Chapter 2.00

DEFINING THE CRIME AND RELATED MATTERS

Table of Instructions

2.01 INTRODUCTION

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

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

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

Use Note

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

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

Committee Commentary 2.01

(current through December 31, 2007)

The Committee made no change in the instruction.

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 LEXIS 30164 (6th Cir. 1999)(unpublished), a panel of the Sixth Circuit held that it was not error to give Pattern Instruction 2.01(3) without modification even though the defendant argued someone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

1991 Edition

See generally Fifth Circuit Instruction 1.20, Eleventh Circuit Basic Instruction 10.1, Federal Judicial Center Instruction 20, Devitt and Blackmar Instructions 11.04 and 11.06, Saltzburg and Perlman Instruction 3.56 and Sand and Siffert Instructions 2-18 and 3-3.

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

aiding and abetting cases. In such cases, the jury may legitimately be required to decide the guilt of other persons not charged in the indictment.

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

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

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

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

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

Use Note

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

Committee Commentary 2.01A
(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 instruction is modeled after Federal Judicial Center Instruction 46A, and Saltzburg and Perlman Instruction 1.04B. See also Fifth Circuit Instruction 1.21, Seventh Circuit Instruction 7.03, Ninth Circuit Instruction 3.9 and Eleventh Circuit Basic Instruction 10.2.

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

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

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

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

Committee Commentary 2.01B
(current through December 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

In United States v. Mayes, 512 F.2d 637, 641 (6th Cir.), cert. denied, 422 U.S. 1008, 95 S.Ct. 2629, 45 L.Ed.2d 670 (1975), the Sixth Circuit quoted with approval Justice Rutledge's admonition in Kotteakos v. United States, 328 U.S. 750, 772, 66 S.Ct. 1239, 1251, 90 L.Ed. 1557 (1946):

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

The proposed instruction is based on these principles, and on the instructions given by the district court in United States v. United States Gypsum Co., 550 F.2d 115, 127-128 n. 12 (3d Cir.1977), which were subsequently affirmed by the Supreme Court in United States v. United States Gypsum Co., 438 U.S. 422, 462-463, 98 S.Ct. 2864, 2886-2887, 57 L.Ed.2d 854 (1978). See also Fifth Circuit Instruction 1.22, Ninth Circuit Instruction 1.13 and 3.10, Eleventh Circuit Basic Instruction 10.3 and Federal Judicial Center Instruction 46B.

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

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

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

Use Note

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

Committee Commentary 2.01C
(current through December 31, 2007)

The Committee made no change in the instruction.

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

1991 Edition

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

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

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

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

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

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

Use Note

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

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

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

2.02 DEFINITION OF THE CRIME

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

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

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

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

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

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

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

Use Note

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

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

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

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

Committee Commentary 2.02
(current through December 31, 2007)

The Committee made no change in the instruction.

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

n.6 (1999))." *See also* Ring v. Arizona, 536 U.S. 584, 602-03 (2002).

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

When the indictment alleges facts which increase the prescribed statutory maximum penalty for the charged offense, these facts should not be included in bracketed paragraph (1)(C) of the instruction because these additional facts are not "required to convict." Rather, in this situation, special verdict forms and an additional instruction may be necessary for the jury to make findings. An example of a prosecution raising this issue is a controlled substances prosecution in which the amount of the controlled substance increases the statutory maximum penalty. See Instruction 8.03C.

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

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

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

1991 Edition

The Committee does not recommend that the trial judge read the indictment to the jury. The content of an indictment is determined by what a valid charging document requires. As a result, it may contain legal jargon not easily understandable by lay jurors. It may also include statements or allegations that are not necessarily material to a particular defendant's guilt or innocence. For these reasons, this instruction does not recommend reading the indictment. But the Committee takes no position on the practice in some districts of providing the jury with a copy of the indictment.

Some pattern instructions suggest that the district court paraphrase the material allegations in the indictment in language that is understandable by lay jurors. But paraphrasing the indictment puts an added burden on the district court, creates the potential for appellate litigation if a material allegation is erroneously translated or overlooked, and is unnecessary because the elements of the crime will be defined elsewhere in the instructions. And whatever weight might be given to the argument that the jury inferentially should be told that a grand jury has found sufficient evidence to indict is countered by the long settled rule that the indictment is not evidence of guilt. E.g., Garner v. United States, 244 F.2d 575, 576-577 (6th Cir.), cert. denied, 355 U.S. 832, 78 S.Ct. 47, 2 L.Ed.2d 44 (1957). For these reasons, the Committee similarly does not recommend paraphrasing the indictment.

Some pattern instructions recommend that the district court read the material parts of the statute the defendant is charged with violating. But like indictments, statutes may contain legal jargon not easily understandable by lay jurors, and often they are drafted broadly to cover a number of ways in which a given offense may be committed, some or most of which may not be material in a particular case. Reading or paraphrasing the statute thus suffers from problems similar to those involved in reading or paraphrasing the indictment. See United States v. Morrow, 923 F.2d 427, 434 (6th Cir.1991) (trial judge's responsibility goes beyond merely reading or reiterating the pertinent statute). This instruction therefore does not recommend reading or paraphrasing the applicable statute.

Some pattern instructions recommend that the district court provide the jury with the citation to the particular United States Code provision the defendant is charged with violating. The apparent reason for this is to impress the jury with the fact that what the defendant is charged with is a crime. But it is questionable whether the numerical citation is necessary to achieve this purpose. For this reason, this instruction does not recommend that the numerical citation be included. Instead, the instruction simply tells the jury that federal law makes what the defendant is accused of a crime.

