of criminal intent necessary for the substantive offense in order to convict a defendant of conspiracy). To avoid confusion, the Committee has substituted the word "voluntarily" for "willfully."

Although the government must prove that the defendant knew the conspiracy's main purpose, "(s)ecrecy and concealment are essential features of (a) successful conspiracy ... (and) (h)ence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details." United States v. Miller, 358 F.2d 696, 697 (6th Cir.1966), quoting Blumenthal v. United States, 332 U.S. 539, 557, 68 S.Ct. 248, 256, 92 L.Ed. 154 (1947). The defendant "must know the purpose of the conspiracy, but not necessarily the full scope thereof, the detailed plans, operation, membership, or even the purpose of the other members of the conspiracy." United States v. Warner, 690 F.2d 545, 550 (6th Cir.1982), quoting United States v. Shermetaro, 625 F.2d 104, 108 (6th Cir.1980). See also United States v. Chambers, 382 F.2d 910, 913 (6th Cir.1967) ("A person may be guilty of conspiracy even though he has limited knowledge as to the scope of the conspiracy and no knowledge of details of the plan or operation in furtherance thereof or of the membership in the conspiracy or of the part played by each member and the division of the spoils.").

Related to this, it is not necessary that a defendant be a member of the conspiracy from the very beginning. E.g., United States v. Stephens, 492 F.2d 1367, 1373 (6th Cir.), cert. denied, 419 U.S. 852, 95 S.Ct. 93, 42 L.Ed.2d 83 (1974).

Knowledge of the existence of a conspiracy cannot be avoided by closing one's eyes "to what (is) going on about him." United States v. Smith, 561 F.2d 8, 13 (6th Cir.), cert. denied, 434 U.S. 958, 98 S.Ct. 487, 54 L.Ed.2d 317 (1977). In such cases, a deliberate ignorance instruction may be appropriate. See Instruction 2.09.

A defendant's knowledge of a conspiracy need not be proved by direct evidence. Circumstantial evidence will suffice. E.g., United States v. Christian, supra, 786 F.2d at 211;

United States v. Richardson, 596 F.2d 157, 162 (6th Cir.1979); United States v. Levinson, supra, 405 F.2d at 985. See also United States v. Martin, 920 F.2d 345, 348 (6th Cir.1990) (knowledge inferred from various circumstances).

In cases involving alleged co-conspirators who were merely purchasers of stolen goods or contraband, or suppliers of goods or other items used to commit a crime, additional instructions may be appropriate. See United States v. Meyers, 646 F.2d 1142, 1145 (6th Cir.1981); United States v. Grunsfeld, 558 F.2d 1231, 1235-1237 (6th Cir.), cert. denied, 424 U.S. 872, 98 S.Ct. 219, 54 L.Ed.2d 152 (1977); United States v. Mayes, 512 F.2d 637, 646- 648 (6th Cir.), cert. denied, 422 U.S. 1008, 95 S.Ct. 2629, 45 L.Ed.2d 670 (1975); United States v. Bostic, 480 F.2d 965, 968-969 (6th Cir.1973).

A defendant's connection to a conspiracy "need only be slight, if there is sufficient evidence to establish that connection beyond a reasonable doubt." United States v. Christian, supra, 786 F.2d at 211. "All with criminal intent who join themselves even slightly to the principal scheme are subject to the (conspiracy) statute...." Blue v. United States, 138 F.2d 351, 359 (6th Cir.1943), cert. denied, 322 U.S. 736, 64 S.Ct. 1046, 88 L.Ed. 1570 (1944). See also United States v. Scartz, 838 F.2d 876, 880 (6th Cir.) (nature and extent of a member's involvement need only be slight), cert. denied, 488 U.S. 923, 109 S.Ct. 303, 102 L.Ed.2d 322 (1988).

Sixth Circuit decisions have repeatedly held that mere presence, association, knowledge, approval or acquiescence is not sufficient to convict a defendant of conspiracy. See, e.g., United States v. Pearce, 912 F.2d 159, 162 (6th Cir.1990) ("mere association with conspirators is not enough to establish participation in a conspiracy"); United States v. Christian, supra, 786 F.2d at 211 ("(m)ere presence at the crime scene is insufficient"); United States v. Richardson, supra, 596 F.2d at 162 ("(m)ere knowledge, approval of or acquiescence in the object or purpose of the conspiracy ... is not sufficient"); United States v. Webb, 359 F.2d 558, 562 (6th Cir.) ("neither association with conspirators nor knowledge that something illegal is going on by themselves constitute proofs of participation in a conspiracy"), cert. denied, 385 U.S. 824, 87 S.Ct. 55, 17 L.Ed.2d 61 (1966). Sixth Circuit cases have also indicated that mere assistance is insufficient. See the instructions quoted in United States v. Davenport, supra, 808 F.2d at 1218. See also Fifth Circuit Instruction 2.21 ("a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of the conspiracy, does not thereby become a conspirator").

Although these things are not enough, standing alone, to convict a defendant of conspiracy, Sixth Circuit decisions indicate that they are factors that the jury may properly consider. See United States v. Christian, supra, 786 F.2d at 211 ("Although mere presence alone is insufficient to support a guilty verdict, presence is a material and probative factor which the jury may consider in reaching its decision.").

What the government must prove to convict has been variously described. In United States v. Richardson, supra, 596 F.2d at 162, the Sixth Circuit said that there must be proof of "an intention and agreement to cooperate in the crime." Accord United States v. Williams, 503 F.2d 50, 54 (6th Cir.1974). In United States v. Webb, supra, 359 F.2d at 562, the Sixth Circuit said

that there must be proof of the defendant's "agreement to or participation in a plan to violate the law." And in United States v. Bostic, supra, 480 F.2d at 968, the Sixth Circuit said that there must be "intentional participation in the transaction with a view to the furtherance of the common design and purpose."

3.04 OVERT ACTS

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

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

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

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

Use Note

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

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

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

Committee Commentary 3.04

(current through December 31, 2007)

The Committee made no change in the instruction.

