

## Chapter 7.00

### SPECIAL EVIDENTIARY MATTERS

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## **7.01 INTRODUCTION**

(1) That concludes the part of my instructions explaining the elements of the crime (the defendant's position). Next I will explain some rules that you must use in considering some of the testimony and evidence.

### **Use Note**

The bracketed language in the first sentence of paragraph (1) should be used instead of the language referring to the elements of the crime when a defense has been explained or a defense theory instruction has been given.

### **Committee Commentary 7.01** (current as of 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 a transitional one designed to be used as a lead-in to the instructions explaining the rules for evaluating certain evidence.

## **7.02A DEFENDANT'S ELECTION NOT TO TESTIFY OR PRESENT EVIDENCE**

(1) A defendant has an absolute right not to testify [or present evidence]. The fact that he did not testify [or present any evidence] cannot be considered by you in any way. Do not even discuss it in your deliberations.

(2) Remember that it is up to the government to prove the defendant guilty beyond a reasonable doubt. It is not up to the defendant to prove that he is innocent.

### **Use Note**

The bracketed language in paragraph (1) should be included when the defense has not presented any evidence.

If there is more than one non-testifying defendant, and some, but not all, the defendants request this instruction, it should be given in general terms without using the defendants' names.

### **Committee Commentary 7.02A** (current as of December 31, 2007)

The Committee made no change in the text of the instruction but did change the title of the instruction and the Use Note. The Committee changed the title from “Defendant’s Failure to Testify” to “Defendant’s Election Not to Testify” to more accurately characterize the decision. *Cf. United States v. Skidmore*, 254 F.3d 635, 640 (7<sup>th</sup> Cir. 2001)(defendant’s choice not to testify should not be referred to as “failure”; conviction affirmed because no plain error). The Committee also changed the Use Note by deleting the first sentence, which stated, “The better practice is not to give this instruction unless the defendant requests it.” The Committee deleted this sentence because it found no consensus on the better practice but suggests that the court consult with defense counsel on the propriety of this instruction in each case. The Committee found no reason to make any changes in or additions to the 1991 Committee Commentary.

### *1991 Edition*

This instruction is patterned after Federal Judicial Center Instruction 22.

The need for such an instruction in federal criminal cases was first noted in *Bruno v. United States*, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939), in which a unanimous court held that 18 U.S.C. s 3481 required such an instruction where the defendant requested it. In *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), the Court firmly based the right on the Fifth Amendment and extended the requirement to state criminal prosecutions.

In *Lakeside v. Oregon*, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978), the Supreme Court upheld the practice of a state trial judge giving such an instruction over the defendant's objection that the instruction would call attention to his failure to testify. The Lakeside Court

reasoned that the Fifth and Fourteenth Amendments bar only adverse comment on a defendant's failure to testify, and that "a judge's instruction that the jury must draw no adverse inferences of any kind from the defendant's exercise of this privilege not to testify is 'comment' of an entirely different order." *Id.* at 339, 98 S.Ct. at 1094. While it may be permissible to give this instruction over the defendant's objection, the better practice is not to give it unless it is requested by the defendant.

Apparently, there are no Sixth Circuit opinions where, in a case involving multiple defendants, one defendant requests such an instruction while another objects to it. However, following the reasoning in *Carter and Lakeside*, it is clear that any such instruction is not harmful to a co-defendant. See also *United States v. Schroeder*, 433 F.2d 846, 851 (8th Cir.1970), cert. denied, 401 U.S. 943, 91 S.Ct. 951, 28 L.Ed.2d 224 (1971); *Caton v. United States*, 407 F.2d 367 (8th Cir.), cert. denied, 395 U.S. 984, 89 S.Ct. 2149, 23 L.Ed.2d 773 (1969); *United States v. Kelly*, 349 F.2d 720, 768-69 (2d Cir.1965), cert. denied, 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed.2d 544 (1966). The Commentary to Federal Judicial Center Instruction 22 recommends that if there is more than one non-testifying defendant and an instruction is requested by some but not all such defendants, it should be given in general terms without the use of the defendants' names.

## **7.02B DEFENDANT'S TESTIMONY**

(1) You have heard the defendant testify. Earlier, I talked to you about the "credibility" or the "believability" of the witnesses. And I suggested some things for you to consider in evaluating each witness's testimony.

(2) You should consider those same things in evaluating the defendant's testimony.

### **Use Note**

This instruction should be used when the defendant chooses to testify.

### **Committee Commentary 7.02B** (current as of 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 patterned after language found in Devitt and Blackmar Instruction 17.12. See also Seventh Circuit Instruction 1.02 and Ninth Circuit Instruction 3.07.

## **7.02C WITNESS OTHER THAN THE DEFENDANT INVOKING THE FIFTH AMENDMENT**

(1) You have heard \_\_\_\_\_ [*insert witness's name*] exercise his right under the Fifth Amendment to the United States Constitution to refuse to answer questions because the testimony might tend to incriminate him.

(2) You must not infer anything at all, for or against either the government or the defendant, because the witness did not answer.

### **Use Note**

This instruction should be used when a witness other than the defendant declines to answer questions because of the Fifth Amendment.

### **Committee Commentary 7.02C** (current as of December 31, 2007)

This instruction is new. It is designed as a cautionary instruction to help offset any prejudice that may arise when a witness declines to testify based on the Fifth Amendment.

The Fifth Amendment to the United States Constitution states that “No person shall be ... compelled in any criminal case to be a witness against himself ....” This privilege applies to a witness at a trial as well as to the defendant. *See, e.g.*, *United States v. Mack*, 159 F.3d 208, 217 (6th Cir. 1998); *United States v. Gaitan-Acevedo*, 148 F.3d 577, 588 (6th Cir. 1998). Thus, the parties’ right to compel witnesses to testify must yield to the witness’s assertion of the Fifth Amendment, assuming it is properly invoked. *Mack*, 159 F.3d at 217; *Gaitan-Acevedo*, 148 F.3d at 588, *citing* *United States v. Damiano*, 579 F.2d 1001, 1003 (6<sup>th</sup> Cir. 1978).

To assert the privilege, the witness must have a reasonable fear of danger of prosecution. *Mack, supra* at 217; *Gaitan-Acevedo, supra* at 588, *citing* *United States v. Damiano*, 579 F.2d 1001, 1003 (6<sup>th</sup> Cir. 1978). *See also* *In re Morganroth*, 718 F.2d 161, 167 (6th Cir. 1983)(“reasonable cause to apprehend a real danger of incrimination”), *citing* *Hoffman v. United States*, 341 U.S. 479 (1951). The privilege can be asserted to cover answers which would themselves support a criminal conviction, and also to cover answers which would furnish a link in the chain of evidence needed to prosecute. *In re Morganroth, supra* at 164, *citing* *Hoffman*, 341 U.S. at 486.

Although a witness has a right to assert the Fifth Amendment when called to testify, there is some danger in allowing the witness to assert it in front of a jury. In *United States v. Vandetti*, 623 F.2d 1144 (6th Cir. 1980), the court explained:

There are two constitutional problems which may arise when a witness is presented who

refuses to testify relying upon the fifth amendment privilege. The first problem is that such a witness permits the party calling the witness to build its case out of inferences arising from the use of the testimonial privilege, a violation of due process. ‘Neither side has the right to benefit from any inferences the jury may draw from the witness’ assertion of the privilege alone or in conjunction with questions that have been put to him.’ Nevertheless, although guilt is not properly inferable from the exercise of the privilege, it is feared that its assertion in the presence of the jury may have a disproportionate effect on its deliberations.