Whether and to what extent instructions defining the offense charged should repeat concepts like the presumption of innocence, the government's burden of proof and reasonable doubt is a matter of some dispute. Some pattern instructions repeat all three of these concepts in their offense definition instructions. See for example Saltzburg and Perlman Instructions 3.58A and 32.01. Most omit reference to the presumption of innocence, but at least mention the government's burden of proof beyond a reasonable doubt. See for example Fifth Circuit Instruction 2.24, Seventh Circuit Instruction 6.01, Federal Judicial Center Instruction 65, Devitt and Blackmar Instruction 13.04, and Sand and Siffert Instruction 3-10. The Committee

recommends this latter approach.

There is also some dispute over whether the offense definition instruction should explicitly explain that if the government fails to prove any one of the required elements, then the jury's verdict must be not guilty. A majority of pattern instructions do not explicitly explain this in their offense definition instructions. See for example Fifth Circuit Instruction 2.24, Eighth Circuit Instruction 6.18.471, Ninth Circuit Instruction 8.06A, Eleventh Circuit Offense Instruction 5, Federal Judicial Center Instruction 65 and Devitt and Blackmar Instruction 13.04. A respectable minority, however, do. See Seventh Circuit Instruction 6.01, Saltzburg and Perlman Instruction 32.01, Sand and Siffert Instruction 3-10 and D.C. Bar Instruction 4.00. The Committee recommends the latter approach because this is an important concept that should not be left to inference.

This instruction recommends a suggested format for defining the elements of the crime which breaks the definition down into two basic parts-- the prohibited acts and/or results required to convict; and the required mental state. This is a common format. See for example Eleventh Circuit Offense Instruction 5 and Federal Judicial Center Instruction 65. Obviously, it is impossible to break every federal crime down into two neatly separate elements, and this instruction should not be viewed as a rigid formula that can or should be rotely followed in every case. A bracketed catch-all paragraph (1)(C) is included to illustrate that other elements may be required to convict.

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

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

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

2.03 DEFINITION OF LESSER OFFENSE

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

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

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

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

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

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

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

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

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

Use Note

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

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

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

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

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

Committee Commentary 2.03
(current through December 31, 2007)

The Committee made no change in the instruction.

Federal Rule of Criminal Procedure 31(c) provides:

> (c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

The Supreme Court identified the test for defining lesser included offenses under Rule 31(c) in Schmuck v. United States, 489 U.S. 705 (1989). The Court adopted the "elements approach." *Id.* at 716. The Court explained: "Under this test, one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)." *Id*. This elements approach requires a comparison of the statutory elements of the greater and lesser offenses as opposed to a comparison of the conduct proved at trial. *Id*. at 716-17. For an application of this test, *see* Carter v. United States, 530 U.S. 255 (2000).

In United States v. Monger, 185 F.3d 574 (6th Cir.1999), the court stated, "A criminal defendant 'is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" *Id.* at 576, *quoting* Keeble v. United States, 412 U.S. 205 (1973). The *Monger* court stated that a lesser included offense instruction should be given when four criteria are met:

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

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

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

Other circuits which have drafted pattern instructions disagree over whether the district court should define the difference between the greater and lesser offenses. *Compare* Fifth Circuit Instruction 1.33 (2001) and Eleventh Circuit Special Instruction 10 (2003)(instructions do define difference) *with* Seventh Circuit Instruction 2.02 (1999)(instruction does not define difference). Ninth Circuit Instruction 3.15 (2003) takes a middle road, defining the difference in the greater and lesser offenses very briefly.

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

1991 Edition

There is disagreement among the circuits over when the jury should be permitted to move on to consider a lesser included offense. The case law on this subject is fully discussed in the Committee Commentary to Instruction 8.07. Because there is no controlling Sixth Circuit authority on point, the Committee has included bracketed language in paragraph (1) 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 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 in paragraph (1). If the court believes that the jury should not be permitted to move on to consider a lesser offense unless it first unanimously acquits the defendant of the greater offense, then the bracketed language should be omitted. The Committee takes no position on which approach should be used.

Paragraph (2) suggests that the district court define the difference between the greater and lesser offenses. Other circuits that have drafted pattern instructions do not do this. But Federal Judicial Center Instruction 48 and Saltzburg and Perlman Instruction 3.64 do so, and there are persuasive reasons for this approach, despite the added burden it places on the district court. Lay jurors are ill-equipped to divine the difference between a greater and lesser offense without explicit guidance from the court. They are not lawyers. The definitions they are given, usually orally, are unfamiliar. And the amount of time devoted to "teaching" them the elements is brief. Without explicit guidance, the odds that they will accurately discern the difference between a greater and lesser offense are poor, and the risk of a mistaken verdict is increased. For these reasons, this instruction recommends that the district court explicitly define the difference between the greater and lesser offense.

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

2.04 ON OR ABOUT

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

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

Use Note

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

Committee Commentary 2.04
(current through December 31, 2007)

The Committee made no change in the instruction.

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

1991 Edition

In Ledbetter v. United States, 170 U.S. 606, 612-613, 18 S.Ct. 774, 776- 777, 42 L.Ed. 1162 (1898), the Supreme Court rejected the defendant's argument that an indictment charging that the offense occurred "on the ___ day of April, 1896" was insufficient. The Court said that it was not necessary for the government to prove that the offense was committed on a particular day, unless the date is made material by the statute defining the offense. The Court said that ordinarily, proof of any date before the indictment and within the applicable statute of limitations will suffice.

In United States v. Ford, 872 F.2d 1231, 1236 (6th Cir.1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1946, 109 L.Ed.2d 309 (1990), the Sixth Circuit held that proof of the exact date of an offense is not required, as long as a date "reasonably near" that named in the indictment is established. Applying this rule to the case before it, the Sixth Circuit reversed the defendant's firearms possession conviction because the district court's "on or about" instruction permitted the jury to convict if it found that the defendant possessed a firearm on any date during an eleven month period preceding the date alleged in the indictment. The Sixth Circuit held that a date eleven months before the date alleged in the indictment did not satisfy the "reasonably near"

requirement.