As the 1991 Commentary states, an overt act is an essential element of the general federal conspiracy statute, 18 U.S.C. § 371. As the Commentary further states, other conspiracy statutes do not require an overt act. *See* United States v. Whitfield, 543 U.S. 209 (2005)(money laundering conspiracy under 18 U.S.C. § 1956(h)); Salinas v. United States, 522 U.S. 52 (1997)(RICO conspiracy under 18 U.S.C. § 1962(d)); United States v. Shabani, 513 U.S. 10 (1994)(controlled substances conspiracy under 21 U.S.C. § 846); United States v. Hayter Oil Co., 51 F.3d 1265 (6th Cir. 1995)(antitrust conspiracy to fix prices under § 1 of the Sherman Act, 15 U.S.C. § 1).

Paragraph (3) of this instruction was quoted with approval in United States v. Rashid, 274 F.3d 407, 415 (6th Cir. 2001)(rejecting an instruction that required the defendant to commit an overt act).

Among the sets of pattern instructions, only the Eighth and Ninth Circuits explicitly require the jury to reach unanimous agreement on a specific overt act. See Eighth Circuit Instruction 5.06D Conspiracy: "Overt Act"–Explained (2003 ed.); Ninth Circuit Instruction 8.16 Conspiracy–Elements (2003 ed.). *Cf.* 2005 Committee Commentary to Instructions 8.03B and 8.03C.

1991 Edition

Proof of an overt act is an essential element of any conspiracy prosecution brought under 18 U.S.C. § 371. E.g., United States v. Reifsteck, 841 F.2d 701, 704 (6th Cir.1988); United States v. Williams, 503 F.2d 50, 54 (6th Cir.1974). For a general explanation of the overt act requirement, see Sandroff v. United States, 174 F.2d 1014, 1018-1019 (6th Cir.1949), cert. denied, 338 U.S. 947, 70 S.Ct. 485, 94 L.Ed. 584 (1950). The language of the proposed instruction is modeled after language used in Federal Judicial Center Instruction 62.

Some federal statutes contain their own separate conspiracy provision that does not require the commission of an overt act. See for example 21 U.S.C. § 846. In such cases this instruction should be omitted. See, e.g., United States v. Schultz, 855 F.2d 1217, 1222 (6th Cir.1988) ("conviction of conspiracy under 21 U.S.C. section 846 does not require proof of an overt act"). See also United States v. Nelson, 922 F.2d 311, 317-318 (6th Cir.1990) (No instruction on overt acts is necessary even if the indictment lists overt acts committed in furtherance of the conspiracy).

The government is only required to prove one overt act committed in furtherance of the conspiracy in order to convict. See United States v. Nowak, 448 F.2d 134, 140 (6th Cir.1971) (approving instruction requiring that "at least one overt act as set forth in the indictment was committed"), cert. denied, 404 U.S. 1039, 92 S.Ct. 714, 30 L.Ed.2d 731 (1972); Sandroff v. United States, supra, 174 F.2d at 1018-1019 (approving instruction that "there need be but one overt act" established); Wilkes v. United States, 291 Fed. 988, 995 (6th Cir.1923) ("(I)t was not necessary to conviction to prove that more than one of the overt acts charged in the indictment had been committed"), cert. denied, 263 U.S. 719, 44 S.Ct. 181, 68 L.Ed. 523 (1924).

"(I)t (is) not necessary that any overt act charged in a conspiracy indictment constitute in and of itself a separate criminal offense." United States v. Cooper, 577 F.2d 1079, 1085 (6th Cir.), cert. denied, 439 U.S. 868, 99 S.Ct. 196, 58 L.Ed.2d 179 (1978). See also Sandroff v. United States, supra, 174 F.2d at 1018 ("An overt act ... need not necessarily be a criminal act, nor a crime that is the object of the conspiracy, but ... (it) must be done in furtherance of the object of the agreement."); United States v. Reifsteck, supra, 841 F.2d at 704 ("(E)ach overt act taken to effect the illegal purpose of the conspiracy need not be illegal in itself."). Acts which, when viewed in isolation, are in themselves legal, "lose that character when they become constituent elements of an unlawful scheme." United States v. Van Hee, 531 F.2d 352, 357 (6th Cir.1976).

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

Of the circuits that have drafted pattern instructions, only the Eighth and Ninth Circuits explicitly require the jury to reach unanimous agreement on the same overt act. See Eighth Circuit Instruction 5.06D and Ninth Circuit Instruction 8.05A.

Bracketed paragraph (4) should be included when compliance with the statute of limitations is an issue. The statute of limitations for prosecutions initiated under 18 U.S.C. s 371 is five years from the date of the commission of the last overt act in furtherance of the conspiracy. Fiswick v. United States, 329 U.S. 211, 216, 67 S.Ct. 224, 227, 91 L.Ed. 196 (1946); United States v. Zalman, 870 F.2d 1047, 1057 (6th Cir.1989). Other circuits have held, or indicated, that overt acts not alleged in the indictment can be used to prove that a conspiracy continued into the statute of limitations period, as long as fair notice principles are satisfied. See, e.g., United States v. Read, 658 F.2d 1225, 1239 (7th Cir.1981); United States v. Lewis, 759 F.2d 1316, 1344 (8th Cir.), cert. denied, 474 U.S. 994, 106 S.Ct. 406, 88 L.Ed.2d 357 (1985); United States v. Elliott, 571 F.2d 880, 911 (5th Cir.1978). The proposed instruction is based on the Seventh Circuit's decision in United States v. Nowak, 448 F.2d 134, 140 (7th Cir.1971) (instruction that "one or more of the overt acts occurred after February 6, 1964" was a sufficient instruction on the statute of limitations defense), cert. denied, 404 U.S. 1039, 92 S.Ct. 714, 30 L.Ed.2d 731 (1972).

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

3.05 BAD PURPOSE OR CORRUPT MOTIVE

(No Instruction Recommended)

Committee Commentary 3.05
(current through December 31, 2007)

The Committee made no change in its approach, and continues to recommend that no instruction on bad purpose or corrupt motive be given. The Committee also concluded that no change in or addition to the 1991 Commentary is warranted.

1991 Edition

In United States v. Feola, 420 U.S. 671, 686-696, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975), the Supreme Court held that generally speaking, the government need not prove anything more than the degree of criminal intent necessary for the substantive offense in order to convict a defendant of conspiracy. The Court noted in passing that requiring some additional degree of criminal intent beyond that required for the substantive offense would come close to embracing the severely criticized "corrupt motive" doctrine, which in some states requires proof of a motive to do wrong to convict a defendant of conspiracy.

