Chapter 8.00

DELIBERATIONS AND VERDICT

Table of Instructions

8.01 INTRODUCTION

(1) That concludes the part of my instructions explaining the rules for considering some of the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room, and your possible verdicts.

(2) The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions, and will speak for you here in court.

(3) Once you start deliberating, do not talk to the jury officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and then give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson.

((4) If you want to see any of the exhibits that were admitted in evidence, you may send me a message, and those exhibits will be provided to you.)

(5) One more thing about messages. Do not ever write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that you are split 6-6, or 8-4, or whatever your vote happens to be. That should stay secret until you are finished.

Use Note

Bracketed paragraph (4) should be included if the exhibits are not being submitted to the jury except upon request.

Committee Commentary 8.01
(current through December 31, 2007)

The Committee made no change in the instruction. The Committee also decided that no change in or addition to the 1991 Committee Commentary is warranted.

1991 Edition

This proposed instruction covers some miscellaneous concepts such as selection of a foreperson, communications with the court and not disclosing numerical divisions that are commonly included in instructions on the jury's deliberations. See for example Fifth Circuit Instruction 12A.

In some districts all exhibits are routinely submitted to the jury when deliberations begin. In other districts exhibits are not provided unless the jury asks for them. Bracketed paragraph (4) should be used when the exhibits are not provided unless the jury makes a request.

8.02 EXPERIMENTS, RESEARCH AND INVESTIGATION

(1) Remember that you must make your decision based only on the evidence that you saw and heard here in court. Do not try to gather any information about the case on your own while you are deliberating.

(2) For example, do not conduct any experiments inside or outside the jury room; do not bring any books, like a dictionary, or anything else with you to help you with your deliberations; do not conduct any independent research, reading or investigation about the case; and do not visit any of the places that were mentioned during the trial.

(3) Make your decision based only on the evidence that you saw and heard here in court.

Committee Commentary 8.02
(current through December 31, 2007)

The Committee made no change in the instruction. The Committee also decided that no change in or addition to the 1991 Committee Commentary is warranted.

1991 Edition

The purpose of this instruction is to caution the jurors that they must not attempt to gather any information about the case on their own during their deliberations. It is based on language commonly included in the court's preliminary instructions to the jury. See for example Ninth Circuit Instruction 1.08, Federal Judicial Center Instruction 1 and Saltzberg and Perlman Instruction 1.19.

8.03 UNANIMOUS VERDICT

(1) Your verdict, whether it is guilty or not guilty, must be unanimous.

(2) To find the defendant guilty, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves his guilt beyond a reasonable doubt.

(3) To find him not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt.

(4) Either way, guilty or not guilty, your verdict must be unanimous.

Committee Commentary 8.03
(current through December 31, 2007)

The Committee made no change in the instruction.

On the question of whether a specific unanimity instruction is required, the Sixth Circuit continues to rely on *Duncan*, discussed in the 1991 Committee Commentary to Instruction 8.03A. "A specific unanimity instruction is ordinarily unnecessary unless: '1) a count is extremely complex, 2) there is a variance between the indictment and the proof at trial, or 3) there is tangible risk of jury confusion.' " United States v. Kimes, 246 F.3d 800, 810 (6th Cir. 2001), *quoting* United States v. Sanderson, 966 F.2d 184, 187 (6th Cir. 1992) *and citing* United States v. Duncan, 850 F.2d 1104, 1114 (6th Cir. 1988).

In *Sanderson, supra*, the question involved a conviction under 18 U.S.C. § 666 for theft. The district court did not give a specific unanimity instruction. The Sixth Circuit, after recounting the three *Duncan* factors, stated, "Simply put, we interpret Schad to hold that there must be a common-sense determination of a subject statute's application and purpose in light of traditional notions of due process and fundamental fairness." *Sanderson,* 966 F.2d at 188. The court looked to the intent of the statute and its legislative history, and concluded that under a plain error standard, failure to give a specific unanimity instruction in the § 666 conviction did not offend fundamental fairness. *Sanderson,* 966 F.2d at 188-89.

In United States v. Kimes, *supra*, the court applied the three-factor test set out in *Duncan* and *Sanderson* and concluded that failure to give a specific unanimity instruction was not error when the defendant was charged under 18 U.S.C. § 111(a)(1)(harming or threatening a federal official) and the government presented evidence that the defendant violated this provision by using all six methods listed in the statute.

1991 Edition

Fed.R.Crim.P. 31(a) mandates that jury verdicts in federal criminal trials "shall be

unanimous." This also appears to be constitutionally required. See Johnson v. Louisiana, 406 U.S. 356, 366-403, 92 S.Ct. 1620, 1626-1628, 32 L.Ed.2d 152 (1972) (five justices indicate in dicta that the Sixth Amendment requires unanimous verdicts in federal criminal trials).

None of the circuits that has drafted pattern instructions treat the unanimity requirement as a distinct concept in a separate instruction. Given the importance of this concept, the Committee believes that a separate instruction is appropriate.

Most instructions make no attempt to specifically relate the unanimity requirement to the requirement of proof beyond a reasonable doubt. Given the importance of the reasonable doubt requirement, the Committee believes that the jurors should be specifically instructed on this point. As characterized by the Supreme Court in In re Winship, 397 U.S. 358, 363-364, 90 S.Ct. 1068, 1072-1073, 25 L.Ed.2d 368 (1970), the reasonable doubt standard plays a "vital" role in our criminal justice system. It is a "prime instrument" for reducing the risk of an erroneous conviction. And it performs the "indispensable" function of "impress(ing) ... the trier of fact (with) the necessity of reaching a subjective state of certitude (on) the facts in issue."

Four of the five circuits that have drafted pattern instructions, and the Federal Judicial Center, briefly mention that a not guilty verdict must also be unanimous. See Seventh Circuit Instruction 7.06, Eighth Circuit Instruction 3.12, Ninth Circuit Instruction 7.01, Eleventh Circuit Basic Instruction 11 and Federal Judicial Center Instruction 9. Typical is Ninth Circuit Instruction 7.01 which states, "Your verdict, whether guilty or not guilty, must be unanimous." This instruction attempts to make this point clearer, to avoid any possible confusion.

8.03A UNANIMITY OF THEORY

(No Instruction Recommended)

Committee Commentary 8.03A
(current through December 31, 2007)

The Committee withdrew this instruction in view of Richardson v. United States, 526 U.S. 813 (1999) and Schad v. Arizona, 501 U.S. 624 (1991).

The 1991 edition instruction required that when a defendant was accused of committing a crime in one of several different ways, the jury had to unanimously agree that the same one had been proved. In Schad v. Arizona, 501 U.S. 624 (1991)(plurality opinion), the Supreme Court rejected this approach of requiring unanimity when the means used to commit an offense simply satisfy an element of a crime and do not themselves constitute a separate offense or an element of an offense. In these circumstances, unanimity is not required. *Id*. at 630-33. On the other hand, if the means used to commit an offense are deemed an element of the crime, unanimity is required.