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

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

However, even when an alibi defense is raised, the district court retains the discretion to give an "on or about" instruction. United States v. Neuroth, 809 F.2d 339, 341-342 (6th Cir.1987) (en banc), cert. denied, 482 U.S. 916, 107 S.Ct. 3190, 96 L.Ed.2d 678 (1987). In exercising this discretion, the district court should look at how specifically the indictment alleges the date on which the offense occurred, and compare that to the proofs at trial regarding the date of the offense. If the indictment or the proofs point exclusively to a particular date, it is preferable for the court not to give an "on or about" instruction. The court should also consider the type of crime charged. An "on or about" instruction may be more appropriate in a case involving a crime like conspiracy, where the proof as to when the crime occurred is more nebulous, than in a case involving a crime like murder, where the proof as to when the crime occurred may be more concrete. These factors are guidelines only, not a rigid formula. Id. at 342.

Caution also should be used in giving this instruction when there is a statute of limitations question, see Ledbetter v. United States, supra, 170 U.S. at 612, 18 S.Ct. at 776, or when the date charged is an essential element of the offense and the defendant may have been misled by the date alleged in the indictment. See United States v. Bourque, 541 F.2d 290, 293-296 (1st Cir.1976); United States v. Goldstein, 502 F.2d 526, 528-530 (3d Cir.1974). See also United States v. Pandilidis, 524 F.2d 644, 647 (6th Cir.1975) (while a mere change of date is not normally considered a substantial variation in an indictment, where the date of the alleged offense affects the determination of whether a crime has been committed, the change is considered material), cert. denied, 424 U.S. 933, 96 S.Ct. 1146, 47 L.Ed.2d 340 (1976).

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

2.05 WILLFULLY

(No General Instruction Recommended.)

Committee Commentary 2.05
(current through December 31, 2007)

The Committee made no change in its approach. The Committee continues to recommend that the district court give no general instruction defining "willfully" and that instead, the district court define the mental state required for the particular crime charged as part of the court's instructions defining the elements of the offense.

No significant changes in the definitions of "willfully" listed by crime in the 1991 commentary have occurred.

The Fifth Circuit, which originally provided a definition of willfully in its 1978 edition, abandoned any attempt to define the term in its 2001 edition. See Fifth Circuit Instruction 1.38. Both the Seventh and Ninth Circuits recommend no general instruction on the term willfully, see Seventh Circuit Instruction 6.03 (1999) and Ninth Circuit Instruction 5.5.

1991 Edition

The Committee does not recommend any general instruction defining the term "willfully" because no single instruction can accurately encompass the different meanings this term has in federal criminal law. This term is "a word 'of many meanings, its construction often being influenced by its context'." Screws v. United States, 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495 (1945) (Opinion of Douglas, J.), quoting Spies v. United States, 317 U.S. 492, 497, 63 S.Ct. 364, 367, 87 L.Ed. 418 (1943).

The Committee instead recommends that the district court define the precise mental state required for the particular offense charged as part of the court's instructions defining the elements of the offense. This approach is consistent with the approach taken by the majority of the circuits that have drafted pattern instructions. See the Committee Comments to Fifth Circuit Instruction 1.36 ("The Committee has ... abandoned ... an inflexible definition of that term. Instead, we have attempted to define clearly what state of mind is required ... to be guilty of the particular crime charged"), Seventh Circuit Instruction 6.03 ("(R)arely desirable to give a general definition of 'willfully' ... (if) it must be defined, it should be defined in a manner tailoring it to the details of the particular offense charged"), Eighth Circuit Instruction 7.02 ("Committee recommends that the word 'willfully' not be used in jury instructions in most cases"), Ninth Circuit Instruction 5.05 ("Congressional purpose is more likely to be accomplished by avoiding the standard specific intent instruction and giving in its place an instruction which tracks the relevant statutory definition of the offense ... in language tailored to the facts"). See also the Introduction to the Federal Judicial Center Instructions ("(W)e have abjured the term ... 'willfully' ... (and instead) have tried our best to make it clear what it is that a defendant must intend or know to be guilty of an offense"), and the Comments to Sand and Siffert Instruction 6.06 ("(N)o general instruction is advanced on ... willfulness").

Of the circuits that have drafted pattern instructions, only the Eleventh unqualifiedly retains a general definition of the term willfully. See Eleventh Circuit Basic Instruction 9.1.

In United States v. Pomponio, 429 U.S. 10, 11-12, 97 S.Ct. 22, 23-24, 50 L.Ed.2d 12 (1976), the Supreme Court stated that the term "willfully" does not require proof of any evil motive or bad purpose other than the intention to violate the law.

To determine the precise mental state required for conviction, "each material element of the offense must be examined and the determination made what level of intent Congress intended the Government to prove, taking into account constitutional considerations (citation omitted), as well as the common-law background, if any, of the crime involved." United States v. Renner, 496 F.2d 922, 926 (6th Cir.1974), quoting United States v. Freed, 401 U.S. 601, 613-614, 91 S.Ct. 1112, 1120-1121, 28 L.Ed.2d 356 (1971) (Brennan, J., concurring in the judgment). Below is an illustrative partial list of various federal crimes, along with the Sixth Circuit or United States Supreme Court decisions interpreting the precise meaning of the term "willfully." Care should be taken to check the current status of these decisions before incorporating them into an instruction.

1. Filing False Income Tax Return (26 U.S.C. s 7206(1)): In the context of s 7206 and related offenses, the requirement that the defendant "willfully" file a false income tax return means that the defendant must voluntarily and intentionally violate a known legal duty. But no proof of any additional evil motive is required. United States v. Pomponio, 429 U.S. 10, 11-13, 97 S.Ct. 22, 23-24, 50 L.Ed.2d 12 (1976). See also United States v. Sassak, 881 F.2d 276, 278-280 (6th Cir.1989). In Cheek v. United States, 498 U.S. ___, 111 S.Ct. 604, 610-611, 112 L.Ed.2d 617, 629-631 (1991), the Supreme Court held that willfulness may be negated by a good faith misunderstanding of the legal duties imposed by the tax laws, even if the misunderstanding is not objectively reasonable, but that it cannot be negated by a good faith belief that a known legal duty is unconstitutional.