Based on Feola, the Committee recommends that no instruction be given regarding any bad purpose or corrupt motive beyond the degree of criminal intent required for the substantive offense. See generally United States v. Prince, 529 F.2d 1108, 1111-1112 (6th Cir.), cert. denied, 429 U.S. 838, 97 S.Ct. 108, 50 L.Ed.2d 105 (1976).

3.06 UNINDICTED, UNNAMED OR SEPARATELY TRIED CO-CONSPIRATORS

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

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

Use Note

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

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

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

Committee Commentary 3.06
(current through December 31, 2007)

The Committee made no change in the instruction.

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

1991 Edition

It is "immaterial" that all members of a conspiracy are not charged in an indictment. United States v. Sandy, 605 F.2d 210, 216 (6th Cir.), cert. denied, 444 U.S. 984, 100 S.Ct. 490, 62 L.Ed.2d 412 (1979). "It is not necessary, to sustain a conviction for a conspiracy, that all co-conspirators be charged." United States v. Sachs, 801 F.2d 839, 845 (6th Cir.1986).

It is also well-settled that "a valid indictment may charge a defendant with conspiring with persons whose names are unknown." E.g., United States v. Piccolo, 723 F.2d 1234, 1239 (6th Cir.1983), cert. denied, 466 U.S. 970, 104 S.Ct. 2342, 80 L.Ed.2d 817 (1984). See also United States v. English, 925 F.2d 154, 159 (6th Cir.1991) (Absent a specific showing of surprise or prejudice, there is no requirement that an indictment or a bill of particulars identify the

supervisees necessary for a continuing criminal enterprise conviction). A defendant "may be indicted and convicted despite the names of his co-conspirators remaining unknown, as long as the government presents evidence to establish an agreement between two or more persons." United States v. Rey, 923 F.2d 1217, 1222 (6th Cir.1991).

3.07 VENUE

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

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

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

Use Note

This instruction should be used when venue is an issue.

Committee Commentary 3.07
(current through December 31, 2007)

The Committee made no change in the instruction.

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

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

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

1991 Edition

A conspiracy prosecution may be brought in the district where the agreement was made, or in any district where an overt act in furtherance of the conspiracy was committed. E.g., United States v. Miller, 358 F.2d 696, 697 (6th Cir.1966); Sandroff v. United States, 174 F.2d 1014, 1018-1019 (6th Cir.1949), cert. denied, 338 U.S. 947, 70 S.Ct. 485, 94 L.Ed. 584 (1950). Unlike true elements, venue is merely a fact that only needs to be proved by a preponderance of the evidence. United States v. Charlton, 372 F.2d 663, 665 (6th Cir.), cert. denied, 387 U.S. 936, 87

S.Ct. 2062, 18 L.Ed.2d 999 (1967). And any objection to venue may be waived if not raised in the district court. United States v. English, 925 F.2d 154, 158 (6th Cir.1991).

3.08 MULTIPLE CONSPIRACIES--MATERIAL VARIANCE FROM THE INDICTMENT

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

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

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

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

Use Note

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

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

Committee Commentary 3.08

(current through December 31, 2007)

The Committee made no change in the instruction.

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

The Sixth Circuit has stated that Instruction 3.08 "should [be] given" when "there [is] evidence of multiple conspiracies and a possible variance...." United States v. Maliszewski, 161 F.3d 992, 1014 (6th Cir. 1998). *See also* United States v. Sanchez, 928 F.2d 1450, 1456 (6th Cir. 1991). The court has also reiterated that the question of whether the evidence shows a single

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

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

1991 Edition

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, 55 S.Ct. 629, 630-631, 79 L.Ed. 1314 (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, 773-774, 66 S.Ct. 1239, 1252-1253, 90 L.Ed. 1557 (1946) (there must be some leeway for conspiracy cases where the evidence differs from the exact specifications in the indictment).

Whether single or multiple conspiracies have been proved is usually a question of fact to be resolved by the jury under proper instructions. See United States v. Schultz, 855 F.2d 1217, 1222 (6th Cir.1988); United States v. Rios, 842 F.2d 868, 872 (6th Cir.1988), cert. denied, 488 U.S. 1031, 109 S.Ct. 840, 102 L.Ed.2d 972 (1989); United States v. Battista, 646 F.2d 237, 243 (6th Cir.), cert. denied, 454 U.S. 1046, 102 S.Ct. 586, 70 L.Ed.2d 488 (1981); and United States v. Grunsfeld, 558 F.2d 1231, 1238 (6th Cir.), cert. denied, 434 U.S. 872, 98 S.Ct. 219, 54 L.Ed.2d 152 (1977). When no evidence is presented warranting an instruction on multiple conspiracies, none need be given. United States v. Levinson, 405 F.2d 971, 989 (6th Cir.1968), cert. denied, 395 U.S. 958, 89 S.Ct. 2097, 23 L.Ed.2d 744 (1969). But "when the evidence is such that the jury could within reason find more than one conspiracy, the trial court should give the jury a multiple conspiracy instruction." United States v. Warner, 690 F.2d 545, 551 (6th Cir.1982). Accord United States v. Davenport, 808 F.2d 1212, 1217 (6th Cir.1987).

This instruction is patterned after instructions quoted by the Sixth Circuit in United States v. Hughes, 895 F.2d 1135, 1140 n. 6 (6th Cir.1990). Where one single conspiracy is charged, "proof of different and disconnected ones will not sustain a conviction." United States v. Bostic, 480 F.2d 965, 968 (6th Cir.1973). See also United States v. Borelli, 336 F.2d 376, 382 (2d Cir.1964), cert. denied, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965).

See generally Fifth Circuit Instruction 2.22, Eighth Circuit Instruction 5.06G, Ninth Circuit Instruction 8.05B, Eleventh Circuit Offense 4.3 and Federal Judicial Center Instruction 64.

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

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

3.09 MULTIPLE CONSPIRACIES--FACTORS IN DETERMINING

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

(2) But a single conspiracy may exist even if all the members did not know each other, or never sat down together, or did not know what roles all the other members played. And a single conspiracy may exist even if different members joined at different times, or the membership of the group changed. These are all things that you may consider in deciding whether there was more than one conspiracy, but they are not necessarily controlling.