Schad was followed by Richardson v. United States, in which the Court again distinguished the elements of a crime from the means used to commit the elements of the crime. *Richardson*, 526 U.S. at 817, *citing* Schad v. Arizona, 501 U.S. 624, 631-32 (1991)(plurality opinion). If a fact is an element, "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved [it]." *Id.* (citations omitted). On the other hand, if the fact is defined as a means of committing the crime, "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Richardson*, 526 U.S. at 817, *citing* Schad v. Arizona, *supra*.

Accordingly, the Committee withdrew Instruction 8.03A Unanimity of Theory. In its place is Instruction 8.03B Unanimity Not Required – Means. This instruction is designed to cover cases where unanimity is not required because it is alleged the defendant used several possible means to commit a single element of the crime as described in *Schad* and *Richardson*. This new instruction is discussed in detail in its accompanying commentary.

1991 Edition

Fed.R.Crim.P. 7(c) permits the government to allege in one count of an indictment that "the defendant committed (the offense) by one or more specified means." In United States v. Duncan, 850 F.2d 1104 (6th Cir.1988), the Sixth Circuit followed the lead of the Fifth Circuit's decision in United States v. Gipson, 553 F.2d 453 (5th Cir.1977), and held that when the alternative means specified in a single count are conceptually separate and distinct, and special circumstances create a genuine risk that a conviction may occur as a result of different jurors

concluding that the defendant committed different acts, the district court must give an augmented unanimity instruction specifically telling the jurors that they must unanimously agree on at least one of the alternative means in order to convict. Accord United States v. Beros, 833 F.2d 455 (3d Cir.1987).

In Duncan, a taxpayer and his tax preparer were indicted for violating 26 U.S.C. §§ 7206(1) and 7206(2), which prohibit the making and the preparation of a tax return containing a false statement as to a material matter. The indictment charged that the taxpayer's 1982 return contained two separate and distinct false statements--one relating to a $115,000 capital gain, and another relating to an $8,800 interest deduction. Evidence was presented supporting both false statements, and the jury returned a general verdict finding the taxpayer and his tax preparer guilty as charged.

The Sixth Circuit reversed, concluding that the two false statements were conceptually separate and distinct, and that there were sufficient "special circumstances" requiring that an augmented unanimity instruction be given. The special circumstances cited by the Sixth Circuit were a pretrial defense motion that had specifically identified the potential for a "patchwork" verdict, and a mid-deliberation question from the jury that raised a genuine possibility that different jurors relied on a different false statement as the underlying factual predicate for guilt.

Other than in Duncan, the Sixth Circuit has consistently held that an augmented unanimity instruction is not required. See United States v. Zalman, 870 F.2d 1047, 1056 n. 10 (6th Cir.), cert. denied, ___ U.S. ___, 109 S.Ct. 3248, 106 L.Ed.2d 594 (1989); United States v. Busacca, 863 F.2d 433, 437-438 (6th Cir.1988), cert. denied, 490 U.S. 1005, 109 S.Ct. 1640, 104 L.Ed.2d 156 (1989); United States v. Bouquett, 820 F.2d 165, 168-169 (6th Cir.1987); United States v. McPherson, 782 F.2d 66, 67-68 (6th Cir.1986); and United States v. McGuire, 744 F.2d 1197, 1202-1203 (6th Cir.1984), cert. denied, 471 U.S. 1004, 105 S.Ct. 1866, 85 L.Ed.2d 159 (1985). See also United States v. English, 925 F.2d 154, 158-159 (6th Cir.1991).

In McKoy v. North Carolina, 494 U.S. ___, 110 S.Ct. 1227, 1236-1237, 108 L.Ed.2d 369, 385 (1990), Justice Blackmun, concurring, stated that there is no general requirement that the jury reach unanimous agreement on the preliminary factual issues that underlie the verdict. But he added that one significant exception is in federal criminal prosecutions, where a unanimous verdict is required. He said that there is general consensus among the federal circuits that there must be substantial agreement as to the principal factual elements underlying a specified offense, citing Duncan among other cases.

In Schad v. Arizona, 163 Ariz. 411, 788 P.2d 1162 (1989), cert. granted, ___ U.S. ___, 111 S.Ct. 243, 112 L.Ed.2d 202 (1990) (No. 90-5551), the Supreme Court granted certiorari to consider whether an augmented unanimity instruction is constitutionally required in a first degree murder case based on alternate theories of premeditated and felony-murder.

See generally Annotation, Requirement of Jury Unanimity as to Mode of Committing Crime Under Statute Setting Forth the Various Modes by Which Offense May Be Committed, 75 A.L.R.4th 91 (1990).

8.03B UNANIMITY NOT REQUIRED – MEANS

(1) One more point about the requirement that your verdict must be unanimous. Count ___ of the indictment accuses the defendant of committing the crime of _____ in more than one possible way. The first is that he _____. The second is that he _____.

(2) The government does not have to prove all of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of any one of these ways is enough. In order to return a guilty verdict, all twelve of you must agree that at least one of these has been proved; however, all of you need not agree that the same one has been proved.

Use Note

This instruction should be used if the indictment alleges that the defendant committed a single element of an offense in more than one way.

Committee Commentary 8.03B
(current through December 31, 2007)

This instruction is new in 2005. In Schad v. Arizona, 501 U.S. 624 (1991) (plurality opinion), the Supreme Court rejected the approach of requiring jury unanimity when the means used to commit an offense simply satisfy an element of a crime and do not themselves constitute a separate offense or an element of an offense. In these circumstances, unanimity is not required. *Id*. at 630-33.

Schad was followed by Richardson v. United States, in which the Court again distinguished the elements of a crime from the means used to commit the elements of the crime. Richardson v. United States, 526 U.S. 813, 817 (1999), *citing* Schad v. Arizona, 501 U.S. 624, 631-32 (1991) (plurality opinion). If a fact is an element, "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved [it]." *Richardson,* 526 U.S. at 817, *citing* Johnson v. Louisiana, 406 U.S. 356, 369-71 (1972)(Powell, J., concurring); Andres v. United States, 333 U.S. 740, 748 (1948); and Fed. Rule of Crim. Pro. 31(a). On the other hand, if the fact is defined as a means of committing the crime, "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Richardson,* 526 U.S. at 817, *citing* Schad v. Arizona, *supra* and Andersen v. United States, 170 U.S. 481, 499-501 (1898).

This instruction is designed to cover situations where the crime charged includes an element that can be committed by multiple means, so jury unanimity on a particular means is not required. The use note indicates that the instruction should only be given if the indictment alleges that the defendant committed a single element through more than one means.

The question of whether the language in a particular statute states multiple elements or merely a single element which can be accomplished by multiple means is resolved by analyzing the offense in question. In *Richardson*, the question was whether the "series of violations" language in the Continuing Criminal Enterprise statute, 21 U.S.C. § 848, required the jury to agree unanimously on the exact violations involved or only to agree that there had been a series of them. The Court analyzed the statute and concluded that each individual violation was an element, so the jury had to agree unanimously on each violation rather than merely agreeing that there had been a series of violations. 526 U.S. at 824.