2. Intercepting Wire or Oral Communications (18 U.S.C. s 2511): A defendant acts "willfully" for purposes of this statute if he knowingly or recklessly disregards a known legal duty. Farroni v. Farroni, 862 F.2d 109, 112 (6th Cir.1988). Note that in 1986 Congress amended s 2511, substituting the word "intentionally" for "willfully."

3. Threatening the President's Life (18 U.S.C. s 871): A defendant acts "willfully" for purposes of this statute if he intentionally does what the law prohibits. United States v. Glover, 846 F.2d 339, 345 (6th Cir.), cert. denied, 488 U.S. 982, 109 S.Ct. 533, 102 L.Ed.2d 565 (1988). The government does not have to prove that the defendant had an actual, subjective intent to carry out the threat. E.g., United States v. Vincent, 681 F.2d 462, 464 (6th Cir.1982).

4. Indirect Criminal Contempt (18 U.S.C. s 401(3)): "Willfulness" in this context means a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent one. United States v. Smith, 815 F.2d 24, 25-26 (6th Cir.1987). The Court reserved judgment on whether an additional specific intent or bad purpose to disobey a rule must also be proven.

5. Obstructing the Mails (18 U.S.C. s 1701): The term "willfully and knowingly" in this context requires proof that the defendant had the specific intent to commit a wrongful act, and that he knew that the effect of his actions would be to obstruct the mails. United States v. Schankowski, 782 F.2d 628, 631-632 (6th Cir.1986).

6. Draft Evasion (50 U.S.C. s 462(a)): The term "willfully" in this context means to act voluntarily and purposely with the specific intent to do that which the law forbids--i.e. with bad purpose either to disobey or disregard the law. United States v. Krosky, 418 F.2d 65, 67 (6th

Cir.1969).

7. Making False Statements Involving Federal Agency Matters (18 U.S.C. s 1001): The term "knowingly and willfully" in this context only requires the government to prove that the defendant made a statement with knowledge that it was false. There is no requirement that the government also prove that the defendant made the statement with actual knowledge of federal agency jurisdiction. United States v. Yermian, 468 U.S. 63, 68-70, 104 S.Ct. 2936, 2939-2940, 82 L.Ed.2d 53 (1984). But see United States v. Gibson, 881 F.2d 318, 323-325 (6th Cir.1989) (Merritt, J. dissenting) (subsequent Supreme Court decisions indicate that some level of culpability must be established even with regard to the jurisdictional element).

2.06 KNOWINGLY

(No General Instruction Recommended)

Committee Commentary 2.06
(current through December 31, 2007)

The Committee made no change in its approach. The Committee continues to recommend that the district court give no general instruction defining the term "knowingly" and that instead, the district court define the mental state required for the particular crime charged as part of the court's instructions defining the elements of the offense.

The following definitions of "knowingly" apply to offenses covered by elements instructions in the 2005 edition:

– Possession of firearm by convicted felon, 18 U.S.C. § 922(g)(1): In United States v. Odom, 13 F.3d 949 (6th Cir. 1994), the Sixth Circuit approved an instruction defining knowingly under § 922(g)(1) as "voluntarily and intentionally, and not because of mistake or accident." *Id.* at 961. *See* Instruction 12.01 FIREARMS – Possession of Firearm by Convicted Felon.

– Mail fraud, 18 U.S.C. § 1341; wire fraud, 18 U.S.C. § 1343; and bank fraud, 18 U.S.C. § 1344: In United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984), the Sixth Circuit approved an instruction defining knowingly under § 1341 as "voluntarily and intentionally, and not because of mistake or some other innocent reason." *See* Instruction 10.01 Mail Fraud; Instruction 10.02 Wire Fraud; and Instruction 10.03 Bank Fraud.

No significant changes have occurred in the definitions of knowingly listed by crime in the 1991 commentary. Consistent but more recent case law on these crimes is provided below.

– Possession of unregistered firearm, 26 U.S.C. § 5861(d): In United States v. Staples, 511 U.S. 600 (1994), the Court held that the government was required to prove that the defendant knew the weapon he possessed had characteristics that brought it within the statutory definition of a firearm. The Court noted that § 5861(d) is silent concerning the mens rea required for a violation. "Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional mens rea element, which would require that the defendant know the facts that make his conduct illegal." 511 U.S. at 616. The Court determined that the background rule of the common law favoring mens rea should govern the interpretation of this statute. *See also* Rogers v. United States, 522 U.S. 252 (1998)(holding that defendant's admission that he knew the item was a silencer constituted evidence sufficient to satisfy the mens rea element).

– Interstate transportation of child pornography, 18 U.S.C. § 2252: In United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), the Court held that the term "knowingly" in § 2252 extends both to the sexually explicit nature of the material and to the age of the performers. 513 U.S. at 78.

1991 Edition

Most other circuits include a general definition of the term "knowingly" in their pattern instructions. See Fifth Circuit Instruction 1.37, Seventh Circuit Instruction 6.04, Ninth Circuit Instruction 5.6. But the meaning of the term "knowingly" varies depending on the particular

statute in which it appears. For example, in Liparota v. United States, 471 U.S. 419, 433-434, 105 S.Ct. 2084, 2092-2093, 85 L.Ed.2d 434 (1985), the Supreme Court held that to convict a defendant of food stamp fraud, the government must prove that the defendant knew that his acquisition or possession of food stamps was unauthorized by statute or regulations. In contrast, in United States v. Elshenawy, 801 F.2d 856, 857- 859 (6th Cir.1986), cert. denied, 479 U.S. 1094, 107 S.Ct. 1309, 94 L.Ed.2d 164 (1987), the Sixth Circuit held that to convict a defendant of possessing contraband cigarettes, the government need only prove that the defendant knew the physical nature of what he possessed. The government need not prove that the defendant also knew that the cigarettes in his possession were required to be taxed, or that the required taxes had not been paid.