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

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

Use Note

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

Committee Commentary 3.09
(current through December 31, 2007)

The Committee made no change in the instruction.

The Sixth Circuit continues to rely on United States v. Warner, 690 F.2d 545 (6th Cir.1982) to distinguish single and multiple conspiracies. *See, e.g.*, United States v. Wilson, 168 F.3d 916, 923-24 (6th Cir. 1999); United States v. Paulino, 935 F.2d 739, 748 (6th Cir. 1991); and United States v. Sanchez, 928 F.2d 1450, 1456 (6th Cir. 1991).

The Sixth Circuit's treatment of the subsidiary issues discussed in the third paragraph of the 1991 Commentary also remains consistent. The government need not prove an actual agreement to establish a single conspiracy. United States v. Segines, 17 F.3d 847, 856 (6th Cir. 1994), *citing* United States v. Davenport, 808 F.2d 1212, 1215-16 (6th Cir.1987); United States v. Paulino, *supra* at 748, *citing Warner*, 690 F.2d 545 (6th Cir.1982). *Accord*, United States v. Maliszewski, 161 F.3d 992, 1015 (6th Cir. 1998), *citing Segines*, 17 F.3d at 856. The conspirators need not have direct association to establish a single conspiracy. United States v. Rugerio, 20 F.3d 1387, 1391 (6th Cir. 1994), *citing Sanchez*, 928 F.2d at 1457 (6th Cir. 1991). A single

conspiracy may be proved although the defendants did not know every other member of the conspiracy, *see Paulino*, 935 F.2d 739, 748 (6th Cir. 1991), and although each member did not know of or become involved in all of the activities in furtherance of the conspiracy, *see* United States v. Maliszewski, *supra* at 1014 *citing* United States v. Moss, 9 F.3d 543 at 551 (6th Cir. 1993). In other words, to establish a single conspiracy, "It is not necessary for each conspirator to participate in every phase of the criminal venture, provided there is assent to contribute to a common enterprise." United States v. Ghazaleh, 58 F.3d 240, 245 (6th Cir. 1995), *quoting* United States v. Hughes, 895 F.2d 1135, 1140 (6th Cir. 1990). A single conspiracy can be proved regardless of changes in conspiracy membership. *See Wilson* at 924, *citing Warner,* 690 F.2d 545; United States v. Rugerio, *supra, citing* United States v. Rios, 842 F.2d 868, 872 (6th Cir.1988).

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

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

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

1991 Edition

The leading Sixth Circuit case on the factors to be considered in determining whether single or multiple conspiracies existed is United States v. Warner, 690 F.2d 545 (6th Cir.1982). See United States v. Rios, 842 F.2d 868, 872-873 (6th Cir.1988), cert. denied, 488 U.S. 1031, 109 S.Ct. 840, 102 L.Ed.2d 972 (1989); United States v. Davenport, 808 F.2d 1212, 1215-1216 (6th Cir.1987); and United States v. McLernon, 746 F.2d 1098, 1107-1108 (6th Cir.1984), all citing and quoting Warner extensively with approval. In Warner, the Sixth Circuit generally described the principles governing the resolution of whether single or multiple conspiracies existed as follows:

"In determining whether the evidence showed single or multiple conspiracies, we must bear in mind that the essence of the crime of conspiracy is agreement. '(I)n order to prove a single conspiracy, the government must show that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal'." Id. at 548-549.

In United States v. Sutton, 642 F.2d 1001, 1017 (6th Cir.1980), cert. denied, 453 U.S. 912,

101 S.Ct. 3143, 69 L.Ed.2d 995 (1981), the Sixth Circuit similarly stated that "(t)o find a single conspiracy, we ... must look for agreement on an overall objective." See also United States v. Mayes, 512 F.2d 637, 643 (6th Cir.) ("essential continuity and singleness of purpose"), cert. denied, 422 U.S. 1008, 95 S.Ct. 2629, 45 L.Ed.2d 670 (1975); United States v. Vida, 370 F.2d 759, 767 (6th Cir.1966) ("one broad and continuing endeavor"), cert. denied, 387 U.S. 910, 87 S.Ct. 1695, 18 L.Ed.2d 630 (1967).

In Warner, the Sixth Circuit also dealt with a number of subsidiary issues relating to this subject. With regard to the proof of an agreement, the Sixth Circuit stated that the government is not required to prove "an actual agreement among the various conspirators" in order to establish a single conspiracy. Id. at 549. See also United States v. Butler, 618 F.2d 411, 416 (6th Cir.) ("the law does not require that all conspirators be physically present at the moment agreement is reached ... (a)greement among conspirators may take place seriatim"), cert. denied, 447 U.S. 927, 100 S.Ct. 3024, 65 L.Ed.2d 1121 (1980); United States v. Perry, 550 F.2d 524, 533 (9th Cir.) ("The government does not have to prove that all of the defendants met together at the same time and ratified the agreement."), cert. denied, 434 U.S. 827, 98 S.Ct. 104, 54 L.Ed.2d 85 (1977).

With regard to knowledge of the other members of the conspiracy and the activities they performed, the Sixth Circuit stated in Warner that "a single conspiracy does not become multiple conspiracies simply because each member of the conspiracy did not know every other member, or because each member did not know of or become involved in all of the activities in furtherance of the conspiracy." Id. at 549. See also United States v. Mayes, supra, 512 F.2d at 642 ("it is common for willing participants not to be acquainted with all of the members of the organization, or even to know the nature of every aspect of the operation").

With regard to changes in membership, the Sixth Circuit stated in Warner that "(n)ew parties may join the agreement at any time while others may terminate their relationship. ... (the parties are not always identical, but this does not mean that there are separate conspiracies." Id. at 549 n. 7. See also United States v. Rios, supra, 842 F.2d at 873 ("a single conspiracy does not become multiple conspiracies simply because of personnel changes or because its members are cast in different roles"); United States v. Vida, supra, 370 F.2d at 767 (finding a single conspiracy even though "(i)ndividual defendants were entering and leaving the operation as it continued its course").