Aside from § 848, other statutes which have been analyzed on this point include:

– 18 U.S.C. § 2 (terms listed in § 2 describe various means by which the elements of the crime can be accomplished, and do not require jury unanimity as to each of these terms, United States v. Davis, 306 F.3d 398, 414 (6th Cir. 2002));

–18 U.S.C. § 111 (harming or threatening a federal officer under § 111(a)(1) states a singular crime which can be committed six ways, United States v. Kimes, 246 F.3d 800, 809 (6th Cir. 2001));

– 18 U.S.C. § 666 (theft of government services under § 666 exemplifies an offense which can be committed by a variety of acts, United States v. Sanderson, 966 F.2d 184, 188-89 (6th Cir. 1992));

– 18 U.S.C. § 922(g)(1) (when the indictment charges a felon possessed more than one firearm, the particular firearm is not an element, but "instead the means used to satisfy the element of 'any firearm'," United States v. DeJohn, 368 F.3d 533, 542 (6th Cir. 2004));

– 18 U.S.C. § 1001 (duty to disclose and concealment of material information as alternative ways to prove violation of single offense, United States v. Zalman, 870 F.2d 1047, 1055 n.10 (6th Cir. 1989)).

Cf. 18 U.S.C. § 1425 ("Rather than defining two crimes, [subsections (a) and (b)] provide two means by which unlawful naturalization can be obtained." United States v. Damrah, 412 F.3d 618, 622 (6th Cir. 2005) (analyzing the issue in the context of a duplicity claim)) and 18 U.S.C. § 242 ("[T]he Fourteenth Amendment and Eighth Amendment excessive force standards describe two alternative methods by which one crime could be committed, rather than two crimes." U.S. v. Budd, 496 F.3d 517 (6th Cir. 2007) (analyzing the issue in the context of a constructive amendment claim)).

8.03C – UNANIMITY REQUIRED: STATUTORY MAXIMUM PENALTY INCREASED (CONTROLLED SUBSTANCES: 21 U.S.C. § 841)

(1) The defendant is charged in Count ___ of the indictment with _____. If you find the defendant guilty of this charge, you will then be asked to determine the quantity of the controlled substance involved in the offense. You will be provided with a special verdict form for this purpose.

(2) If you find by unanimous agreement that the government has proved beyond a reasonable doubt that the offense involved a quantity of at least ____ of a mixture or substance containing a detectable amount of _____, then please indicate this finding in the special verdict form.

[(3) If you do not so find, you will then be asked to determine whether the government has proved a lesser quantity. If you unanimously find that the government has proved beyond a reasonable doubt that the offense involved a quantity of at least ____ of a mixture or substance containing a detectable amount of _____, then please indicate this finding in the special verdict form.]

(4) In determining the quantity of the controlled substance involved in the offense, you need not find that the defendant knew the quantity involved in the offense.

Use Note

This is an example of a jury instruction which satisfies the requirements of Apprendi v. New Jersey, 530 U.S. 466 (2000) in a drug case. In these cases, it is recommended that the court use a special verdict form.

Depending upon the nature and quantity of the controlled substance alleged in the indictment, bracketed paragraph (3) may not be necessary to determine the quantity for sentencing purposes.

Thus, for example, if the indictment alleges a quantity of 50 grams or more of crack cocaine (cocaine base), then this instruction is intended to elicit, first, whether an amount of 50 grams or more has been proved by the government. Such a finding would invoke a statutory maximum sentence of life imprisonment (and a mandatory minimum sentence of 10 years imprisonment) under 21 U.S.C. § 841(b)(1)(A)(iii)(assuming that the defendant has no prior felony drug convictions, which would further enhance his sentence). If the jury does not find this quantity, it must then determine whether the amount met or exceeded a lesser threshold, in this case 5 grams of cocaine base. Such a finding would invoke a statutory maximum sentence of 40 years imprisonment (and a mandatory minimum sentence of 5 years imprisonment) under 21 U.S.C. § 841(b)(1)(B)(iii). If the jury finds that neither of these threshold quantities has been proved, then the base statutory maximum sentence of 20 years imprisonment would apply under 21 U.S.C. § 841(b)(1)(C).

Committee Commentary 8.03C
(current through December 31, 2007)

Instruction 8.03C, Unanimity Required – Statutory Maximum Penalty Increased (Controlled Substances, 21 U.S.C. § 841), is designed to cover prosecutions where unanimity is required because the amount of the controlled substance increases the statutory maximum penalty as described in Apprendi v. New Jersey, 530 U.S. 466 (2000).

Aside from the requirement that the jury must unanimously agree on all facts deemed to be elements of the offense, *see* Richardson v. United States, 526 U.S. 813, 817 (1999), the jury must also unanimously agree on any fact (other than a prior conviction) that increases the penalty for the crime beyond the prescribed statutory maximum. Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000); and Jones v. United States, 526 U.S. 227 (1999), discussed in Commentary to Instruction 2.02 Definition of the Crime. This new instruction 8.03C provides a framework for application of the *Apprendi* unanimity requirements in the context of a particular crime, 21 U.S.C. § 841. Under § 841, the quantity of a controlled substance can increase the penalty beyond the prescribed statutory maximum and so require that the jury agree unanimously on the quantity involved in the offense. Because *Apprendi* issues arise most frequently in controlled substances cases, the Committee drafted an instruction for prosecutions under § 841 that can be adapted for use in other cases.

8.04 DUTY TO DELIBERATE

(1) Now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.

(2) But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that--your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

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

(4) Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

Use Note

This instruction is designed for use before deliberations begin as part of the court's final instructions to the jury.

Committee Commentary 8.04
(current through December 31, 2007)

The Committee made no change in the instruction. The Committee also decided that no change in or addition to the 1991 Committee Commentary is warranted.

Case law on a related issue, the *Allen* charge, is discussed in the 2005 Commentary to Instruction 9.04.

1991 Edition

This instruction is designed for use before deliberations begin as part of the court's final instructions to the jury. Its content is heavily dependent on cases dealing with post-deliberation Allen-charges. In United States v. Sawyers, 902 F.2d 1217, 1220-1221 (6th Cir.1990), petition for cert. filed, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1990), the Sixth Circuit said that an Allen-charge "probably would have its least coercive effect if given along with the rest of the instructions before the jury ever start(s) deliberating."

In Allen v. United States, 164 U.S. 492, 501-502, 17 S.Ct. 154, 157, 41 L.Ed. 528 (1896), the district court gave some lengthy supplemental instructions which, as paraphrased by the Supreme Court in its opinion, included the following concepts:

1) that in a large proportion of cases absolute certainty could not be expected;

2) that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other;

3) that it was their duty to decide the case if they could conscientiously do so;

4) that they should listen, with a disposition to be convinced, to each other's arguments;

5) that, if the much larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one given that it had made no impression upon the minds of so many equally honest and intelligent persons; and

6) that if, on the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

The Supreme Court analyzed these supplemental instructions as follows:

"While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions."