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

Below is an illustrative partial list of various federal crimes and the Sixth Circuit or United States Supreme Court decisions interpreting the particular level of knowledge required to convict. Care should be taken to check the current status of these decisions before incorporating them into an instruction.

1. Food Stamp Fraud (7 U.S.C. 2024(b)(1)): The government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations. Liparota v. United States, 471 U.S. 419, 433-434, 105 S.Ct. 2084, 2092-2093, 85 L.Ed.2d 434 (1985).

2. Possession of Contraband Cigarettes (18 U.S.C. s 2342(a)): The government need only prove the defendant knew the physical nature of what he possessed. There is no requirement that the government also prove the defendant knew that the cigarettes in his possession were required to be taxed, or that the required taxes had not been paid. United States v. Elshenawy, 801 F.2d 856, 857-859 (6th Cir.1986), cert. denied, 479 U.S. 1094, 107 S.Ct. 1309, 94 L.Ed.2d 164 (1987).

3. Possession of Unregistered Firearm (26 U.S.C. s 5861(d)): The government need only prove the defendant knew that the instrument he possessed was a firearm. There is no requirement that the government also prove that the defendant knew the firearm was not registered. United States v. Freed, 401 U.S. 601, 607-610, 91 S.Ct. 1112, 1117-1119, 28 L.Ed.2d 356 (1971). See also United States v. Poulos, 895 F.2d 1113, 1118 (6th Cir.1990) (no requirement that the government prove knowledge that registration was required).

4. Transferring an Unregistered Fully Automatic Weapon (26 U.S.C. s 5861(e)): At least when a weapon's outer appearance does not indicate that it is fully automatic, the government must prove that the defendant knew of the weapon's fully automatic nature. United States v. Williams, 872 F.2d 773 (6th Cir.1989).

5. Reentry Without Permission After Deportation (8 U.S.C. s 1326): The government need not prove that the defendant knew he was not entitled to reenter the country without the Attorney General's permission. United States v. Hussein, 675 F.2d 114, 115-116 (6th Cir.1982), cert. denied, 459 U.S. 869, 103 S.Ct. 154, 74 L.Ed.2d 129 (1982).

6. Travel Act (18 U.S.C. s 1952): The government must prove that the defendant intended with bad purpose to violate the law of the state of destination. United States v. Stagman, 446 F.2d 489, 494 (6th Cir.1971).

7. Interstate Transportation of Child Pornography (18 U.S.C. s 2252): The government need only prove that the defendant knowingly dealt in the prohibited material. There is no requirement that the government also prove that the defendant knew his doing so was statutorily unlawful. United States v. Tolczeki, 614 F.Supp. 1424, 1428-1429 (N.D.Ohio 1985).

8. Controlled Substances: There is no requirement that the government prove that the defendant knew the drugs he possessed were subject to federal regulation. United States v. Balint, 258 U.S. 250, 254, 42 S.Ct. 301, 303, 66 L.Ed. 604 (1922).

9. Making False Statements Involving Federal Agency Matters (18 U.S.C. s 1001): The term "knowingly and willfully" in this context only requires the government to prove that the defendant made a statement with knowledge it was false. There is no requirement that the government also prove the defendant made the statement with actual knowledge of federal agency jurisdiction. United States v. Yermian, 468 U.S. 63, 68-70, 104 S.Ct. 2936, 2939-2940, 82 L.Ed.2d 53 (1984). But see United States v. Gibson, 881 F.2d 318, 323-325 (6th Cir.1989) (Merritt, J. dissenting) (subsequent Supreme Court decisions indicate that some level of culpability must be established even with regard to the jurisdictional element).

10. Assaulting a Federal Officer (18 U.S.C. s 111): There is no requirement that the government prove the defendant knew he was assaulting a federal officer. All the government must prove is the intent to assault. United States v. Feola, 420 U.S. 671, 684, 95 S.Ct. 1255, 1263, 43 L.Ed.2d 541 (1975).

2.07 SPECIFIC INTENT

(No General Instruction Recommended)

Committee Commentary 2.07
(current through December 31, 2007)

The Committee made no change in its approach. The Committee continues to recommend that the district court give no general instruction on specific intent and that instead, the district court define the mental state required to convict as part of the instructions defining the elements of the offense.

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

No other pattern instructions recommend defining the term specific intent.

1991 Edition

In United States v. Bailey, 444 U.S. 394, 403, 100 S.Ct. 624, 631, 62 L.Ed.2d 575 (1980), the Supreme Court characterized the distinction between general and specific intent as "ambigu(ous)" and as "the source of a good deal of confusion." In Liparota v. United States, 471 U.S. 419, 433 n. 16, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), the Court noted that Devitt and Blackmar Instruction 14.03 on specific intent had been criticized as "too general and potentially misleading." The Court then said that "(a) more useful instruction might relate specifically to the mental state required (for the particular offense) and eschew use of difficult legal concepts like 'specific intent' and 'general intent'."

In United States v. S & Vee Cartage Co., 704 F.2d 914, 918-920 (6th Cir.), cert. denied, 464 U.S. 935, 104 S.Ct. 343, 78 L.Ed.2d 310 (1983), the district court refused to give any general instruction on general and specific intent. Instead, the court just instructed the jury on the precise mental state required to convict. The Sixth Circuit rejected the defendants argument that an instruction on general and specific intent should have been given and affirmed the defendants' convictions. The Sixth Circuit said that "(a) court may properly instruct the jury about the necessary mens rea without resorting to the words 'specific intent' or 'general intent'," and that "(i)t is sufficient to define the precise mental state required by the statute." Id. at 919.