Related to this, it is "not necessary that each member of the conspiracy be a member of it from the beginning so long as each joins it while it is still in operation." United States v. Stephens, 492 F.2d 1367, 1373 (6th Cir.), cert. denied, 419 U.S. 852, 95 S.Ct. 93, 42 L.Ed.2d 83 (1974). Accord United States v. Warner, supra, 690 F.2d at 549 n. 7 ("The fact that (some of the defendants) entered the conspiracy relatively late does not preclude our finding that they were part of the single conspiracy alleged in the indictment."). "All with criminal intent who join themselves ... to the principal scheme are subject to the statute, although they were not parties to the scheme at its inception." Blue v. United States, 138 F.2d 351, 359 (6th Cir.1943), cert. denied, 322 U.S. 736, 64 S.Ct. 1046, 88 L.Ed. 1570 (1944).

In United States v. Warner, supra, 690 F.2d at 550 n. 8, the Sixth Circuit also stated that just because a conspiracy can be divided into "distinct sub-groups" does not mean that there is

more than one conspiracy. "As long as the different sub-groups are committing acts in furtherance of one overall plan, the jury can still find a single, continuing conspiracy." Id. See also United States v. Cambindo Valencia, 609 F.2d 603, 624 (2d Cir.1979) ("mere territorial separation.... does not necessarily establish discrete conspiracies"), cert. denied, 446 U.S. 940, 100 S.Ct. 2163, 64 L.Ed.2d 795 (1980).

In United States v. Mayes, supra, 512 F.2d at 642, the SixthCircuit stated that just because a conspiracy "continued over a long period of time and contemplated the commission of many illegal acts (does not) transform the single conspiracy into several conspiracies." As stated by the Supreme Court in Braverman v. United States, 317 U.S. 49, 52, 63 S.Ct. 99, 101, 87 L.Ed. 23 (1942), "a single agreement to commit an offense does not become several conspiracies because it continues over a period of time.... (t)here may be such a single continuing agreement to commit several offenses." In Braverman, the Supreme Court also stated that "one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." See also United States v. Hughes, 895 F.2d 1135, 1140 (6th Cir.1990) (a conspirator need not have agreed to commit every crime within the scope of the conspiracy so long as it is reasonable to infer that each crime was intended to further the enterprise's affairs, and it is not necessary for each conspirator to participate in every phase of the criminal venture provided there is assent to contribute to a common enterprise).

In United States v. Warner, supra, 690 F.2d at 549-550, the defendant argued that the evidence presented at his trial showed at least two separate drug distribution conspiracies instead of the single conspiracy alleged in the indictment. The Sixth Circuit rejected this argument, in part on the ground that in so-called "chain" conspiracies, a single agreement "can be inferred from the interdependent nature of the criminal enterprise." The Sixth Circuit explained that "(b)ecause the success of participants on each level of distribution is dependent upon the existence of other levels of distribution, each member of the conspiracy must realize that he is participating in a joint enterprise." Applying these principles to the facts of the case, the Sixth Circuit stated that "the evidence shows that the two groups of dealers were dependent upon one another for their success, a factor which indicates that they were a part of a single conspiracy."

In Kotteakos v. United States, 328 U.S. 750, 754-755, 66 S.Ct. 1239, 1242- 1243, 90 L.Ed. 1557 (1946), the Supreme Court held that the commission of similar crimes by the alleged conspirators and their connection to a common "hub" was not sufficient to establish a single conspiracy. Where none of the alleged conspirators benefit from the others' participation, like "separate spokes meeting in a common center," but "without the rim of the wheel to enclose the spokes," there are multiple, not single conspiracies, even if the "spokes" and the "hub" commit similar criminal acts. The government must show that there was a "single enterprise," not "several, though similar ... separate adventures of like character." Id. at 768-769, 66 S.Ct. at 1249-1250. See also United States v. Sutherland, 656 F.2d 1181, 1190 (5th Cir.1981) (absent evidence that the spokes were dependent on or benefited from each others' participation, or that there was some interaction between them, government's proofs were insufficient to establish a single conspiracy), cert. denied, 455 U.S. 949, 102 S.Ct. 1451, 71 L.Ed.2d 663 (1982).

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

In United States v. Castro, 908 F.2d 85, 88 (6th Cir.1990), the Sixth Circuit stated that in drug trafficking conspiracies, "importers, wholesalers, purchasers of cutting materials, and persons who 'wash' money are all as necessary to the success of the venture as the retailer." For this reason, the Sixth Circuit refused to find that evidenceof currency collections connected with the drug trafficking at issue constituted a material variance from the charged conspiracy, particularly in light of additional evidence of the defendants' knowledge and intent. Cf. United States v. Todd, 920 F.2d 399, 406 (6th Cir.1990) (Money-laundering is integrally related to the success of a drug distribution conspiracy, but there must be a "sufficient link" between a defendant's money-laundering activities and the drug distribution conspiracy to convict the defendant of the conspiracy.)

3.10 PINKERTON LIABILITY FOR SUBSTANTIVE OFFENSES COMMITTED BY OTHERS

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

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

(3) In other words, under certain circumstances, the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by only one of them, even though they did not all personally participate in that crime themselves.

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

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

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

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

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

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

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

Use Note

This instruction should be used when the government is attempting to convict a defendant of a substantive crime committed by other members of a conspiracy, and there is also some evidence that the defendant personally committed or participated in the commission of the substantive offense.

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

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

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

Committee Commentary 3.10
(current through December 31, 2007)

The Committee made no change in the instruction.

The Sixth Circuit continues to rely on Pinkerton v. United States, 328 U.S. 640 (1946). *See, e.g.*, United States v. Odom, 13 F.3d 949, 959 (6th Cir. 1994) ("Once a conspiracy is shown to exist, the Pinkerton doctrine permits the conviction of one conspirator for the substantive offense of other conspirators committed during and in furtherance of the conspiracy, even if the offense is not an object of the conspiracy.") (*citing* United States v. Christian, 942 F.2d 363, 367 (6th Cir. 1991)).