Second, calling such a witness encroaches upon the right to confrontation. ... The probative value of this sort of testimony is almost entirely undercut by the impossibility of testing it through cross-examination.

*Vandetti*, 623 F.2d at 1148 (citations omitted). In addition, the American Bar Association Standards for Criminal Justice provide that the prosecution and defense should not call a witness in the presence of the jury who the party knows will claim a valid privilege not to testify. See American Bar Association Standards for Criminal Justice, the Prosecution Function, Standard 3-5.7(c) and *id.*, the Defense Function, Standard 4-7.6(c).

Notwithstanding these dangers, parties may still seek to call a witness, subject to the court’s discretion, knowing the witness will refuse to answer under the Fifth Amendment. *United States v. Vandetti*, *supra* at 1147, *citing* *United States v. Kilpatrick*, 477 F.2d 357, 360 (6th Cir. 1973) and *United States v. Compton*, 365 F.2d 1, 5 (6th Cir. 1966). See, e.g., *United States v. Mack*, *supra* at 217. See also *Lindsey v. United States*, 484 U.S. 934 (1987)(White and Brennan, JJ., dissenting from denial of cert., acknowledging Sixth Circuit law that party may seek to call witness whom party knows will assert the Fifth Amendment and noting circuit split on this issue).

Because of the competing interests involved, *i.e.*, the constitutional concerns versus the factfinders’ need to operate with as much relevant information as possible, the judge should “closely scrutinize” requests to call a witness who has indicated he will assert the Fifth Amendment. *Vandetti*, 623 F.2d at 1147, *citing* *United States v. Maffei*, 450 F.2d 928, 929 (6th Cir. 1971). The judge should “weigh a number of factors in striking a balance between the competing interests.” *Vandetti*, 623 F.2d at 1149, *citing* *Eichel v. New York Central R. Co*, 375 U.S. 253, 255 (1963). “The judge must determine whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice.” *Vandetti*, 623 F.2d at 1149, *citing* F. R. Evid. 403. Factors to balance include: (1) the extent of the questioning following the witness’s assertion of the Fifth Amendment, *see Vandetti*, 623 F.2d at 1149; (2) the value of the testimony sought, *id.*; (3) the phrasing of the questions to minimize prejudice, *id.* at 1150; and (4) the effect of a limiting instruction, *United States v. Epley*, 52 F.3d 571, 577 (6th Cir. 1995) and *Vandetti*, 623 F.2d at 1149.

The Sixth Circuit has elaborated on the role of cautionary instructions, stating:

Even though a cautionary instruction may be useful, it may not be sufficiently

ameliorative in all cases. .... Some courts have suggested that any prejudice to the government arising from the absence of a witness, who, if called, would assert his fifth amendment privilege, can be dissipated by an instruction that the witness is not available to either side and that no inferences about his testimony may be drawn by the jury.

*Vandetti*, 623 F.2d at 1148 & 1150 (citations omitted).

The Sixth Circuit has quoted limiting instructions which helped avoid error when witnesses asserted the Fifth Amendment. *See* United States v. Mack, *supra* at 217; United States v. Okeezie, 1993 WL 20997, 10, 1993 U.S. App. LEXIS 1968, 4 (6th Cir. 1993)(unpublished). The language of Instruction 7.02C is based on these quoted instructions.



### 7.03 OPINION TESTIMONY

- (1) You have heard the testimony of \_\_\_\_\_, who testified as an opinion witness.
- (2) You do not have to accept \_\_\_\_\_'s opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions. Also consider the other factors discussed in these instructions for weighing the credibility of witnesses.
- (3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

#### Use Note

If the witness testifies to both opinions and facts, a cautionary instruction on the dual role should be given in addition to Instruction 7.03. This situation usually arises when law enforcement witnesses testify. See the discussion in the commentary below.

#### Committee Commentary 7.03 (current as of December 31, 2007)

The title of Instruction 7.03 and paragraphs (1) and (2) have been amended in the wake of *United States v. Johnson*, 488 F.3d 690 (6th Cir. 2007) to avoid the term expert. A Use Note has been added to mention the need for an additional cautionary instruction when expert witnesses testify to facts as well as opinions.

In *United States v. Johnson*, 488 F.3d 690 (6th Cir. 2007), the court said that district judges should use the term “opinion” rather than “expert” in the presence of the jury. *Id.* at 698, quoting *Berry v. McDermid Transp., Inc.*, 2005 U.S. Dist. LEXIS 19568, 2005 WL 2147946 at \*4 (S.D. Ind. 2005) and citing *Jordan v. Bishop*, 2003 U.S. Dist. LEXIS 4586, 2003 WL 1562747 at \*2 (S.D. Ind. 2003). Although the court found no plain error on the facts in *Johnson*, the court explained that, “Except in ruling on an objection, the court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion....” *Johnson*, *supra* at 697, quoting ABA Civil Trial Practice Standard 17 (Feb. 1998). Based on *Johnson*, the title of Instruction 7.03 and paragraphs (1) and (2) have been amended to use the term “opinion” in lieu of the term “expert.” To reflect the *Johnson* rationale, a sentence referring to the witness’s “special knowledge or experience” was deleted from paragraph (1).

In paragraph (2), the Committee added the final sentence that refers to other instructions on the credibility of witnesses. Specifically, Instruction 1.07 Credibility of Witnesses identifies the general bases for evaluating witness credibility. The language of this sentence in paragraph (2) is based on Third Circuit Instruction 4.08. The Committee added this cross-reference for consistency.

In *Johnson*, the court also counseled district judges not to certify before the jury that a witness is qualified as an expert. The court explained, “Instead, the proponent of the witness

should pose qualifying and foundational questions and proceed to elicit opinion testimony. If the opponent objects, the court should rule on the objection, allowing the objector to pose voir dire questions to the witness's qualifications if necessary and requested." *Johnson, supra* at 698.

The *Johnson* court's disapproval of certifying a witness as an expert is consistent with previous cases. In *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994), the court pointed out that the Federal Rules of Evidence do not call for a proffer and stated that in a previous case, *United States v. Kozminski*, 821 F.2d 1186, 1219 (6th Cir. 1987) (en banc) (dissent), the Sixth Circuit "counseled against putting some general seal of approval on an expert after he has been qualified but before any questions have been posed to him." *Berry v. City of Detroit, supra* at 1351.

The admissibility of expert testimony is governed by *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). These decisions do not affect the instruction.

"Expert testimony, even if uncontradicted, may be believed in its entirety, in part, or not at all." *Dawahare v. Spencer*, 210 F.3d 666, 671 (6th Cir. 2000). In holding that the arbitration panel was not compelled to accept the expert's damages evidence, the Sixth Circuit cited authority from other circuits, including *Quinones-Pacheco v. American Airlines, Inc.*, 979 F.2d 1, 5 (1st Cir. 1992) (fact finder not ordinarily bound by uncontradicted expert opinion testimony, particularly where testimony "lacks great convictive force" in context of evidence as a whole); *Gregg v. U.S. Indus., Inc.*, 887 F.2d 1462, 1469-70 (11th Cir. 1989) (expert testimony is not conclusive and need not be accepted).