Based on these cases, the Committee recommends that no general instruction on specific intent be given. Instead, the Committee recommends that the district court define the precise mental state required to convict as part of the court's instructions defining the elements of the offense. For some federal crimes, this will require an instruction that the government must prove that the defendant intentionally violated a known legal duty. E.g., Cheek v. United States, 498 U.S. ___, 111 S.Ct. 604, 610-611, 112 L.Ed.2d 617, 629-631 (1991). For other federal crimes, proof that the defendant knew an act was unlawful is not required to convict. E.g., United States

v. S & Vee Cartage Co., supra 704 F.2d at 919.

This approach is consistent with the approach recommended by all of the circuits that have drafted pattern instructions. See for example the Committee Comments to Seventh Circuit Instruction 6.02 ("The Committee recommends avoiding instructions that distinguish between 'specific intent' and 'general intent'.... (and instead) recommends that instructions be given which define the precise mental state required by the particular offense charged."). See also the Committee Comments to Eighth Circuit Instruction 7.01, and Ninth Circuit Instruction 5.4. This is also the approach taken by the Federal Judicial Center Instructions. See Introduction ("(W)e have abjured the terms 'specific intent' and 'general intent'.").

See Committee Commentaries 2.05 and 2.06 for a partial list of some federal crimes and the precise mental state required to convict.

2.08 INFERRING REQUIRED MENTAL STATE

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

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

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

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

Use Note

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

Committee Commentary 2.08
(current through December 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

In United States v. Reeves, 594 F.2d 536, 541 (6th Cir.), cert. denied, 442 U.S. 946, 99 S.Ct. 2893, 61 L.Ed.2d 317 (1979), the Sixth Circuit characterized Devitt and Blackmar Instruction 14.13 on proof of intent as a "wholly appropriate charge," and said that in future cases where such a charge is appropriate, "this Circuit will approve language similar to (this instruction)." Subsequent Sixth Circuit cases also have approved this instruction. E.g., United States v. Thomas, 728 F.2d 313, 320-321 (6th Cir.1984); United States v. Guyon, 717 F.2d 1536, 1539 (6th Cir.1983), cert. denied, 465 U.S. 1067, 104 S.Ct. 1419, 79 L.Ed.2d 744 (1984); United States v. Bohlmann, 625 F.2d 751, 752-753 (6th Cir.1980).

In United States v. Gaines, 594 F.2d 541, 544 (6th Cir.), cert. denied, 442 U.S. 944, 99 S.Ct. 2888, 61 L.Ed.2d 314 (1979), one Sixth Circuit panel appeared to question whether any such instruction should be given at all, stating, that "(i)f district judges in the Sixth Circuit charge at all on inferred intent, it is suggested that they do so in the language of ... Devitt and Blackmar s 14.13." The Committee believes that some instruction on inferred intent is appropriate, particularly in cases where the requisite intent is disputed, in order to provide the jury with some guidance on this subject.

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

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

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

2.09 DELIBERATE IGNORANCE

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

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

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

Use Note

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

Committee Commentary 2.09
(current through December 31, 2007)

The Committee made no change in the instruction.

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

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

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

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

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

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

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

v. Mari, *supra*.

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

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

1991 Edition

The Sixth Circuit has repeatedly approved the concept that knowledge can be proved by deliberate ignorance or willful blindness. But is it less clear precisely what an instruction on this subject should say.

In United States v. Thomas, 484 F.2d 909, 912-914 (6th Cir.), cert. denied, 414 U.S. 912, 94 S.Ct. 253, 38 L.Ed.2d 151 (1973), the defendant was charged and convicted of knowingly making false statements in connection with the purchase of a handgun from a licensed dealer. The district court had instructed the jury that it could convict if it found from the evidence beyond a reasonable doubt that the Defendant "acted with reckless disregard of whether the statements made were true or with a conscious purpose to avoid learning the truth." Id. at 912-913. The Sixth Circuit concluded that this instruction "was proper." Id. at 913. Quoting from the Second Circuit's decision in United States v. Sarantos, 455 F.2d 877, 881 (2d Cir.1972), the Sixth Circuit explained that such an instruction was necessary to prevent a defendant from avoiding criminal sanctions "merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct." Thomas, supra at 913.

In United States v. Seelig, 622 F.2d 207, 213 (6th Cir.), cert. denied, 449 U.S. 869, 101 S.Ct. 206, 66 L.Ed.2d 89 (1980), the defendants were charged and convicted of knowingly distributing controlled substances. On appeal they objected to the district court's instructions telling the jury that the element of knowledge could be inferred from proof that the defendants deliberately closed their eyes to what would otherwise be obvious to them. The Sixth Circuit held that this instruction was "not erroneous," citing Thomas and noting that other circuits had approved deliberate ignorance instructions in cases involving violations of the Controlled Substances Act.

In United States v. Gullett, 713 F.2d 1203, 1212 (6th Cir.1983), cert. denied, 464 U.S. 1069, 104 S.Ct. 973, 79 L.Ed.2d 211 (1984), the defendants were charged and convicted of various offenses, including interstate transportation of stolen goods. On appeal they challenged the district court's instruction that the element of knowledge could be inferred from proof that the

defendants "acted with a reckless disregard for the truth or with a conscious purpose to avoid learning the truth." The defendants argued that this instruction permitted conviction on proof amounting to negligence. The Sixth Circuit rejected this argument, stating that the instruction only prevented a defendant from escaping conviction "by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct." Citing Seelig, the Court noted that this interpretation, as well as the instruction itself, had already been upheld by the Sixth Circuit.