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

In contrast, in United States v. Henning, 286 F.3d 914 (6th Cir. 2002), the district court gave Pattern Instruction 3.10, and the defendant was convicted on one § 371 conspiracy count and five counts of substantive bank crimes. *Id.* at 919. The district court granted a post-trial motion to acquit the defendant on the conspiracy charge due to insufficient evidence. The Sixth Circuit held that the district court should automatically have considered the viability of the substantive bank crime convictions because of the close relationship between the substantive and conspiracy crimes created by the *Pinkerton* instruction. *Id.* at 920. The failure to consider the substantive convictions was plain error and the convictions were reversed. *Id.* at 923. The court limited its holding to the unique facts of the case. *Id.* at 922 n.11. In *Budd*, the court distinguished *Henning* and explained, "It was not the absence of a conspiracy *charge* that led this court to reverse in *Henning*; it was the absence of a conspiracy." *Budd, supra* at 528.

1991 Edition

This instruction is designed for use when there is some evidence that would support a conviction based on a co-conspirator liability theory, and some evidence that a defendant personally committed or participated in a substantive offense.

In Pinkerton v. United States, 328 U.S. 640, 645-648, 66 S.Ct. 1180, 1183- 1185, 90 L.Ed. 1489 (1946), the Supreme Court held that even though there was no evidence that one of two conspirators participated directly in the commission of the substantive offenses charged in the indictment, that conspirator could still be convicted of the substantive offenses based on the principle that the "act of one partner (committed in furtherance of the conspiracy) may be the act of all." Accord United States v. Martin, 920 F.2d 345, 348 (6th Cir.1990) ("The Pinkerton doctrine permits conviction of a conspirator for the substantive offenses of other conspirators committed during and in furtherance of the conspiracy."); United States v. Adamo, 742 F.2d 927, 943-944 (6th Cir.1984) ("Once a person becomes a member of a conspiracy, he or she may 'be held responsible for all that may be ... done' by co- conspirators."), cert. denied, 469 U.S. 1193, 105 S.Ct. 971, 83 L.Ed.2d 975 (1985); United States v. Chambers, 382 F.2d 910, 914 (6th Cir.1967)) ("Where the substantive offense is committed by one or more conspirators in furtherance of an unlawful activity, all members of the conspiracy are guilty of the substantive offense.").

The instruction requires the prosecution to prove that the substantive offense was committed after the defendant joined the conspiracy, and while he was still a member of it. Although there is some authority for the proposition that a person who joins a conspiracy may be held responsible for acts committed before he joined it, see, e.g., United States v. Cimini, 427 F.2d 129, 130 (6th Cir.), cert. denied, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970), that authority is questionable in light of the United States Supreme Court's decision in Levine v. United States, 383 U.S. 265, 266-267, 86 S.Ct. 925, 925-926 15 L.Ed.2d 737 (1966). In Levine, the Supreme Court accepted the Solicitor General's concession that an individual "cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy."

The Supreme Court has indicated that it would not hold co-conspirators liable for a substantive offense committed by other members of the conspiracy if the substantive offense "was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of ... the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." Pinkerton, supra, 328 U.S. at 647- 648, 66 S.Ct. at 1184-1185. In United States v. Etheridge, 424 F.2d 951, 965 (6th Cir.1970), cert. denied, 400 U.S. 1000, 91 S.Ct. 464, 27 L.Ed.2d 452 (1971), the Sixth Circuit treated this statement from Pinkerton as creating three separate limitations on the rule that the act of one co-conspirator is the act of all, and Instruction 3.10 does the same. Cf. United States v. Frost, 914

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

In Pinkerton, the Supreme Court stated that the act of one co- conspirator may be the act of all "without any new agreement specifically directed to that act." Id., 328 U.S. at 646-647, 66 S.Ct. at 1183-1184. And in Etheridge, the Sixth Circuit held that even though a defendant had no knowledge of a particular substantive offense, he could still be convicted of that offense if it was "within the reasonable contemplation of those who formulated and participated" in the conspiracy. Id., 424 F.2d at 965.

In United States v. Borelli, 336 F.2d 376, 385-386 (2d Cir.1964), cert. denied, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965), the Second Circuit held that when the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance to the case, a special instruction should be given focusing the jury's attention on this issue. Quoting from United States v. Peoni, 100 F.2d 401, 403 (2d Cir.1938), the Second Circuit stated that "(n)obody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it". See also United States v. United States Gypsum Co., 438 U.S. 422, 463 n. 36, 98 S.Ct. 2864, 2886 n. 36, 57 L.Ed.2d 854 (1978) (quoting a similar requested instruction, and stating that the district court's actual instructions differed in only "minor and immaterial" respects).

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

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

3.11A WITHDRAWAL AS A DEFENSE TO CONSPIRACY

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

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

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

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

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

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

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

Use Note

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

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

Committee Commentary 3.11A

(current through December 31, 2007)

The Committee modified paragraph (2)(B) of this instruction. Previously, that paragraph provided:

> (B) Second, that he took some affirmative step to renounce or defeat the purpose of the conspiracy. This would include **things like voluntarily going to the police or other law enforcement officials and telling them about the plan; or telling the**

> **other members of the conspiracy that he did not want to have anything more to do with it; or any other** affirmative acts that are inconsistent with the purpose of the conspiracy, and that are communicated in a way that is reasonably likely to reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding the other members of the group, would not be enough.

The Committee deleted the language in bold type. The rationale for deleting these examples of withdrawal was that they are potentially confusing. See the 1991 Commentary, discussing United States v. United States Gypsum Co., 438 U.S. 422 (1978) and United States v. Battista, 646 F.2d 237 (6th Cir. 1981).

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

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

The court continues to hold that withdrawal is an affirmative defense which the defendant has the burden of proving. *See Lash*, 937 F.2d at 1083, *citing* United States v. Battista, *supra*. In United States v. Dents, 1992 WL 317151 at 4, 1992 U.S. App. LEXIS 28982 at 11 (6th Cir. 1992)(unpublished), the panel specifically rejected the Seventh Circuit's conclusion in United States v. Read, 658 F.2d 1225 (7th Cir. 1981), that the burden of disproving withdrawal was on the government. As to the standard of proof, in In re Winship, it was identified as a preponderance. 397 U.S. 358, 371-72 (1970)(Harlan, J., concurring). The Sixth Circuit has also identified the standard as a preponderance of the evidence but only in an unpublished case. See United States v. Eck, 11 Fed. Appx. 527, 532, 2001 WL 630057 at 5, 2001 U.S. App. LEXIS 11408 at 16 (6th Cir. 2001)(unpublished).