Caution is required when a law enforcement officer testifies both as a fact witness and as an expert witness. In this situation, the court should give a cautionary instruction regarding the witness's dual role, and failure to do so can be plain error. In *United States v. Lopez-Medina*, 461 F.3d 724 (6th Cir. 2006) the court held it was plain error to allow a government agent to give dual testimony as both a fact witness and an expert witness when no cautionary instruction was given and there was no clear demarcation between the officer's fact testimony and expert testimony. *Id.* at 744-45. In such cases, the court " 'should take care to assure that the jury is informed of the dual roles of a law enforcement officer as a fact witness and an expert witness, so that the jury can give proper weight to each type of testimony.' " *Id.* at 743, *quoting* *United States v. Thomas*, 74 F.3d 676, 683 (6th Cir. 1996), *abrogated on other grounds by* *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). For example, the Sixth Circuit found no abuse of discretion in allowing such dual testimony "where the court 'instructed the jury, both before [an agent] gave his opinion and again in the jury charge, that it should consider [the agent's] dual roles in determining what weight ... to give [his] expert testimony.' " *Lopez-Medina, supra* at 743, *quoting* *United States v. Tocco*, 200 F.3d 401, 419 (6th Cir. 2000). *See also* *United States v. Cobbs*, 2007 U.S. App. LEXIS 12826, 2007 WL 1544207 (6th Cir. 2007) (unpublished) (stating that a cautionary instruction on the witness's dual role should have been given but finding no plain error on the facts).

Under the Federal Rules of Evidence, an expert may testify in order to assist the trier of fact to understand the evidence or determine a fact in issue. Such testimony may be in the form of an opinion. Fed.R. of Evid. 702. The basic approach to opinion testimony in the Federal Rules of Evidence is to allow it when it is helpful to the trier of fact. This includes opinions as to an ultimate issue to be decided by the trier of fact. Fed.R. of Evid. 704. However, expert testimony as to ultimate issues with respect to a defendant's mental state or condition may not be introduced. Fed.R. of Evid. 704(b); *United States v. Pickett*, 604 F.Supp. 407 (S.D. Ohio 1985).

There is some question whether this instruction is necessary in light of the general instruction relating to the jury's role in determining the weight and credibility of witnesses. However, all circuits that have drafted pattern instructions and the Federal Judicial Center include a special instruction such as this one on expert testimony. See Fifth Circuit Instruction 1.18, Seventh Circuit Instruction 3.27, Eighth Circuit Instruction 4.10, Ninth Circuit Instruction 4.16, Eleventh Circuit Basic Instruction 7 and Federal Judicial Center Instruction 27.

There is no case authority supporting the instruction in the Sixth Circuit, but a similar instruction was upheld in *United States v. Johnson*, 575 F.2d 1347, 1361 (5th Cir.1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979).

## **7.04 IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT NOT UNDER OATH**

(1) You have heard the testimony of \_\_\_\_\_. You have also heard that before this trial he made a statement that may be different from his testimony here in court.

(2) This earlier statement was brought to your attention only to help you decide how believable his testimony was. You cannot use it as proof of anything else. You can only use it as one way of evaluating his testimony here in court.

### **Use Note**

This instruction must be given when a prior inconsistent statement which does not fall within Fed.R.Evid. 801(d)(1)(A) has been admitted.

If several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, this instruction should identify which statements were offered for impeachment purposes.

### **Committee Commentary 7.04** (current as of December 31, 2007)

The Committee made no change in the instruction.

A panel of the Sixth Circuit has stated that this instruction is “clearly a correct statement of the law....” *United States v. Johnson*, 1995 WL 517229, 3, 1995 U.S. App. LEXIS 32896, 6 (6<sup>th</sup> Cir. 1995)(unpublished).

Often the question is not the content of the instruction but whether it should be given. In two cases, the Sixth Circuit did not resolve whether omitting the instruction was error because it found the omission harmless. In *United States v. Aguwa*, 123 F.3d 418, 422 (6<sup>th</sup> Cir. 1997), the trial court refused to instruct that prior inconsistent statements not under oath are evidence of credibility only and not substantive evidence. The Sixth Circuit affirmed the conviction, stating that the defendant was not prejudiced and might have actually benefitted from the absence of such an instruction. *Id.*

In one case the Sixth Circuit concluded it was error to give the instruction but found the error harmless. *See United States v. Toney*, 161 F.3d 404 (6<sup>th</sup> Cir. 1998)(error for district court to give Instruction 7.04 since no evidence of a prior inconsistent statement was admitted but error harmless).

This instruction deals only with prior inconsistent statements *not* under oath. The Committee considered drafting an instruction on prior statements under oath and discarded the idea. In other pattern instructions, only the Federal Judicial Center offers such an instruction. See § 33, *Impeachment by Prior Inconsistent Statements, Under Oath: Pattern Criminal Jury Instructions*, Federal Judicial Center, 1988 ed. As the First Circuit explains in commentary, the

instruction on prior inconsistent statements not under oath is:

for use where a witness's prior statement is admitted only for impeachment purposes. Where a prior statement is admitted substantively under Fed.R. Evid. 801(d)(1), this instruction is not appropriate. Once a prior statement is admitted substantively as non-hearsay under Rule 801(d)(1), it is actual evidence and may be used for whatever purpose the jury wishes. No instruction seems necessary in that event, but one may refer to Federal Judicial Center Instructions 33 and 34.

Pattern Jury Instructions: First Circuit, Criminal Cases, Instruction 2.02 Comment.

*1991 Edition*

The traditional view had been that a prior statement of a witness is hearsay if offered to prove the happening of matters asserted therein. This did not preclude the use of the prior statement to impeach the witness if the statement was inconsistent with his testimony. Fed.R.Evid. 801(d)(1)(A) carved out an exception where the prior statement was under oath in a judicial hearing or in a deposition. Where a prior statement does not fall within Fed.R.Evid. 801(d)(1)(A), the jury must be instructed that the statement is offered solely to impeach the credibility of the witness. *United States v. Harris*, 523 F.2d 172, 175 (6th Cir.1975); *United States v. McDonald*, 620 F.2d 559, 565 (5th Cir.1980).

If during the course of the trial, several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, then this instruction should be given with the court identifying the impeaching statement or statements.

## **7.05A IMPEACHMENT OF DEFENDANT BY PRIOR CONVICTION**

(1) You have heard that before this trial the defendant was convicted of a crime.

(2) This earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. You cannot use it for any other purpose. It is not evidence that he is guilty of the crime that he is on trial for now.

### **Use Note**

This instruction should not be given if evidence of other crimes has been admitted to prove motive, opportunity, intent or the like under Fed.R.Evid. 404(b). Instead, the jury should be specifically instructed on the purpose for which the evidence was admitted. See Instruction 7.13.

### **Committee Commentary 7.05A** (current as of 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*

Generally, evidence of a defendant's prior conviction is only admissible to attack his credibility as a witness. See Fed.R.Evid. 609; *United States v. Sims*, 588 F.2d 1145, 1149 (6th Cir.1978). The defendant is entitled, upon request, to an instruction limiting the jury's consideration of the conviction to the purpose for which it was admitted.

The defendant's commission of other crimes may also be admissible to prove motive, opportunity, intent, and the like. See Fed.R.Evid. 404(b). In such cases, this instruction should not be given. Instead the jury should be specifically instructed on the purpose for which the evidence may be considered. See Instruction 7.13.