The Supreme Court noted in its opinion that these instructions were "taken literally" from instructions approved by the Massachusetts Supreme Court in Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1, 2-3 (1851). The Tuey instructions included the following additional concepts, not noted by the Supreme Court in its Allen opinion:

7) that in order to make a decision more practicable, the law imposes the burden of proof on one party or the other;

8) that in a criminal case the burden of proof is on the government to prove every element of the charge beyond a reasonable doubt; and

9) that if the jurors are left in doubt as to any element, then the defendant is entitled to the benefit of that doubt and must be acquitted.

The records in the Allen case indicate that the actual instruction given by the district court only included a shortened version of these additional concepts. In the course of giving the supplemental instructions, the district court in Allen included the following from Tuey:

"In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the government."

See Records and Briefs, United States Supreme Court, Vol. 829, October Term 1896, Allen v. United States, Docket No. 371, Transcript of Record pp 137-138. Except for one First Circuit

decision, see Pugliano v. United States, 348 F.2d 902, 903-904 (1st Cir.), cert. denied, 382 U.S. 939, 86 S.Ct. 390, 15 L.Ed.2d 349 (1965), no other cases appear to have noticed or discussed this omission from the Supreme Court's opinion in Allen.

Despite substantial judicial and scholarly criticism of Allen in the years since it was decided, see generally American Bar Association Standards for Criminal Justice, Trial by Jury Standard 15-4.4 and Commentary, the Supreme Court recently reaffirmed Allen's constitutional validity in Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Referring to the Allen Court's analysis quoted above, the Court said that "(t)he continuing validity of this Court's observations in Allen are beyond dispute." Lowenfield, supra at 237.

Sixth Circuit decisions have repeatedly emphasized that the instructions approved by the Supreme Court in Allen "approach 'the ultimate permissible limits' for a verdict urging instruction." E.g., United States v. Harris, 391 F.2d 348, 354 (6th Cir.), cert. denied, 393 U.S. 874, 89 S.Ct. 169, 21 L.Ed.2d 145 (1968), quoting Green v. United States, 309 F.2d 852, 855 (5th Cir.1962). "Our ... circuit has determined that the wording approved at the turn of the century represents, at best, 'the limits beyond which a trial court should not venture in urging a jury to reach a verdict'." United States v. Scott, 547 F.2d 334, 337 (6th Cir.1977), quoting Harris, supra at 354. "Any variation upon the precise language approved in Allen imperils the validity of the trial." Scott, supra at 337. Accord Williams v. Parke, 741 F.2d 847, 850 (6th Cir.1984), cert. denied, 470 U.S. 1029, 105 S.Ct. 1399, 84 L.Ed.2d 787 (1985); United States v. Giacalone, 588 F.2d 1158, 1166 (6th Cir.1978), cert. denied, 441 U.S. 944, 99 S.Ct. 2162, 60 L.Ed.2d 1045 (1979); United States v. LaRiche, 549 F.2d 1088, 1092 (6th Cir.), cert. denied, 430 U.S. 987, 97 S.Ct. 1687, 52 L.Ed.2d 383 (1977).

Among the more important variations that the Sixth Circuit has criticized or disapproved are the following: 1) statements regarding the expense and burden of conducting a trial, United States v. Harris, supra, 391 F.2d at 354 ("questionable extension"); 2) statements that the case must be decided at some time by some jury, id. at 355 ("coercive ... (and) misleading"); 3) omitting statements reminding jurors that they should not surrender an honest belief about the outcome of the case simply because other jurors disagree, United States v. Scott, supra, 547 F.2d at 337 ("one of the most important parts of the Allen charge"); and 4) statements that juror intransigence would delay the trial of other cases and add to the court's backlog, Scott, supra at 337 ("impermissibly coercive").

These and other Sixth Circuit cases provide further guidance regarding the appropriate content of an Allen charge. In United States v. Barnhill, 305 F.2d 164, 165 (6th Cir.), cert. denied, 371 U.S. 865, 83 S.Ct. 126, 9 L.Ed.2d 102 (1962), the district court's supplemental instructions stressed the importance of reaching a verdict, and the duty of each individual juror to listen to the views expressed by the other jurors and to give those views due weight and consideration in attempting to arrive at a verdict. These statements were balanced with a reminder that each juror had the right to his own beliefs, and that if it developed that they could not agree, a mistrial would be declared and the case would be submitted to another jury. The Sixth Circuit affirmed, stating that these instructions "complied with the standards approved ... in Allen."

In United States v. Markey, 693 F.2d 594, 597 (6th Cir.1982), the district court concluded its instructions to the jury with the comment that the courthouse would be available the next morning, which was Christmas Eve day, if the jury was not able to reach a consensus that afternoon. The Sixth Circuit affirmed, stating that this comment "was not 'likely to give the jury the impression that it was more important to be quick than to be thoughtful'."

In United States v. Harris, supra, 391 F.2d at 355, the Sixth Circuit explained as follows why instructions indicating that the case must be decided at some time by some jury were coercive and misleading:

"The constitutional safeguards of trial by jury (Article III, Section 2, Clause 3, and the Sixth Amendment) have always been held to confer upon every citizen the right ... to remain free from the stigma and penalties of a criminal conviction until he has been found guilty by a unanimous verdict of a jury of twelve of his peers. The possibility of disagreement by the jury and the lack of a unanimous verdict is a protection conferred upon a defendant in a criminal case by the Constitution. For the judge to tell a jury that a case must be decided is therefore not only coercive in nature but is misleading in fact. It precludes the right of a defendant to rely on the possibility of disagreement by the jury."

The Sixth Circuit then noted that in Thaggard v. United States, 354 F.2d 735, 739 (5th Cir.1965), cert. denied, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301 (1966), the Fifth Circuit had said that:

"(An) Allen charge should be approved only so long as it 'avoids creating the impression that there is anything improper, questionable, or contrary to good conscience for a juror to cause a mistrial'."

Harris and subsequent Sixth Circuit cases have said that there is a clear distinction between language stating that the case "must be decided at some time," which is improper, and language stating that the case "must be disposed of at some time," which is not. Harris, supra at 356. "The latter phrase merely restates the obvious proposition that all cases must come to an end at some point, whether by verdict or otherwise." United States v. LaRiche, supra, 549 F.2d at 1092.

In Williams v. Parke, supra, 741 F.2d at 850-852, the Sixth Circuit upheld the defendant's state court conviction against constitutional attack. In rejecting the argument that the state trial court's supplemental instructions violated due process, the Sixth Circuit emphasized that the instructions had not included the much criticized language from Allen singling out minority jurors. Id. at 850. See also Lowenfield v. Phelps, supra, 484 U.S. at 237-238, 108 S.Ct. at 551 (noting same omission in the course of affirming a state court conviction). The Sixth Circuit also emphasized that the trial court's instructions implicitly advised the jurors of their "right to continue disagreeing" by alluding to the possibility that a new jury might be necessary, and by telling them that they should return to court if they could not agree. Williams, supra at 850. See also Hyde v. United States, 225 U.S. 347, 383, 32 S.Ct. 793, 808, 56 L.Ed. 1114 (1912) (district court's instruction that it was not the court's intention to unduly prolong the deliberations, and that if the jurors could not conscientiously agree, they would be discharged, eliminated potential coercive effect of other instructions).