1991 Edition

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

defendant joins the conspiracy, the concept of withdrawal as a defense to the conspiracy charge "would appear to be inapplicable." See the Committee Commentary to Federal Judicial Center Instruction 63.

In the Sixth Circuit, the members of a conspiracy "continue to be co- conspirators until there has been an affirmative showing that they have withdrawn." E.g., United States v. Mayes, 512 F.2d 637, 642-643 (6th Cir.), cert. denied, 422 U.S. 1008, 95 S.Ct. 2629, 45 L.Ed.2d 670 (1975). Withdrawal remains a strict affirmative defense that the defendant must prove. Chiropractic Cooperative Association of Michigan v. American Medical Association, 867 F.2d 270, 274-275 (6th Cir.1989); United States v. McLernon, 746 F.2d 1098, 1114 (6th Cir.1984); United States v. Hamilton, 689 F.2d 1262, 1268-1269 (6th Cir.1982), cert. denied, 459 U.S. 1117, 103 S.Ct. 753, 74 L.Ed.2d 971 (1983); United States v. Battista, 646 F.2d 237, 246 (6th Cir.1980), cert. denied, 454 U.S. 1046, 102 S.Ct. 586, 70 L.Ed.2d 488 (1981); Blue v. United States, 138 F.2d 351, 360 (6th Cir.1943), cert. denied, 322 U.S. 736, 64 S.Ct. 1046, 88 L.Ed. 1570 (1944). But see the Seventh Circuit's decision in United States v. Read, 658 F.2d 1225, 1236 (7th Cir.1981) (overruling prior decisions and holding that once a defendant comes forward with some evidence of withdrawal, the burden of persuasion is on the government to disprove withdrawal beyond a reasonable doubt). See also Ninth Circuit Instruction 8.05D ("The government has the burden of proving that the defendant did not withdraw from the conspiracy"), and Federal Judicial Center Instruction 63 ("So you may find _____ guilty only if the government has proved beyond a reasonable doubt that he was a member of the conspiracy at the time an overt act was committed"). The standard of proof that the defendant must meet to carry his burden has not been delineated.

A partial withdrawal is not sufficient to establish this defense. See United States v. Battista, supra, 646 F.2d at 246 (quoting instruction that the defendant must "completely" disassociate himself from the conspiracy). And some "affirmative action to disavow or defeat the purposes of the conspiracy" is required. Id. Accord United States v. Edgecomb, 910 F.2d 1309, 1312 (6th Cir.1990). Mere cessation of activity, or termination of one's relationship with the other co-conspirators, is not enough. See United States v. Adamo, 742 F.2d 927, 943-944 (6th Cir.1984), cert. denied, 469 U.S. 1193, 105 S.Ct. 971, 83 L.Ed.2d 975 (1985); United States v. Wirsing, 719 F.2d 859, 862 n. 5 (6th Cir.1983); United States v. Borelli, 336 F.2d 376, 388 (2d Cir.1964), cert. denied, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965).

Jury instructions quoted or approved in the decided cases commonly include examples of the kinds of affirmative steps considered sufficient to constitute a withdrawal. See for example, United States v. United States Gypsum Co, 438 U.S. 422, 463-464, 98 S.Ct. 2864, 2886-2887, 57 L.Ed.2d 854 (1978); United States v. Battista, supra, 646 F.2d at 246. See also Seventh Circuit Instruction 5.12. These examples include such things as notifying the authorities, or effectively communicating the withdrawal to the other members of the conspiracy. See Battista, supra at 246 (quoted instruction containing these two examples "was in accord with the law of this circuit"). But in United States Gypsum Co., the Supreme Court held that jury instructions which limited the ways in which a defendant could withdraw to either informing the authorities, or notifying the other members of the conspiracy of an intention to withdraw, constituted reversible error. The Court stated that other affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach the other co- conspirators have

generally been regarded as sufficient to establish withdrawal. Id. at 463-464, 98 S.Ct. at 2886-2887.

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

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

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

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

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

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

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

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

Use Note

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

Committee Commentary 3.11B

(current through December 31, 2007)

The Committee modified paragraph (2)(B) of this instruction. Previously, that paragraph provided:

> (B) Second, that he took some affirmative step to renounce or defeat the purpose of the conspiracy. This would include **things like voluntarily going to the police or other law enforcement officials and telling them about the plan; or telling the other members of the conspiracy that he did not want to have anything more to do with it; or any other** affirmative acts that are inconsistent with the purpose of the conspiracy, and that are communicated in a way that is reasonably likely to

reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding the other members of the group, would not be enough.

The Committee deleted the language in bold type. The rationale for deleting these examples of withdrawal was that they are potentially confusing. See the 1991 Commentary, discussing United States v. United States Gypsum Co., 438 U.S. 422 (1978) and United States v. Battista, 646 F.2d 237 (6th Cir. 1981).

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

As long as a defendant has not taken some affirmative action to withdraw from the conspiracy, the defendant remains liable for all co-conspirators' actions in furtherance of the conspiracy. *See* United States v. Hayter Oil Co., Inc., 51 F.3d 1265, 1271 (6th Cir. 1995), *citing* Pinkerton v. United States, 328 U.S. 640, 646-47 (1946); United States v. Lash, 937 F.2d 1077, 1083-84 (6th Cir. 1991).

1991 Edition

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

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

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

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

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

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

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

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

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

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

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

Use Note

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

Committee Commentary 3.11C

(current through December 31, 2007)

The Use Note was changed to refer to "the limiting date" rather than to a five-year limitation period in order to accommodate different limitations periods.

The Committee modified paragraph (3)(B) of this instruction. Previously, that paragraph provided:

(B) Second, that he took some affirmative step to renounce or defeat the purpose of the conspiracy. This would include **things like voluntarily going to the police or other law enforcement officials and telling them about the plan; or telling the other members of the conspiracy that he did not want to have anything more to do with it; or any other** affirmative acts that are inconsistent with the purpose of the conspiracy, and that are communicated in a way that is reasonably likely to reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding the other members of the group, would not be enough.