## **7.05B IMPEACHMENT OF A WITNESS OTHER THAN DEFENDANT BY PRIOR CONVICTION**

(1) You have heard the testimony of \_\_\_\_\_. You have also heard that before this trial he was convicted of a crime.

(2) This earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. Do not use it for any other purpose. It is not evidence of anything else.

### **Committee Commentary 7.05B** (current as of 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 designed for use when a witness other than the defendant is impeached by a prior conviction. The instruction is similar to Federal Judicial Center Instruction 30 and Ninth Circuit Instruction 4.08.

## **7.06A TESTIMONY OF A PAID INFORMANT**

(1) You have heard the testimony of \_\_\_\_\_. You have also heard that he received money [or \_\_\_\_\_] from the government in exchange for providing information.

(2) The use of paid informants is common and permissible. But you should consider \_\_\_\_\_'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the government gave him.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

### **Use Note**

The bracketed language in paragraph (1) should be used when some consideration other than money has been given.

This instruction may not be necessary if the informant's testimony has been materially corroborated, or if an accomplice cautionary instruction has been given.

### **Committee Commentary 7.06A** (current as of December 31, 2007)

The text of this instruction has not been changed. The title of the instruction has been changed in two ways to make it consistent with the text of the instruction. The word "informer" has been changed to "informant," and the word "paid" has been added to describe the informant.

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

### *1991 Edition*

In *On Lee v. United States*, 343 U.S. 747, 757, 72 S.Ct. 967, 96 L.Ed. 1270 (1952), the Supreme Court said that to the extent an informant's testimony raises serious questions of credibility, the defendant is entitled to have the issue submitted to the jury "with careful instructions."

No cautionary instruction is required when there is no evidence that the witness was an informant. See *United States v. Vinson*, 606 F.2d 149, 154 (6th Cir.1979), cert. denied, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980). Less clear is whether an instruction is required if the witness's testimony has been materially corroborated. In *United States v. Griffin*, 382 F.2d 823, 827-828 (6th Cir.1967), the Sixth Circuit indicated in dictum that even if corroborated, the better practice would be to give a cautionary instruction. But subsequently, in *United States v.*



Vinson, *supra*, the Sixth Circuit rejected the argument that a cautionary instruction should have been given, in part on the ground that the witness's testimony had been materially corroborated. Vinson also indicated that no instruction was required because the district court had instructed the jury to treat the witness's testimony with care because of evidence that he was an accomplice, and that this "had the same cautionary effect" as if the court had given an informant instruction. *Id.*

Instruction 7.06A does not use the term "informer" in order to avoid pejorative labeling. See *United States v. Turner*, 490 F.Supp. 583 (E.D.Mich.1979), *aff'd*, 633 F.2d 219 (6th Cir.1980), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981). It is based on Fifth Circuit Instruction 1.15 and Federal Judicial Center Instruction 24.

## **7.06B TESTIMONY OF AN ADDICT-INFORMANT UNDER GRANT OF IMMUNITY OR REDUCED CRIMINAL LIABILITY**

(1) You have heard the testimony of \_\_\_\_\_. You have also heard that he was using \_\_\_\_\_ during the time that he testified about, and that the government has promised him that he will not be prosecuted for \_\_\_\_\_ [or will \_\_\_\_\_ ] in exchange for his testimony.

(2) It is permissible for the government to make such a promise. But you should consider \_\_\_\_\_'s testimony with more caution than the testimony of other witnesses. An addict may have a constant need for drugs, and for money to buy drugs, and may also have a greater fear of imprisonment because his supply of drugs may be cut off. Think about these things and consider whether his testimony may have been influenced by the government's promise.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

### **Use Note**

The bracketed language in paragraph (1) should be used when some consideration other than an agreement not to prosecute has been given by the government.

Whether this instruction must be given may depend on the particular circumstances of the case.

### **Committee Commentary 7.06B** (current as of December 31, 2007)

The Committee made two changes in this instruction. In the title, the term “informer” was changed to “informant” for consistency with Instruction 7.06A. In the text, the phrase “against the defendant” has been deleted from the end of paragraph (1) as unnecessarily limiting.

In *United States v. Anderson*, 1998 WL 833701, 1998 U.S. App. LEXIS 30121 (6<sup>th</sup> Cir. 1998) (unpublished), the defendant requested an “addict-witness instruction” and the district court refused. A panel of the Sixth Circuit noted that Pattern Instruction 7.06B, and the underlying case law, refer to addict-*informants*, and then went on to discuss the propriety of refusing the instruction. The panel stated there was no “per se rule” requiring this instruction whenever an addict-informant testifies; district courts should assess the need for such an instruction based on the circumstances of each case. *Anderson*, 1998 WL at 4, 1998 LEXIS at 12, *quoting* *United States v. Brown*, 946 F.2d 1191, 1195 (6<sup>th</sup> Cir. 1991). The panel concluded that, assuming that the addict-informant instruction applied in the case of an addict-witness/codefendant, the district court did not err by refusing the instruction because the jury was aware of the witness’s addiction, the witness’s testimony was corroborated, and a cautionary instruction was given. 1998 WL at 4, 1998 LEXIS at 13, *citing* *United States v. McGhee*, 882 F.2d 1095, 1100 (6<sup>th</sup> Cir. 1989)(less need for an addict-informant instruction when the jury is aware of the witness’s addiction and there is substantial corroboration for the witness’s testimony).

In other cases, panels of the Sixth Circuit have likewise concluded that omission of an addict-informant instruction was not error. In *United States v. Rich*, 2000 WL 92269, 5, 2000 U.S. App. LEXIS 826, 13 (6<sup>th</sup> Cir. 2000)(unpublished), the panel reiterated that there was no per se rule requiring an addict-informant instruction, *citing Brown, supra* at 1195, and concluded it was not error to refuse the instruction because no evidence suggested that the witness was addicted at the relevant time. In *United States v. Lopez*, 1999 WL 397947, 1999 U.S. App. LEXIS 11827 (6<sup>th</sup> Cir. 1999)(unpublished), a panel of the Sixth Circuit held that it was not error to omit an addict-informant instruction. The trial judge gave a general witness credibility instruction, cautioning the jury to weigh carefully testimony affected by a witness's own interest, and the panel stated that this instruction accomplished the same objective as an addict-informant instruction by warning jurors that the credibility of the witnesses might be suspect.

### *1991 Edition*

The proposed instruction is a plain English version of the instruction approved in *United States v. Hessling*, 845 F.2d 617 (6th Cir.1988). Hessling approved the instruction but did not mandate its use.

In *United States v. Dempewolf*, 817 F.2d 1318, 1321 (8th Cir.), cert. denied, 484 U.S. 903, 108 S.Ct. 245, 98 L.Ed.2d 203 (1987), the Eighth Circuit noted four factors that may make an addict-informer instruction unnecessary: doubt as to whether the witness was an addict; cross-examination concerning the witness's addiction; corroboration of the testimony; and an instruction alerting the jury that an informer's testimony should be viewed with care. The Eighth Circuit said that there is no requirement that all four factors be present in order to eliminate the need for the instruction.

## **7.07 TESTIMONY OF A WITNESS UNDER GRANT OF IMMUNITY OR REDUCED CRIMINAL LIABILITY**

(1) You have heard the testimony of \_\_\_\_\_. You have also heard that the government has promised him that [he will not be prosecuted for \_\_\_\_\_ ] [ he will \_\_\_\_\_] in exchange for his cooperation.