In United States v. Holloway, 731 F.2d 378, 380-381 (6th Cir.1984) ("Holloway I"), several defendants were charged and convicted of making and presenting fraudulent tax refund checks to the Treasury Department. One defendant, Connor, challenged the district court's instruction that knowledge could be inferred from "proof that the defendant deliberately closed his eyes or her eyes to what would otherwise have been obvious to him or her." Id. at 380. He argued that the knowledge element could be satisfied only by proof that he had "a certain and clear perception of the falsity of the claim made." Id. at 380-381. The Sixth Circuit rejected this argument, explaining that the district court's instruction had been repeatedly upheld by previous Sixth Circuit decisions.

In United States v. Holloway, 740 F.2d 1373 (6th Cir.) ("Holloway II"), cert. denied, 469 U.S. 1021, 105 S.Ct. 440, 83 L.Ed.2d 366 (1984), another defendant, Holloway, objected to the district court's knowledge instruction. The Sixth Circuit quoted the instruction in full as follows:

"The fact of knowledge, however, may be established by direct or circumstantial evidence, just as any other fact in the case.
The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes or her eyes to what would otherwise have been obvious to him or her.
A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from wilfull blindness to the existence of the fact.
It is entirely up to you to--as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge." Id. at 1380.
The Sixth Circuit then held that "(t)here was no error in this instruction." Id.

In United States v. Lawson, 780 F.2d 535 (6th Cir.1985), the defendants were charged and convicted of various stolen property offenses. They objected to the district court's knowledge instruction, which included the following paragraph:
"An element of knowledge may be inferred from proof that a defendant deliberately closed his eyes to what would otherwise be obvious. The knowledge requirement may be satisfied also if you find from the evidence beyond a reasonable doubt that a defendant acted with a conscious purpose to avoid learning the truth."
The Sixth Circuit rejected the defendant's argument that this instruction incorporated the equivalent of a negligence concept, and held that the instruction did not improperly lessen the government's burden of proving the necessary elements of the offense. Id. at 542. See also United States v. Hoffman, 918 F.2d 44, 46 (6th Cir.1990) (No error in instructing that knowledge may be inferred from willful blindness.)

Some instructions from other circuits include the concept that if the jurors conclude the defendant actually believed the disputed fact did not exist, then they cannot find that the defendant acted knowingly. For example, Ninth Circuit Instruction 5.07 states:

"You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that (e.g. drugs were in his automobile) and deliberately avoided learning the truth.

You may not find such knowledge, however, if you find that the defendant actually believed that (e.g. no drugs were in his automobile), or if you find that the defendant was simply careless."

The Eighth and Eleventh Circuits follow the Ninth Circuit's approach. See Eighth Circuit Instruction 7.04 and Eleventh Circuit Special Instruction 15. The Fifth Circuit does not include this concept. See Fifth Circuit Instruction 1.35.

The only guidance on this subject from the United States Supreme Court is Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). In Leary, the defendant challenged a statutory presumption that anyone who possesses marijuana will be presumed to do so "knowing" it was imported contrary to federal law. Id. at 30. After noting that the legislative history of the statute in question was of no help in determining the intended scope of the word "knowing," the Supreme Court said that it would employ "as a general guide" the definition of "knowledge" contained in Section 2.02(7) of the Model Penal Code:

"When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." Leary, supra at 46 n. 93.

The Second Circuit also relied on this section of the Model Penal Code in its decision in United States v. Sarantos, supra, 455 F.2d at 881 n. 4. In United States v. Thomas, supra, 484 F.2d at 913-914, the Sixth Circuit's seminal decision on this subject, the Sixth Circuit relied on Second Circuit law in general, and on Sarantos in particular, in concluding that deliberate ignorance instructions were proper, but did not specifically mention or address this particular point.

Instruction 2.09 incorporates the Model Penal Code concept that the defendant must ignore a high probability that the disputed fact exists. Although the Sixth Circuit has not explicitly addressed this point, it has repeatedly used the term "obvious risk" in explaining the situations in which deliberate ignorance will suffice to supply proof of knowledge. Together with the Supreme Court's approval of this concept as a general guide in Leary, this is a justifiable clarification of what the term "obvious risk" means.

The instruction does not include the Model Penal Code concept that knowledge cannot be established if the defendant "actually believes" that the disputed fact does not exist, for two reasons. First, no Sixth Circuit case has approved or required that this concept be included in a deliberate ignorance instruction. Second, it injects a troubling and unresolved burden of proof issue. Does the defendant have the burden of proving he actually believed the disputed fact did not exist? Or must the government prove beyond a reasonable doubt that the defendant did not actually believe it? The Official Commentary to Section 2.02(7) of the Model Penal Code says that the burden is on the defendant to establish "an honest, contrary belief."

Second Circuit decisions have criticized the use of the word "recklessly" in instructions of this kind, on the ground that it might cause a jury to convict upon a finding of carelessness or negligence. See United States v. Precision Medical Laboratories, Inc., 593 F.2d 434, 444-445 (2d Cir.1978). But the Second Circuit has refused to reverse where the district court avoids any confusion by also instructing that mistake or carelessness on the defendant's part is not enough to convict. Id. at 445. The Sixth Circuit has refused to find plain error under similar circumstances. See United States v. Hoffman, supra, 918 F.2d at 46-47.

2.10 ACTUAL AND CONSTRUCTIVE POSSESSION

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

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

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

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

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

Use Note

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

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

Committee Commentary 2.10

(current through December 31, 2007)

The Committee changed the possession instructions in two ways. First, the title of Instruction 2.10 has been changed from Constructive Possession to Actual and Constructive Possession. The text of the instruction has not been changed; the new title merely describes the content of the instruction more accurately.

Second, the Committee has added a new instruction, 2.10A Actual Possession. This instruction is for cases where the government's only theory of possession is actual. In those cases, there is no reason for the additional complexity injected by defining constructive possession and the difference between it and actual possession.