The Committee deleted the language in bold type. The rationale for deleting these examples of withdrawal was that they are potentially confusing. See the 1991 Commentary, discussing United States v. United States Gypsum Co., 438 U.S. 422 (1978) and United States v. Battista, 646 F.2d 237 (6th Cir. 1981).

Paragraph (3)(B) continues to provide that withdrawal includes an affirmative acts that is inconsistent with the purpose of the conspiracy "and" that is communicated in a way likely to reach the other members. However, the defense is not limited to situations where communication of withdrawal to other members of the conspiracy occurs. For example, withdrawal may be established by notifying the authorities. The instruction should be tailored to fit the facts of the case.

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

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This instruction should be used when there is some evidence that a defendant withdrew from the conspiracy more than five years before the date of the indictment.

Generally speaking, the statute of limitations for prosecutions under 18 U.S.C. s 371 is five years from the date of the last overt act committed in furtherance of the conspiracy. See United States v. Zalman, 870 F.2d 1047, 1057 (6th Cir.), cert. denied, ___ U.S. ___, 109 S.Ct. 3248, 106 L.Ed.2d 594 (1989). But a defendant's withdrawal from a conspiracy starts the statute of limitations running as to him. See Chiropractic Cooperative Association of Michigan v. American Medical Association, 867 F.2d 270, 272-275 (6th Cir.1989) (a claimed withdrawal before the applicable statute of limitations period presents a question of fact that should not be resolved by way of summary judgment). See also Hyde v. United States, 225 U.S. 347, 368-370, 32 S.Ct. 793, 802-803, 56 L.Ed. 1114 (1912) (implicitly recognizing that the statute of limitations begins to run as soon as there has been an affirmative act of withdrawal); United States v. Read, 658 F.2d 1225, 1233 (7th Cir.1981) ("A defendant's withdrawal from the conspiracy starts the running of the statute of limitations as to him. If the indictment is filed more than five years after a defendant withdraws, the statute of limitations bars prosecution for ... the conspiracy."). Without explanation, the Seventh Circuit recommends that no instruction be given on this subject. See Seventh Circuit Instruction 5.13.

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

3.12 DURATION OF A CONSPIRACY

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

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

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

Use Note

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

Committee Commentary 3.12
(current through December 31, 2007)

The Committee made no change in the instruction.

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

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

1991 Edition

The duration of a conspiracy may be relevant to various issues that a jury may have to decide. These include: statute of limitations issues, see Instruction 3.04(4); single vs. multiple conspiracy issues, see Instructions 3.08 and 3.09; and whether co-conspirators are responsible for substantive offenses committed by other members of the conspiracy, see Instruction 3.10(4)(B).

Conspiracy is a continuing crime which is not completed at the conclusion of the agreement. United States v. Edgecomb, 910 F.2d 1309, 1312 (6th Cir.1990).

The language of this instruction is based on the Sixth Circuit's decisions in United States v. Hamilton, 689 F.2d 1262, 1268 (6th Cir.1982), cert. denied, 459 U.S. 1117, 103 S.Ct. 753, 74 L.Ed.2d 971 (1983); United States v. Mayes, 512 F.2d 637, 642 (6th Cir.), cert. denied, 422 U.S. 1008, 95 S.Ct. 2629, 45 L.Ed.2d 670 (1975); and United States v. Etheridge, 424 F.2d 951, 964 (6th Cir.1970), cert. denied, 400 U.S. 1000, 91 S.Ct. 464, 27 L.Ed.2d 452 (1971).

3.13 IMPOSSIBILITY OF SUCCESS

(1) One last point about conspiracy. It is no defense to a conspiracy charge that success was impossible because of circumstances that the defendants did not know about. This means that you may find the defendants guilty of conspiracy even if it was impossible for them to successfully complete the crime that they agreed to commit.

Use Note

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

Committee Commentary 3.13
(current through December 31, 2007)

The Committee made no change in the instruction.

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

1991 Edition

In United States v. Hamilton, 689 F.2d 1262, 1269 (6th Cir.1982), cert. denied, 459 U.S. 1117, 103 S.Ct. 753, 74 L.Ed.2d 971 (1983), the Sixth Circuit rejected the defendants' argument that statements made to a co- conspirator who had become a government agent were not made in furtherance of the conspiracy. The Sixth Circuit held that such statements are admissible even when the conspirator to whom the statements were made was acting under the direction and surveillance of government agents. The Sixth Circuit then buttressed this holding by reference to "the principle that 'it is no defense that success was impossible because of unknown circumstances'." But Cf. United States v. Howard, 752 F.2d 220, 229 (6th Cir.1985) ("A conspiracy is deemed to have ended when ... achievement of the objective has ... been rendered impossible.").

3.14 STATEMENTS BY CO-CONSPIRATORS

(No Instruction Recommended)

Committee Commentary 3.14
(current through December 31, 2007)

The Committee made no change in its approach on this instruction and continues to recommend that no instruction be given.

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

1991 Edition

The rule in the Sixth Circuit is that the trial judge alone is responsible for deciding whether statements by co-conspirators are admissible, and that the question of admissibility should not be submitted to the jury. E.g., United States v. Mitchell, 556 F.2d 371, 377 (6th Cir.), cert. denied, 434 U.S. 925, 98 S.Ct. 406, 54 L.Ed.2d 284 (1977). Instructions that the jury may only consider a co-conspirator's statement if the jury first finds that a conspiracy existed and that the defendant was a member of it have repeatedly been held to be "altogether unnecessary." E.g., United States v. Enright, 579 F.2d 980, 986-987 (6th Cir.1978). Accord, United States v. Swidan, 888 F.2d 1076, 1081 (6th Cir.1989). The judge should not advise the jury of the government's burden of proof on the preliminary question of admissibility, or the judge's determination that the government has met its burden. United States v. Vinson, 606 F.2d 149, 153 (6th Cir.1979), cert. denied, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980). Instead, the judge should admit the statements, subject only to instructions on the government's ultimate burden of proof beyond a reasonable doubt, and on the weight and credibility to be given statements by co-conspirators. Id.

Special instructions limiting the consideration of statements made by co- conspirators may be required when the evidence would support a finding that multiple conspiracies existed. See

Use Note and Committee Commentary to Instruction 3.08.