(2) It is permissible for the government to make such a promise. But you should consider \_\_\_\_\_'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by the government's promise.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

### **Use Note**

In paragraph (1) , the first bracketed language should be used when the plea agreement is based on a government promise not to prosecute; the second bracketed language should be used when the plea agreement is based on some other consideration.

This instruction may not be necessary when the witness's testimony has been materially corroborated.

### **Committee Commentary 7.07** (current as of December 31, 2007)

The language of paragraph (1) was changed in two ways.

First, the Committee inserted the phrase “he will not be prosecuted for \_\_\_\_” into brackets. This change does not affect the content of the instruction but merely adopts a second set of brackets to more readily accommodate different types of plea bargains. The first paragraph of the Use Note was also changed to explain the additional brackets.

Second, the Committee deleted the phrase “against the defendant” at the end of paragraph (1) as unnecessarily limiting.

The Sixth Circuit has described this as a “proper jury instruction[.]” that “correctly” and “properly” informs the jury about this issue. *United States v. Hynes*, 467 F.3d 951, 971 (6th Cir. 2006) (instruction given was Pattern Instruction 7.07, see Joint Appendix at 940).

The title and text of the instruction continue to avoid using the terms plea bargain and plea agreement.

*1991 Edition*

This instruction is based on Fifth Circuit Instruction 1.15 and Federal Judicial Center Instruction 24. Its purpose is to alert the jury to potential credibility problems with witnesses who have entered into plea bargains in exchange for their testimony.

Since the rationale for this instruction is similar to that for Instruction 7.06A on the testimony of an informer, the limitations from *United States v. Vinson*, 606 F.2d 149 (6th Cir.1979), cert. denied, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980), should apply. Where ample corroboration of the testimony exists, the instruction may not be necessary.

## 7.08 TESTIMONY OF AN ACCOMPLICE

(1) You have heard the testimony of \_\_\_\_\_. You have also heard that he was involved in the same crime that the defendant is charged with committing. You should consider \_\_\_\_\_'s testimony with more caution than the testimony of other witnesses.

(2) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

[(3) The fact that \_\_\_\_\_ has pleaded guilty to a crime is not evidence that the defendant is guilty, and you cannot consider this against the defendant in any way.]

### Use Note

This instruction is not necessary if the jury has been instructed to treat the witness's testimony with caution for other reasons.

Bracketed paragraph (3) should be included when the fact that an accomplice has pleaded guilty has been brought to the jury's attention.

### Committee Commentary 7.08 (current as of December 31, 2007)

The Committee made no change in the instruction.

The Sixth Circuit has described this as a “proper jury instruction[]” that “correctly” and “properly” informs the jury about this issue. *United States v. Hynes*, 467 F.3d 951, 971 (6th Cir. 2006)(instruction given was Pattern Instruction 7.08, see Joint Appendix at 941). In addition, a panel has cited Instruction 7.08(1) and (2) with approval. *United States v. Savoca*, 166 Fed. Appx. 183, 187, 2006 WL 126737, 2006 U.S. App. LEXIS 1465 (6th Cir. 2006)(unpublished)(stating that the instruction “was not erroneous. Indeed, the charge is taken from Sixth Circuit Pattern Instruction 7.08.”).

In *United States v. Carr*, 5 F.3d 986, 992 (6th Cir. 1993), the court found no reversible error in omitting an explicit accomplice testimony instruction because the court substantially covered the same considerations in the general witness credibility instructions. Those instructions were adequate because they cautioned the jury to consider “any relation that a witness may bear to either side of the case and his or her reasons for testifying” and stated that “the testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a crime.” *Id.*

### 1991 Edition

The Federal Judicial Center did not believe it necessary to have both an accomplice

instruction and an immunity/plea bargain instruction, and thus only included the latter. The Seventh, Eighth and Ninth Circuits include both. See Seventh Circuit Instructions 3.19 and 3.22, Eighth Circuit Instructions 4.04 and 4.05 and Ninth Circuit Instructions 4.09 and 4.11.

In *United States v. Ailstock*, 546 F.2d 1285, 1288 (6th Cir.1976), the Sixth Circuit held that an accomplice instruction alone adequately cautioned the jury about the weight to be given an accomplice's testimony, even though the accomplice had a plea bargain with the government and no plea bargain instruction had been given.

If the court thoroughly instructs the jury about evaluating the witness's credibility, and cautions the jury to use care in considering accomplice testimony, it is not an abuse of discretion to refuse any additional instruction on perjured testimony. *United States v. Frost*, 914 F.2d 756, 766 (6th Cir.1990).

## 7.09 CHARACTER AND REPUTATION OF DEFENDANT

(1) You have heard testimony about the defendant's good character. You should consider this testimony, along with all the other evidence, in deciding if the government has proved beyond a reasonable doubt that he committed the crime charged.

### **Committee Commentary 7.09** (current as of December 31, 2007)

The Committee made no change in the instruction.

In the 1991 edition, as the 1991 Commentary explains, the Committee excluded any “standing alone” language. In this edition the Committee continues to exclude this language. *See United States v. Kirkland*, 1994 WL 454864 at 9 n.8, 1994 U.S. App. LEXIS 22925 at 27 n.8 (6<sup>th</sup> Cir. 1994)(unpublished)(describing “standing alone” language as “not warranted under the law”), *citing Poliafico v. United States*, 237 F.2d 97, 114 (6th Cir. 1956).

#### *1991 Edition*

Some instruction on the defendant's good character is required if supported by the evidence. *See Edgington v. United States*, 164 U.S. 361, 365-367, 17 S.Ct. 72, 73-74, 41 L.Ed. 467 (1896). *Accord United States v. Huddleston*, 811 F.2d 974, 977 (6th Cir.1987). But there is disagreement about whether the instruction must say that good character evidence "standing alone" may create a reasonable doubt of guilt. *See Spangler v. United States*, 487 U.S. 1224, 108 S.Ct. 2884, 101 L.Ed.2d 918 (1988) (White, J. dissenting to denial of certiorari) (noting disagreement).

Old Supreme Court cases provide some support for the position that "standing alone" language may be appropriate, at least in some circumstances. *See Edgington*, *supra*, 164 U.S. at 366, 17 S.Ct. at 73 ("The circumstances may be such that ... good character ... would alone create a reasonable doubt."); *Michelson v. United States*, 335 U.S. 469, 476, 69 S.Ct. 213, 218, 93 L.Ed. 168 (1948) ("(T)his Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed."). But recent decisions from other circuits have questioned whether these cases actually require that "standing alone" language be included. *E.g.*, *United States v. Burke*, 781 F.2d 1234, 1240-1241 (7th Cir.1985).

Of all the officially sanctioned pattern federal instructions, only the Federal Judicial Center still explicitly includes "standing alone" language. *See Federal Judicial Center Instruction 51*. But in the accompanying commentary, the Judicial Center concedes that it is "not clear that (such language) is legally required."

The Fifth and Eleventh Circuits include language that good character evidence may give rise to a reasonable doubt, without any explicit "standing alone" language, and state that such evidence should be considered "along with all the other evidence" in the case. *See Fifth Circuit*



Instruction 1.10 and Eleventh Circuit Special Instruction 8.