In United States v. LaRiche, supra, 549 F.2d at 1092-1093, the Sixth Circuit rejected the

defendant's argument that the district court's Allen charge constituted plain error because it did not remind the jurors of the government's burden of proof. But in doing so the Sixth Circuit did say that "it may be desirable for a judge to restate the beyond a reasonable doubt standard in an Allen charge." Id. at 1093. See also United States v. Lewis, 651 F.2d 1163, 1165 (6th Cir.1981) (given the weakness of the evidence against the defendant, and the jury's difficulty in weighing the evidence, it was improper not to reinstruct on the government's burden of proving guilt beyond a reasonable doubt).

In United States v. Giacalone, supra, 588 F.2d at 1166-1167, the Sixth Circuit noted that in Kawakita v. United States, 343 U.S. 717, 72 S.Ct. 950, 96 L.Ed. 1249 (1952), the Supreme Court implicitly approved an Allen charge which later became the basis for Devitt and Blackmar Instruction 18.14. That instruction, which is intended for use as a supplemental instruction when the jurors fail to agree, states:

"The Court wishes to suggest a few thoughts which you may desire to consider in your deliberations, along with the evidence in the case, and all the instructions previously given.

This is an important case. The trial has been expensive in time, and effort, and money, to both the defense and the prosecution. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of some time. There appears no reason to believe that another trial would not be costly to both sides. Nor does there appear any reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before you. Any future jury must be selected in the same manner and from the same source as you have been chosen. So, there appears no reason to believe that the case would ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced on behalf of either side.

Of course these things suggest themselves, upon brief reflection, to all of us who have sat through this trial. The only reason they are mentioned now is because some of them may have escaped your attention, which must have been fully occupied up to this time in reviewing the evidence in the case. They are matters which, along with other and perhaps more obvious ones, remind us how desirable it is that you unanimously agree upon a verdict.

As stated in the instructions given at the time the case was submitted to you for decision, you should not surrender your honest convictions as to the weight or effect of evidence, solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

However, it is your duty as jurors to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence in the case with your fellow jurors. And in the course of your deliberations, you should not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous.

In order to bring twelve minds to an unanimous result, you must examine the questions submitted to you with candor and frankness, and with proper deference to and regard for the opinions of each other. That is to say, in conferring together, each of you should pay due attention and respect to the views of the others, and listen to each other's arguments with a disposition to reexamine your own views.

If much the greater number of you are for a conviction, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one, since it makes no effective impression upon the minds of so many equally honest, equally conscientious fellow jurors, who bear the same responsibility, serve under the same oath, and have heard the same evidence with,

we may assume, the same attention and an equal desire to arrive at the truth. On the other hand, if a majority or even a lesser number of you are for acquittal, other jurors ought seriously to ask themselves again, and most thoughtfully, whether they do not have reason to doubt the correctness of a judgment, which is not concurred in by many of their fellow jurors, and whether they should not distrust the weight and sufficiency of evidence, which fails to convince the minds of several of their fellows beyond a reasonable doubt.

You are not partisans. You are judges--judges of the facts. Your sole interest here is to seek the truth from the evidence in the case. You are the exclusive judges of the credibility of all the witnesses, and of the weight and effect of all the evidence. In the performance of this high duty, you are at liberty to disregard all comments of both court and counsel, including of course the remarks I am now making.

Remember, at all times, that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence. But remember also that, after full deliberation and consideration of all the evidence in the case, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and your conscience. Remember too, if the evidence in the case fails to establish guilt beyond a reasonable doubt, the accused should have your unanimous verdict of "NOT GUILTY".

In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is on the government.

Above all, keep constantly in mind that, unless your final conscientious appraisal of the evidence in the case clearly requires it, the accused should never be exposed to the risk of having to run twice the gauntlet of a criminal prosecution; and to endure a second time the mental, emotional and financial strain of a criminal trial.

You may conduct your deliberations as you choose, but I suggest that you now carefully reexamine and reconsider all the evidence in the case bearing upon the questions before you.

You may be as leisurely in your deliberations as the occasion may require; and you shall take all the time which you may feel is necessary. (The bailiffs have been instructed to take you to your meals at your pleasure, and to take you to your hotel whenever you may be ready to go.)

You may now retire and continue your deliberations, in such manner as shall be determined by your good and conscientious judgment as reasonable men and women."

In United States v. Nickerson, 606 F.2d 156, 158-159 (6th Cir.), cert. denied, 444 U.S. 994, 100 S.Ct. 528, 62 L.Ed.2d 424 (1979), the Sixth Circuit concluded that an instruction similar to Devitt and Blackmar Instruction 18.15 was not coercive. See also United States v. Lewis, supra, 651 F.2d at 1165 (characterizing Devitt and Blackmar Instruction 18.15 as having been "approved" in Nickerson). Instruction 18.15 is a milder and shorter version of the Allen charge. It states:

"I am going to ask you that you resume your deliberations in an attempt to return a verdict.

As I have told you, each of you must agree in order to return a verdict. You have the duty to consult with one another and to deliberate with a view to reaching an agreement, if this can be done without violence to individual judgment. Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors. During the course of your deliberations, each of you should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous. No juror, however, should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict."

Four of the five circuits that have drafted pattern instructions include an instruction on the jurors' duty to deliberate to be given as part of the court's final instructions before deliberations begin. See Fifth Circuit Instruction 1.25, Seventh Circuit Instruction 7.06, Ninth Circuit Instruction 7.01 and Eleventh Circuit Basic Instruction 11. And the Committee Comments to Eighth Circuit Instruction 10.02 state that "it is preferable that an 'Allen' type instruction be given as part of the regular final instructions, before the jurors begin their deliberations." All other sources surveyed, except for the D.C. Bar, also include such an instruction. See Federal Judicial Center Instruction 10, Devitt and Blackmar Instruction 18.01, Saltzburg and Perlman Instruction 3.67, and Sand and Siffert Instruction 9-7.

The instructions recommended by the Fifth, Seventh, Ninth and Eleventh Circuits, as well as those recommended by the Federal Judicial Center and Devitt and Blackmar, are all based to varying extents on the instruction recommended by the Commentary to ABA Standards for Criminal Justice, Trial by Jury Standard 15-4.4, which states:

"The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges--judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case."

Instruction 8.04 attempts to incorporate the best parts of these various instructions in plain English form.

The "every reasonable effort" language in paragraph (1) comes from Seventh Circuit Instruction 7.06, and is essentially a plain English restatement of the language in other instructions that the jurors have a duty to deliberate with a view to reaching an agreement if they can do so without violence to individual judgment.