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

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

A panel of the Sixth Circuit also considered Pattern Instruction 2.10 in a case where the question was whether it was error for the district judge to refuse to give the pattern instruction. In United States v. Jones, 1994 WL 108963, 1994 U.S. App. LEXIS 6907 (6th Cir. 1994)(unpublished), the defendant requested Pattern Instruction 2.10, but instead the trial judge gave an instruction which provided:

> The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. ... An act or failure to act is knowingly done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reasons. ....

1994 WL at 4, 1994 LEXIS at 14-15. This language defining constructive possession in terms of power and intention to exercise dominion or control differed slightly from the pattern instruction. The *Jones* panel concluded that this instruction appropriately stated the law as described in United States v. Craven, 478 F.2d 1329, 1333 (6th Cir. 1973), so it was not error to refuse to give Pattern Instruction 2.10. The court further stated that the pattern instructions were not the only instructions which could be used in the Sixth Circuit and cited the language from the Judicial Council Resolution to the effect that the resolution was not adjudicative approval of the pattern instructions. United States v. Jones, *supra*, 1994 WL at 5, 1994 LEXIS at 15-16.

The Sixth Circuit continues to define constructive possession by reference to *Craven*, 478 F.2d at 1333 (6th Cir. 1973). *See, e.g.*, United States v. Reed, 141 F.3d 644, 651 (6th Cir.1998). Later case law is consistent with this definition of constructive possession. *See* United States v. Gibbs, 182 F.3d 408, 424 (6th Cir.1999)(court found sufficient evidence for the jury to conclude that the defendant had constructive possession and stated that "Constructive possession requires that a person knowingly have power and intention to exercise control over an object."), *quoting* United States v. Critton, 43 F.3d 1089, 1096 (6th Cir.1995) and *citing* United States v. Kincaide,

145 F.3d 771 at 782 (6th Cir. 1998).

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

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The Sixth Circuit has long approved the concept that a defendant can be convicted of a possessory offense based on constructive possession. E.g., United States v. Craven, 478 F.2d 1329, 1333 (6th Cir.), cert. denied, 414 U.S. 866, 94 S.Ct. 54, 38 L.Ed.2d 85 (1973); United States v. Wolfenbarger, 426 F.2d 992, 994-995 (6th Cir.1970); United States v. Burch, 313 F.2d 628, 629 (6th Cir.1963). In Craven, the Sixth Circuit outlined the general principles governing this subject as follows:

"Possession may be either actual or constructive and it need not be exclusive but may be joint. (citations omitted) Actual possession exists when a tangible object is in the immediate possession or control of the party. Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others." Id. at 1333.

Accord United States v. Poulos, 895 F.2d 1113, 1118-1119 (6th Cir.1990); United States v. Draper, 888 F.2d 1100, 1103 (6th Cir.1989); United States v. Reeves, 794 F.2d 1101, 1105 (6th Cir.), cert. denied, 479 U.S. 963, 107 S.Ct. 463, 93 L.Ed.2d 408 (1986); United States v. Beverly, 750 F.2d 34, 37 (6th Cir.1984).

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

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

* * *

The mere presence at the situs of property does not constitute possession; that is, a man innocently at the situs of a property does not mean that he is in possession of it. If he is innocently at the situs--I say innocently--he isn't deemed to be in possession of it. And that is logical to you members of the jury, I am sure." Id. at 1049.

In United States v. Stroble, 431 F.2d 1273, 1277 (6th Cir.1970), the Sixth Circuit cited to the Second Circuit's decision in United States v. Casalinuovo, 350 F.2d 207 (2d Cir.1965), for a definition of constructive possession. In Casalinuovo, the Second Circuit defined constructive

possession as "such a nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it were actual possession." Casalinuovo, supra at 209. The Second Circuit approved the following instruction as "adequate," at least in the absence of an objection:

"Did the defendant Casalinuovo have such possession and control of that room where some of the goods were found so that it can reasonably be said that he had possession of the merchandise?" Id.

In United States v. Williams, 526 F.2d 1000, 1003-1004 (6th Cir.1975), the defendant argued that the district court erred in refusing his requested instruction that the "mere presence of a short-barreled shotgun under the driver's seat of the car, without some evidence that the driver exercised some dominion over it, is not sufficient for you to find that it was in the possession of the driver." The Sixth Circuit rejected this argument on the ground that the defendant's requested instruction would only have permitted conviction based on a finding of actual possession. The Sixth Circuit stressed that in addition to correctly defining actual and constructive possession, the district court had also instructed the jury that the word "knowingly" was added to the definition of constructive possession to ensure "that no one would be convicted ... because of mistake, or accident, or innocent reason." See also Federal Judicial Center Instruction 47B and Devitt and Blackmar Instruction 16.07

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

This instruction should not be given unless there is some evidence supporting a finding of constructive possession. United States v. James, 819 F.2d 674 (6th Cir.1987) (reversible error to give constructive possession instruction where no evidence of constructive possession was presented). See also United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir.1991) (cautions against use of boilerplate possession instruction including concepts of joint and constructive possession when neither concept was at issue given the facts of the case).

2.10A ACTUAL POSSESSION

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

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

Use Note

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

Committee Commentary 2.10A
(current through December 31, 2007)

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

2.11 JOINT POSSESSION

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

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

Use Note

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

Committee Commentary 2.11
(current through December 31, 2007)

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

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

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The Sixth Circuit has long recognized that a defendant need not have exclusive possession of property to be convicted of a possessory offense. Joint possession will suffice. See United States v. Craven, 478 F.2d 1329, 1333 (6th Cir.), cert. denied, 414 U.S. 866, 94 S.Ct. 54, 38 L.Ed.2d 85 (1973). But this instruction should not be given unless there is some evidence of joint possession. See United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir.1991) (cautions against use of boilerplate possession instruction including concepts of joint and constructive possession when neither concept was at issue given the facts of the case).

See generally Fifth Circuit Instruction 1.31, Eleventh Circuit Special Instruction 4, Federal Judicial Center Instruction 47B and Devitt and Blackmar Instruction 16.07.