The Seventh Circuit formerly included "standing alone" language in its pattern instruction, see Seventh Circuit Instruction 3.15, but Seventh Circuit decisions have since held that such language is misleading and not required. *United States v. Burke*, supra, 781 F.2d at 1238-1242.

The Eighth and Ninth Circuits recommend that no "standing alone" language be included, and that any instruction simply state that good character evidence should be considered along with all the other evidence in the case. See the Committee Comments to Eighth Circuit Instruction 4.03 and Ninth Circuit Instruction 4.05.

In *Poliafico v. United States*, 237 F.2d 97, 114 (6th Cir.1956), cert. denied, 352 U.S. 1025, 77 S.Ct. 590, 1 L.Ed.2d 597 (1957), the Sixth Circuit, without extensive analysis, rejected the argument that "standing alone" language should have been included in the district court's instructions. The Sixth Circuit characterized the instructions given, which told the jury to consider the good character evidence along with all the other evidence in the case, as "proper," citing *Edgington* in support.

In *United States v. Huddleston*, supra, 811 F.2d at 977, the Sixth Circuit, again without extensive analysis, held that the district court adequately met its responsibility to instruct on good character evidence by instructing the jury to consider such evidence along with all the other evidence in determining whether the government had sustained its burden of proving guilt beyond a reasonable doubt.

Based on *Poliafico* and *Huddleston*, the Committee recommends that no "standing alone" language be included in the instruction. If such language is included, it should only be when special circumstances are present. See for example *United States v. McMurray*, 656 F.2d 540, 551 (10th Cir.1980) (good character evidence was the only evidence offered by the defense). But see *United States v. Burke*, supra, 781 F.2d at 1242 (criticizing "standing alone" language even in such cases).

## 7.10 AGE OF WITNESS

(1) You have heard the testimony of \_\_\_\_\_, a young witness. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. With any witness, young or old, you should consider not only age, but also the witness's intelligence and experience, and whether the witness understands the duty to tell the truth and the difference between truth and falsehood.

### **Committee Commentary 7.10** (current as of December 31, 2007)

The Committee made no change in the instruction.

A panel of the Sixth Circuit described this instruction as “a general admonition to the jury to weigh the maturity and experience of a young witness when the jury considers the substance of the testimony presented by that witness.” *United States v. Bourne*, 1994 WL 84742 at 1, 1994 U.S. App. LEXIS 4562 at 2-3 (6<sup>th</sup> Cir. 1994)(unpublished).

In 1990, Congress enacted 18 U.S.C. § 3509, The Child Victims’ and Child Witnesses’ Rights Act. This Act defines children as persons under eighteen who are or allegedly are victims of physical abuse, sexual abuse or exploitation, or are witnesses to a crime committed against another. 18 U.S.C. § 3509(a)(2). The Act provides, “A child is presumed to be competent.” *Id.* § 3509(c)(2). In *Bourne*, *supra*, a panel of the Sixth Circuit noted that this provision lends itself to the interpretation that a child witness is presumed competent to testify in the absence of an express determination to the contrary, but the issue was not preserved and the panel did not rule on it. *Bourne*, 1994 WL at 1, 1994 U.S. App. LEXIS at 3. The Tenth Circuit has ruled on the issue. In *United States v. Allen J.*, 127 F.3d 1292 (10<sup>th</sup> Cir. 1997), that court disregarded the standard from *Wheeler v. United States*, 159 U.S. 523 (1895), discussed in the commentary to the 1991 edition of these instructions. The Tenth Circuit noted that *Wheeler* was decided long before Fed. R. Evid. 601 and 18 U.S.C. § 3509 were enacted. The court then stated: “Upon enactment of § 3509, the rules changed. Now children are presumed competent and the party seeking to prevent a child from testifying has the burden of providing a compelling reason for questioning the child’s competence.” *Allen J.*, 127 F.3d 1292, 1295 (10<sup>th</sup> Cir. 1997). Similarly, the Seventh Circuit has concluded that § 3509(c)(2) means that “Children are presumed to be competent to testify.” *United States v. Snyder*, 189 F.3d 640, 645 (7<sup>th</sup> Cir. 1999).

The statutory presumption of competency is a procedural rule to use in determining the competency of a child witness and does not affect the applicability of the instruction after the child witness is found competent.

### *1991 Edition*

Under Fed.R.Evid. 601 there is no specific age requirement for the competency of witnesses. Generally, a child witness is considered competent if the judge finds that the child

can understand the difference between truth and falsehood and is aware of his or her duty to tell the truth. *Wheeler v. United States*, 159 U.S. 523, 16 S.Ct. 93, 40 L.Ed. 244 (1895).

## **7.11 IDENTIFICATION TESTIMONY**

(1) You have heard the testimony of \_\_\_\_\_, who has identified the defendant as the person who \_\_\_\_\_. You should carefully consider whether this identification was accurate and reliable.

(2) In deciding this, you should especially consider if the witness had a good opportunity to see the person at that time. For example, consider the visibility, the distance, whether the witness had known or seen the person before, and how long the witness had to see the person.

[(3) You should also consider the circumstances of the earlier identification that occurred outside of court. For example, consider how that earlier identification was conducted, and how much time passed after the alleged crime before the identification was made.]

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

(5) Consider all these things carefully in determining whether the identification was accurate and reliable.

(6) Remember that the government has the burden of proving beyond a reasonable doubt that the defendant was the person who committed the crime charged.

### **Use Note**

This instruction should be given when the identification has become an issue because of lack of corroboration, or limited opportunity for observation, or when the witness's memory has faded by the time of trial.

Bracketed paragraph (3) should be included when evidence of an out-of-court identification has been admitted.

Bracketed paragraph (4) should be included when evidence of an earlier failure to make identification or evidence of an inconsistent identification is admitted.

### **Committee Commentary 7.11** (current as of December 31, 2007)

The text of this instruction has been changed in two ways. In paragraph (2), the list of factors to consider was reordered. This is not a substantive change but merely makes the language more fluid.

The other change is that bracketed paragraph (4) is new. This paragraph has been added

to more accurately reflect the *Telfaire* decision as described by the Sixth Circuit in *Scott*. See *United States v. Scott*, 578 F.2d 1186, 1191 (6th Cir. 1978)(listing as a factor the jury should consider “(3) the inconsistent identifications made by the same witness”). The language in the instruction is drawn directly from *Telfaire*, 469 F.2d at 552, 558-59 (6<sup>th</sup> Cir. 1972). *Telfaire* and *Scott* are discussed in detail in the 1991 Commentary. A new paragraph has been added to the Use Note indicating that bracketed paragraph (4) should be given when evidence of an earlier failure to make identification or evidence of an inconsistent identification is admitted.

This instruction omits any mention of the credibility of the identification witnesses because that topic is adequately covered in the general credibility instruction, Instruction 1.07. If the credibility of identification witnesses is a particularly significant issue in a case, the *Scott* decision gives district courts the leeway to mention the credibility factor in this instruction as well as in the general credibility instruction. See *Scott*, 578 F.2d at 1191 (listing as a factor the jury should consider “(4) the credibility of the witness.”).

### *1991 Edition*

The testimony of a single eyewitness is sufficient to take a criminal case to the jury. However, courts have recognized that there is a serious possibility of mistake inherent in uncorroborated identification testimony. *United States v. O'Neal*, 496 F.2d 368 (6th Cir.1974). In cases where identification is a key issue, courts have required an instruction that emphasizes the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt.