The "keep an open mind" language in paragraph (1) is patterned after the "open mind" language found in Seventh Circuit Instruction 7.06.

The "try your best" language at the end of paragraph (1) summarizes the "every reasonable effort" theme stated in the first sentence for emphasis.

The "do not ever change your mind" language at the beginning of paragraph (2) is a plain English restatement of the "do not surrender" language found in other instructions. The adverb "ever" was included to provide an appropriate balance to the "do not hesitate" language and the other strong language in the first paragraph encouraging jurors to reach agreement.

The "just because other jurors see things differently" language, and the "just to get it

over with language," in paragraph (2) is a plain English restatement of language in other instructions. See Eleventh Circuit Basic Instruction 11 and Federal Judicial Center Instruction 10.

The "your own vote" language in paragraph (2) is a plain English restatement of the language in other instructions that the verdict must represent the considered judgment of each juror. The "only if you can do so honestly and in good conscience" language is drawn from the 1985 version of Ninth Circuit Instruction 7.01.

Paragraph (3) tells the jurors that no one will be allowed to hear their deliberations and that no record will be made of what they say. It is based on concepts included in Eleventh Circuit Basic Instruction 11 and Federal Judicial Center Instruction 9.

Paragraph (4) summarizes the deliberation process and relates it to the government's burden of proof. This approach is consistent with the concluding sentences recommended by Seventh Circuit Instruction 7.06 and Federal Judicial Center Instruction 10. It rejects the "seek the truth" language found in other instructions for the reasons more fully explained in the Committee Commentary to Instruction 1.02. Such language incorrectly assumes that the "truth" is somewhere in the evidence presented, overlooks the possibility that the proofs do not satisfactorily establish the truth one way or the other, and thereby shifts attention away from the government's obligation to convince the jury beyond a reasonable doubt. But see United States v. LaRiche, supra, 549 F.2d at 1093 (rejecting the defendant's argument that such language distorts the jury's function and dilutes the government's burden of proof).

8.05 PUNISHMENT

(1) If you decide that the government has proved the defendant guilty, then it will be my job to decide what the appropriate punishment should be.

(2) Deciding what the punishment should be is my job, not yours. It would violate your oaths as jurors to even consider the possible punishment in deciding your verdict.

(3) Your job is to look at the evidence and decide if the government has proved the defendant guilty beyond a reasonable doubt.

Committee Commentary 8.05
(current through December 31, 2007)

The Committee made no change in the instruction.

The Sixth Circuit cited this instruction and quoted paragraph (2) in support of its conclusion on an issue involving cross-examination on penalties in United States v. Bilderbeck, 163 F.3d 971, 978 (6th Cir. 1999).

This instruction remains appropriate in cases involving a verdict of not guilty by reason of insanity in the wake of Shannon v. United States, 512 U.S. 573 (1994). That decision is discussed in detail in the 2005 Commentary to Pattern Instruction 6.04 on the insanity defense.

1991 Edition

It is standard practice to include an instruction telling the jurors that if they find the defendant guilty, it is the judge's job to determine the appropriate punishment, and that they cannot consider what the possible punishment might be in deciding their verdict. See Fifth Circuit Instruction 1.21, Eighth Circuit Instruction 3.12, Ninth Circuit Instruction 7.03, Eleventh Circuit Basic Instruction 10.1, Federal Judicial Center Instruction 4, D.C. Bar Instruction 2.71, Devitt and Blackmar Instruction 18.02, Saltzburg and Perlman Instruction 3.61 and Sand and Siffert Instruction 9-1.

The language used in paragraph (2) of this instruction is patterned after Eleventh Circuit Basic Instruction 10.1, which states that "the question of punishment should never be considered by the jury in any way in deciding the case." See also the 1983 version of Fifth Circuit Basic Instruction 10A ("the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court or judge, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused").

8.06 VERDICT FORM

(1) I have prepared a verdict form that you should use to record your verdict. The form reads as follows: _____.

(2) If you decide that the government has proved the charge against the defendant beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. If you decide that the government has not proved the charge against him beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Your foreperson [Each of you] should then sign the form, put the date on it, and return it to me.

Use Note

The bracketed language in the last sentence of paragraph (2) should be used in place of "Your foreperson" if the court follows the practice of having all jurors sign the verdict form.

Committee Commentary 8.06
(current through December 31, 2007)

The Committee made no change in the instruction. The Committee also decided that no change in or addition to the 1991 Committee Commentary is warranted.

1991 Edition

Most of the circuits that have drafted pattern instructions have included an explanation to the jurors about how to use the verdict form, either as part of a general instruction on deliberations or as a separate instruction. See Fifth Circuit Instruction 1.25, Seventh Circuit Instruction 7.01, Eighth Circuit Instruction 3.12, Ninth Circuit Instruction 7.04 and Eleventh Circuit Basic Instruction 12. See also Federal Judicial Center Instruction 58, Devitt and Blackmar Instruction 18.03 and Saltzburg and Perlman Instruction 3.68.

Some judges prefer to have all jurors sign the verdict form. The bracketed language in the last sentence of paragraph (2) should be used in place of "Your foreperson" when this approach is preferred. See Federal Judicial Center Instruction 58.

In United States v. Escobar-Garcia, 893 F.2d 124, 126 (6th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 1792, 108 L.Ed.2d 793 (1990), the Sixth Circuit cautioned against the use of special interrogatories in criminal cases, unless exceptional circumstances are present.

Special interrogatories are proper when a drug conspiracy has two objects, such as the distribution of marijuana and cocaine, and the sentencing ranges vary depending on the object offense. United States v. Todd, 920 F.2d 399, 407-408 (6th Cir.1990). Similarly, courts have required the use of special interrogatories when a defendant's conviction rests on counts charging the violation of multiple statutes, each with different maximum sentences. Id. But special

interrogatories are not required when the amount of drugs is disputed, even though the sentence may vary depending on the amount possessed, because the amount of drugs is not an element of the offense. Id. Accord United States v. Rey, 923 F.2d 1217, 1223 (6th Cir.1991).

8.07 LESSER OFFENSE, ORDER OF DELIBERATIONS, VERDICT FORM

(1) As I explained to you earlier, the charge of _____ includes the lesser charge of _____.

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

(3) If you decide that the government has proved this lesser charge beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the verdict form. If you decide that the government has not proved this lesser charge beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Your foreperson [Each of you] should then sign the form, put the date on it and return it to me.

Use Note

The bracketed language in paragraph (2) should be added if the court believes that the jurors should be permitted to consider a lesser offense even though they have not unanimously acquitted the defendant of the charged offense.

The bracketed language in the last sentence of paragraph (3) should be used in place of "Your foreperson" if the court follows the practice of having all jurors sign the verdict form.

Committee Commentary 8.07

(current through December 31, 2007)

The Committee made no change in the instruction.

Lesser included offenses are defined in Pattern Instruction 2.03.