The leading case is *United States v. Telfaire*, 469 F.2d 552 (D.C.Cir.1972). *Telfaire* set out a model instruction in an appendix which emphasized: (1) the capacity and opportunity of the witness to observe reliably the offender; (2) the question whether the identification was the product of the witness's own recollection; (3) the inconsistent identification made by the same witness; and (4) the credibility of the witness. *Id.* at 558-59. The *Telfaire* type instruction has been adopted by the Sixth Circuit, *United States v. Scott*, 578 F.2d 1186, 1191 (6th Cir.), cert. denied, 439 U.S. 870, 99 S.Ct. 201, 58 L.Ed.2d 182 (1978), as well as the Eighth, Seventh, and Fourth Circuits, *United States v. Roundtree*, 527 F.2d 16, 19 (8th Cir.1975), cert. denied, 424 U.S. 923, 96 S.Ct. 1133, 47 L.Ed.2d 332 (1976); *United States v. Hodges*, 515 F.2d 650, 652-53 (7th Cir.1975); *United States v. Holley*, 502 F.2d 273, 275 (4th Cir.1974). A similar instruction was adopted by the Third Circuit before *Telfaire*. *United States v. Barber*, 442 F.2d 517, 528 (3d Cir.), cert. denied, 404 U.S. 958, 92 S.Ct. 327, 30 L.Ed.2d 275 (1971). The Ninth Circuit recommends that no such instruction be given. See Committee Comment to Ninth Circuit Instruction 4.13.

The instruction should be given when the identification has become an issue because of lack of corroboration or limited opportunity for observation, or where the witness's memory has faded by the time of trial. *United States v. Scott*, *supra*, 578 F.2d at 1191.

This instruction is a modification of the *Telfaire* instruction. It is similar to Seventh Circuit Instruction 3.06. See also Fifth Circuit Instruction 1.29, Eighth Circuit Instruction 4.08

and Federal Judicial Center Instruction 35.

## **7.12 SUMMARIES AND OTHER MATERIALS NOT ADMITTED IN EVIDENCE**

(1) During the trial you have seen counsel use [summaries, charts, drawings, calculations, or similar material] which were offered to assist in the presentation and understanding of the evidence. This material is not itself evidence and must not be considered as proof of any facts.

### **Use Note**

This instruction should be used when pedagogical-device summaries or similar material are not admitted into evidence.

If the summaries or similar material are admitted into evidence as secondary-evidence summaries, see Instruction 7.12A.

If the summaries or similar material are admitted as primary-evidence summaries, no instruction is necessary.

### **Committee Commentary 7.12** (current as of December 31, 2007)

This instruction has been rewritten based on *United States v. Bray*, 139 F.3d 1104, 1112 (6<sup>th</sup> Cir. 1998), in which the Sixth Circuit noted some confusion in past cases and provided a comprehensive discussion on the treatment of summary evidence. The court explained:

To recapitulate, there are three kinds of summaries:

(1) Primary-evidence summaries, ... which summarize “voluminous writings, recordings, or photographs” that, because they are so voluminous, “cannot conveniently be examined in court.” Fed.R.Evid. 1006. In this instance, the summary, and not the underlying documents, is the evidence to be considered by the factfinder.

(2) Pedagogical-device summaries, or illustrations, such as chalkboard drawings, graphs, calculations, or listings of data taken from the testimony of witnesses or documents in evidence, which are intended to summarize, clarify or simplify testimonial or other evidence that has been admitted in the case, but which are not themselves admitted, instead being used only as an aid to the presentation and understanding of the evidence. For these the jury should be instructed that the summaries are not evidence and were used only as an illustrative aid.

(3) Secondary-evidence summaries that are a combination of (1) and (2), in that they are not prepared entirely in compliance with Rule 1006 and yet are more than mere pedagogical devices designed to simplify and clarify other evidence in the case. These secondary-evidence summaries are admitted in evidence not in lieu of the evidence they summarize but in addition thereto, because in the judgment of the trial court such summaries so accurately and reliably summarize complex or difficult evidence that is received in the case as to materially assist the jurors in better understanding the evidence. In the unusual instance in which this third form of secondary evidence summary is

admitted, the jury should be instructed that the summary is not independent evidence of its subject matter, and is only as valid and reliable as the underlying evidence it summarizes.

*Id.* (citations omitted).

As the Sixth Circuit explained, when summaries are used as (2) pedagogical-device summaries or (3) secondary-evidence summaries, the trial court should give a limiting instruction. Pattern Instruction 7.12 is the limiting instruction designed to cover the type of material described in category (2) as pedagogical-device summaries. This instruction should be given only when the material is not admitted into evidence. If the summary or other material falls into category (3) as secondary-evidence summaries and is admitted into evidence, Pattern Instruction 7.12A should be given. Finally, if the summary or other material falls into category (1) as primary-evidence summaries and is admitted into evidence, no limiting instruction is necessary since Rule 1006 authorizes the admission into evidence of the summary itself. *Bray*, 139 F.3d at 1111-12.

In *United States v. Paulino*, 935 F.2d 739 (6<sup>th</sup> Cir. 1991), the court stated that summaries other than those directly admissible under Rule 1006 should generally be accompanied by a limiting instruction, but held that omission of a limiting instruction was not reversible error because the defendants did not request a limiting instruction, the trial judge did give a limiting instruction at the close of the proof, the defendants had a full opportunity to cross-examine the witness on the summaries, and the summaries were not substantially inconsistent with the evidence. *Id.* at 753-54. The Sixth Circuit later relied again on the opportunity to cross-examine, explaining “we have not held a court’s failure to issue such [limiting] instructions fatal where the defendants had a full opportunity to cross-examine the witness and thereby ‘alleviat[e] any danger or inaccuracy or unfair characterization.’” *United States v. Gaitan-Acevedo*, 148 F.3d 577, 587-88 (6<sup>th</sup> Cir. 1998), *quoting Paulino*, 935 F.2d at 753.

### *1991 Edition*

This instruction should be used when charts and summaries are not received into evidence, but are used for demonstrative purposes. To avoid the charts and summaries from taking on a life of their own as evidence, the court must examine them to determine that everything they contain is supported by the evidence, and the jury must be instructed that they are not evidence, but only an aid in evaluating the evidence. *United States v. Scales*, 594 F.2d 558 (6<sup>th</sup> Cir.), cert. denied, 441 U.S. 946, 99 S.Ct. 2168, 60 L.Ed.2d 1049 (1979).

In *United States v. Bartone*, 400 F.2d 459 (6<sup>th</sup> Cir.1968), cert. denied, 393 U.S. 1027, 89 S.Ct. 631, 21 L.Ed.2d 571 (1969), the Sixth Circuit indicated that the jury should also be cautioned that the summaries have no significance if the underlying evidence is not believed.



## **7.12A SECONDARY- EVIDENCE SUMMARIES ADMITTED IN EVIDENCE**

(1) During the trial you have seen or heard summary evidence in the form of [a chart, drawing, calculation, testimony, or similar material]. This summary was admitted in evidence, in addition to the material it summarizes, because it may assist you in understanding the evidence that has been presented.

(2) But the summary itself is not evidence of the material it summarizes, and is only as valid and reliable as the underlying material it summarizes.

### **Use Note**

Giving Instruction 7.03 Opinion Testimony does not obviate the need for this instruction when summary evidence is admitted.