A panel of the Sixth Circuit held that it was not error for the district judge to omit the "reasonable effort" language in the paragraph (2) brackets. In United States v. Amey, 1995 WL 696680, 1995 U.S. App. LEXIS 35527 (6th Cir. 1995)(unpublished), the district court instructed the jury on lesser included offenses using an instruction substantially similar to Pattern Instruction 8.07 but omitting the bracketed language on "every reasonable effort" in paragraph (2). A panel of the Sixth Circuit affirmed the decision, explaining:

> We note, first, that the defendant's requested "reasonable efforts" instruction, if given in this case would not have constituted error. See, e.g., United States v. Tsanas, 572 F.2d at 346 ("we cannot say either form of instruction is wrong as a matter of law"); Sixth Circuit District Judges Association, Pattern Criminal Jury Instructions section 8.07, Committee Commentary (1991 ed.)("the Committee takes no position on which approach should be used"). However, given what even Tsanas recognizes to be the speculative advantages to be gained by a defendant from a "reasonable efforts" instruction, we conclude that the failure to give that instruction also cannot be held to constitute error.

We thus decline to reverse the conviction.

Amey, 1995 WL at 5, 1995 U.S. App. LEXIS at 14-15.

1991 Edition

All of the circuits that have drafted pattern instructions at some point explain to the jury the order and manner in which greater and lesser offenses should be considered. See Fifth Circuit Instruction 1.32, Seventh Circuit Instructions 2.03 and 7.02, Eighth Circuit Instruction 3.10, Ninth Circuit Instruction 3.13 and Eleventh Circuit Special Instruction 5. All of the other sources surveyed also include such an explanation somewhere in the instructions. See Federal Judicial Center Instruction 48, D.C.Bar Instruction 4.00, Devitt and Blackmar Instruction 18.05, Saltzburg and Perlman Instruction 3.64 and Sand and Siffert Instruction 9-10.

Although there is uniform agreement that some explanation about this should be given, there is a substantial variation of opinion about what the instruction should say. The Eleventh Circuit, along with Devitt and Blackmar, Saltzburg and Perlman and the D.C.Bar, take the position that the jury should not move on to consider a lesser included offense until the jury first unanimously agrees that the defendant is not guilty of the greater offense. The Fifth and Eighth Circuits, and the Federal Judicial Center, take the position that the jury should be allowed to move on to consider a lesser offense if the jury is unable to unanimously agree on a verdict on the greater offense. The Seventh Circuit and Sand and Siffert take the position that neither of these two options is legally incorrect, and that the district court may choose between them as the court sees fit, unless the defendant objects, in which case the court should give whichever option the defendant elects. The Ninth Circuit includes both options, and by case decision agrees that the defendant should have the right to elect whichever option he prefers. See United States v. Jackson, 726 F.2d 1466, 1469-1470 (9th Cir.1984).

Giving the defendant the right to elect the option to be given is based on the Second Circuit's decision in United States v. Tsanas, 572 F.2d 340 (2d Cir.), cert. denied, 435 U.S. 995, 98 S.Ct. 1647, 56 L.Ed.2d 84 (1978). In his opinion for the Court in Tsanas, Judge Friendly explained that the two available options had advantages and disadvantages for both the prosecution and the defense. With regard to the option that requires the jury to unanimously find the defendant not guilty of the greater offense before moving on to consider a lesser offense, he first described its advantages:

"(This) instruction ... has the merit, from the Government's standpoint, of tending to avoid the danger that the jury will not adequately discharge its duties with respect to the greater offense, and instead will move too quickly to the lesser one. From the defendant's standpoint, it may prevent any conviction at all; a jury unable either to convict or acquit on the greater charge will not be able to reach a lesser charge on which it might have been able to agree7.

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7 It might be thought to have the further advantage of producing a clear acquittal on the greater charge which would plainly forbid reprosecution on that charge after a successful appeal from the conviction on the lesser charge. But, here again, such a reprosecution apparently is barred by the double jeopardy clause regardless of the form of instruction. See Green v. United States, 355

U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970)." Tsanas, supra at 346.

He then went on to describe the disadvantages of such an instruction:

"But it entails disadvantages to both sides as well: By insisting on unanimity with respect to acquittal on the greater charge before the jury can move to the lesser, it may prevent the Government from obtaining a conviction on the lesser charge that would otherwise have been forthcoming and thus require the expense of a retrial. It also presents dangers to the defendant. If the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge." Id. at 346.

With regard to the option that allows the jury to move on to consider a lesser offense if the jury is unable to unanimously agree on a verdict on the greater offense, Judge Friendly said:

"An instruction permitting the jury to move on to the lesser offense if after all reasonable efforts it is unable to reach a verdict on the greater likewise has advantages and disadvantages to both sides--the mirror images of those associated with the (option discussed above). It facilitates the Government's chances of getting a conviction for something, although at the risk of not getting the one that it prefers. And it relieves the defendant of being convicted on the greater charge just because the jury wishes to avoid a mistrial, but at the risk of a conviction on the lesser charge which might not have occurred if the jury, by being unable to agree to acquit on the greater, had never been able to reach the lesser." Id. at 346.

He then concluded as follows:

"With the opposing considerations thus balanced, we cannot say that either form of instruction is wrong as a matter of law. The court may give the one that it prefers if the defendant expresses no choice. If he does, the court should give the form of instruction which the defendant seasonably elects. It is his liberty that is at stake, and the worst that can happen to the Government under the less rigorous instruction is his readier conviction for a lesser rather than a greater crime. As was said in Bell v. United States, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955), albeit in a different context:

It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." Id. at 346.

In United States v. Jackson, supra, 726 F.2d at 1469-1470, the Ninth Circuit found this reasoning persuasive, and joined the Second Circuit in holding that the district court should give whichever option the defendant elects. In addition to the reasons advanced by Judge Friendly, the Ninth Circuit argued that this approach "ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard." The Ninth Circuit explained that if the jury must unanimously agree on a not guilty verdict on the greater offense before moving on to a lesser, there is a risk that jurors who have a doubt that the defendant is guilty of the greater offense, but who are convinced the defendant is guilty of some offense, will likely resolve their doubts in favor of convicting the defendant of the greater offense, rather than holding out and not convicting the defendant of anything at all. See also Catches v. United States, 582 F.2d 453, 459 (8th Cir.1978) (referring to Judge Friendly's opinion in Tsanas as a "well-reasoned rule").

The closest that the Sixth Circuit has come to ruling on this question was in United States v. Cardinal, 782 F.2d 34 (6th Cir.), cert. denied, 476 U.S. 1161, 106 S.Ct. 2282, 90 L.Ed.2d 724 (1986). In Cardinal, the district court gave Devitt and Blackmar Instruction 18.05, which states that if the jury unanimously finds the defendant not guilty of the greater offense, it must proceed to consider the lesser offense. On appeal the defendant contended that the jury should have been told to consider the lesser offense if, after consideration of the greater, they had "some reasonable doubt" as to guilt of the greater offense. The Sixth Circuit held that the defendant had not properly preserved this issue for review, and held that the instruction given was clearly not plain error under Fed.R.Crim.Pro. 52(b). Cardinal, supra at 36-37. The Sixth Circuit did not cite or discuss the Second Circuit's decision in Tsanas, and distinguished the Ninth Circuit's decision in Jackson on the ground that there the defendant had made a timely request.

In Cardinal, the Sixth Circuit noted in the course of its opinion that in Catches v. United States, supra, 582 F.2d at 459, the Eighth Circuit had held that the rejection of such a request by the defense is not an error of constitutional magnitude. But see Spierings v. Alaska, 479 U.S. 1021, 107 S.Ct. 679, 93 L.Ed.2d 729 (1986) (White, J. dissenting to denial of certiorari). In Spierings, the Alaska Supreme Court rejected the defendant's argument that the trial court erred by instructing the jurors that they could not render a verdict on a lesser included offense until they unanimously acquitted him of the greater offense. Justice White noted that the Alaska Supreme Court's decision conflicted with Tsanas and Jackson, and urged the Supreme Court to grant certiorari to resolve this conflict.

In the absence of controlling authority from the Supreme Court or the Sixth Circuit, the Committee has included bracketed language in paragraph (2) to be used in the discretion of the district court. This bracketed language incorporates the concept that the jurors may move on to consider a lesser offense even if they cannot unanimously agree on a verdict on the greater charge. If the district court believes that this concept is appropriate, this bracketed language should be added to the unbracketed language used in paragraph (2). If the court believes that this concept is not appropriate, the bracketed language should be omitted. The Committee takes no position on which approach should be used.

Some judges prefer to have all jurors sign the verdict form. The bracketed language in the last sentence should be used instead of "Your foreperson" when this approach is preferred. See Federal Judicial Center Instruction 58.

See generally Annotation, Propriety of Lesser-Included-Offense Charge to Jury in Federal Criminal Cases, 100 A.L.R.Fed. 481 (1990).

8.08 VERDICT LIMITED TO CHARGES AGAINST THIS DEFENDANT

(1) Remember that the defendant is only on trial for the particular crime charged in the indictment [and the lesser charges which I described]. Your job is limited to deciding whether the government has proved the crime charged [or one of those lesser charges].

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

Use Note

Any changes made in paragraphs (1) and (2) should be made in paragraphs (2) and (3) of Instruction 2.01 as well.

Bracketed paragraph (2) should be included if the possible guilt of others has been raised as an issue during the trial. Modifications of this paragraph may be necessary in conspiracy, aiding and abetting, alibi or mistaken identification cases, where the possible guilt of others may be a legitimate issue.

Committee Commentary 8.08
(current through December 31, 2007)

The Committee made no change in the instruction. The Committee also decided that no change in or addition to the 1991 Committee Commentary is warranted.

1991 Edition

The purpose of this instruction is twofold. First, to remind the jurors that their verdict is limited to the particular charge made against the defendant. And second, to remind them that their verdict is limited to the particular defendant who has been charged. It is a plain English restatement of various concepts found in comparable instructions. See Fifth Circuit Instruction 1.20, Ninth Circuit Instruction 3.12, Eleventh Circuit Basic Instruction 10.1, Federal Judicial Center Instruction 20, Devitt and Blackmar Instructions 11.04 and 11.06, and Sand and Siffert Instructions 2-18 and 3-3.

Paragraph (2) should not be given in every case. If the possible guilt of others has not been raised during trial, this paragraph is unnecessary and should be omitted to avoid confusion. Note also that this paragraph may require modification in cases where vicarious criminal liability is alleged, such as conspiracy or aiding and abetting cases. In such cases the jury may be required to decide the guilt of other persons not charged in the indictment. Paragraph (2) may also require modification in cases in which the defendant has raised an alibi defense or has argued mistaken identification. Where the defendant claims that someone else committed crime,

it may be confusing to instruct the jurors that they should not be concerned with anyone else's guilt.

The concepts covered in paragraphs (1) and (2) are also covered in Instruction 2.01. Corresponding deletions or modifications should be made there as well.

8.09 COURT HAS NO OPINION

(1) Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the government has proved the defendant guilty beyond a reasonable doubt.

Committee Commentary 8.09
(current through December 31, 2007)

The Committee made no change in the instruction.

A panel of the Sixth Circuit has suggested that giving this instruction may help avoid error if the district judge questions the witnesses. In United States v. Voyles, 1993 WL 272448, 1993 U.S. App. LEXIS 19381 (6th Cir. 1993)(unpublished), the panel concluded that the questions the district judge asked witnesses during the trial were within the judge's authority and did not require the conviction to be reversed. In support of this conclusion, the panel noted that the district judge gave Pattern Instruction 8.09. *Voyles*, 1993 WL at 4, 1993 U.S. App. LEXIS at 11.

Similarly, a panel of the Sixth Circuit found no error in comments the judge made to the jury, in part because the district court gave an instruction identical to Pattern Instruction 8.09. In United States v. Frye, 2000 WL 32029, 2000 U.S. App. LEXIS 446 (6th Cir. 2000)(unpublished), the district court told the jury during voir dire that the court had approved the wire-tap used in the case. A panel of the Sixth Circuit found no error in refusing to strike the jury venire because of the comment and explained, "Due to the innocuous nature of the comment made to the jury, and based upon the curative instruction given by the court, it cannot be said that Frye was harmed to such an extent that reversal of the conviction is warranted." *Frye*, 2000 WL at 3, 2000 U.S. App. LEXIS at 8-9, *citing* United States v. Mosely, 810 F.2d 93, 99 (6th Cir. 1987).

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This instruction is designed to remind the jurors that nothing the judge has said or done should be taken as an expression of an opinion about how the case should be decided. Both the Ninth Circuit and Devitt and Blackmar include such a reminder in their instructions. See Ninth Circuit Instruction 7.02 and Devitt and Blackmar Instruction 18.10.

8.10 JUROR NOTES

(1) Remember that if you elected to take notes during the trial, your notes should be used only as memory aids. You should not give your notes greater weight than your independent recollection of the evidence. You should rely upon your own independent recollection of the evidence or lack of evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impression of each juror.

(2) Whether you took notes or not, each of you must form and express your own opinion as to the facts of the case.

Use Note

If note-taking is permitted, the court should also give a preliminary instruction on juror note-taking.

Committee Commentary
(current through December 31, 2007)

This instruction is new.

In United States v. Johnson, 584 F.2d 148 (6th Cir. 1978), the Sixth Circuit held that it was within the sound discretion of the trial court to allow the jury to take notes during the course of trial and use them in deliberations. *Id*. at 157. The Sixth Circuit particularly noted that allowing the jury to take notes during the course of trial is appropriate where numerous defendants are charged in a multi-count indictment. *Id*. at 158. The Committee recognizes the common practice of allowing the jury to take notes, especially in complex cases. This instruction is designed to accommodate that practice.

The language of the first paragraph is based upon the last two paragraphs of Eleventh Circuit Trial Instruction 2.1 (1997). The language of the second paragraph is based upon language in Fifth Circuit Pattern Instruction 1.02, Alternative B (2001).