This instruction should be used when summaries or similar material are admitted into evidence as secondary-evidence summaries.

If the summaries or similar material are admitted as a primary-evidence summaries, no instruction is necessary.

If the summaries or other material are not admitted into evidence, see Instruction 7.12.

### **Committee Commentary 7.12A** (current through December 31, 2007)

This instruction is new in 2005. It is based on *United States v. Bray*, 139 F.3d 1104, 1112 (6th Cir. 1998), which is discussed in the Commentary to Instruction 7.12.

In 2008, the instruction was amended by adding the words “heard” and “testimony” to the first sentence in paragraph (1) and adjusting the brackets. This amendment reflects *United States v. Vasilakos*, 508 F.3d 401, 412 (6th Cir. 2007), where the court held that the omission of a limiting instruction on the summary testimony of an IRS agent was plain error.

In addition, a sentence was added to the Use Note indicating that when summary evidence is admitted, giving Instruction 7.03 Opinion Testimony does not obviate the need for this instruction.

## 7.13 OTHER ACTS OF DEFENDANT

(1) You have heard testimony that the defendant committed [crimes, acts, wrongs] other than the ones charged in the indictment. If you find the defendant did those [crimes, acts, wrongs], you can consider the evidence only as it relates to the government's claim on the defendant's [intent, motive, opportunity, preparation, plan, knowledge, identity, absence of mistake, absence of accident]. You must not consider it for any other purpose.

(2) Remember that the defendant is on trial here only for \_\_\_\_\_, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged in the indictment beyond a reasonable doubt.

### Use Note

This instruction should be used when evidence of other acts has been admitted to prove intent, motive, opportunity, or the like under Fed.R.Evid. 404(b). In identifying the purposes for which the evidence may be used, the instruction should name only the purpose or purposes actually in issue.

This instruction should be given when the evidence is introduced and at the end of the case as well.

### Committee Commentary 7.13 (current through December 31, 2007)

This instruction has been rewritten to specify more clearly the limited purposes for which evidence of uncharged acts can be used. The Sixth Circuit has explained that once the evidence of other acts has been admitted under Rule 404(b), the trial court should give a cautionary instruction identifying the specific, limited purpose for which the evidence was admitted. The district court "must 'clearly, simply, and correctly' instruct the jury as to the specific purpose for which they may consider the evidence." *United States v. Merriweather*, 78 F.3d 1070, 1077 (6<sup>th</sup> Cir. 1996), *quoting* *United States v. Johnson*, 27 F.3d 1186, 1193 (6<sup>th</sup> Cir. 1994). In the limiting instruction, the court should be careful to identify only purposes for using the other acts evidence that are actually in issue. In *Merriweather*, the Sixth Circuit reversed a conviction because the limiting instructions allowed the jury to consider the other acts evidence for seven of the nine purposes listed in Rule 404(b) when only two purposes were arguably presented on the facts. 78 F.3d at 1077. Similarly, in *United States v. Ward*, 190 F.3d 483 (6<sup>th</sup> Cir. 1999), the court held the limiting instruction to be error because it recited the list of all the purposes for which other acts evidence was admissible as set out in Rule 404(b). The Sixth Circuit cautioned district courts as follows:

Rule 404(b) evidence, even when properly admitted, under a properly limiting instruction, asks jurors to engage in mental gymnastics that may well be beyond their ability or even their willingness. Such evidence has great potential for unfair prejudice, and ordinarily it is only the trial court's carefully and clearly articulated limiting

instruction as to the specific purpose for which the evidence may be considered by the jurors, that avoids substantial unfairness to the accused. Here, the court's instruction was certainly error, but [not plain error]. We do, however, caution district courts, when admitting rule 404(b) evidence, to instruct the jury that the "other act" evidence may be considered only with respect to the specific factor named in the rule—usually only one—which is in issue in the case.

*Id.* at 489-90. *See also* United States v. Everett, 270 F.3d 986, 992 (6th Cir. 2001)(limiting instructions erroneous but error harmless); United States v. Spikes, 158 F.3d 913, 929-30 (6th Cir. 1998)(same).

This new version of the instruction responds to these concerns by listing the appropriate purposes for which the evidence may be admitted rather than just leaving a blank for the district court to fill in. District courts can more readily identify the appropriate purpose or purposes involved. Likewise, the Use Note has been amended to caution the court to name in the instruction only the purposes in issue in the case. This new version of the instruction was modeled in part on the Ninth Circuit's Instruction 2.10.

District courts are urged to identify the specific use or uses for the evidence that are actually implicated in the case even if defense attorneys do not object to an instruction listing purposes not implicated in the case. *See* United States v. Newsom, 452 F.3d 593, 607 (6th Cir. 2006), *citing* United States v. Johnson, 27 F.3d 1196, 1194 (6th Cir. 1994) and commenting on "the tension between existing Sixth Circuit opinions regarding Rule 404(b) jury instructions."

The Use Note was also expanded to indicate that the instruction should be given when the evidence is admitted as well as at the close of the case.

Federal Rule of Evidence 404(b) has been amended since the 1991 Commentary was published to add a notice requirement. The rule now states:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The notice requirement does not affect the text of Pattern Instruction 7.13.

### *1991 Edition*

Fed.R.Evid. 404(b) provides:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The threshold inquiry the trial court must make before admitting evidence under Rule 404(b) is whether such evidence is "probative of a material issue other than character." *Huddelston v. United States*, 485 U.S. 681, 686, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988). In so doing, the court necessarily assesses whether the evidence is relevant and, if so, whether the probative value is substantially outweighed by its potential for unfair prejudice under Fed.R.Evid. 403.

Once the evidence of other crimes has been admitted under Rule 404(b), it becomes important for the court to caution the jury regarding the reasons for its admission. *United States v. Sims*, 430 F.2d 1089 (6th Cir.1970). However, if no limiting instruction is requested by the defendant, the failure of the court to give an instruction will not necessarily result in reversible error. *United States v. Yopp*, 577 F.2d 362 (6th Cir.1978) (but noting that it would have been better practice for the court to give the instruction sua sponte).

If an instruction is given, it is important that the court carefully inform the jury about the limited purpose for which the evidence is admitted. This should include an explanation of what evidence was admitted and for what limited purpose. In *United States v. Aims Back*, 588 F.2d 1283, 1287 (9th Cir.1979), the Ninth Circuit reversed a conviction when a cautionary instruction had been given but the trial court did not state the specific purpose for admitting the evidence. An improper limiting instruction may have the effect of enhancing the prejudicial effect of the testimony. *Id.*

## **7.14 FLIGHT, CONCEALMENT OF EVIDENCE, FALSE EXCULPATORY STATEMENTS**

(1) You have heard testimony that after the crime was supposed to have been committed, the defendant \_\_\_\_\_.

(2) If you believe that the defendant \_\_\_\_\_, then you may consider this conduct, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that he committed the crime charged. This conduct may indicate that he thought he was guilty and was trying to avoid punishment. On the other hand, sometimes an innocent person may \_\_\_\_\_ for some other reason.

### **Use Note**

The language in paragraphs (1) and (2) should be tailored to the specific kinds of evidence in the particular case.

### **Committee Commentary 7.14** (current through December 31, 2007)

This instruction has a minor change in the text. In paragraph (2), in the last line after the blank, the phrase “to avoid being arrested, or” has been deleted. The purpose is to make the instruction more generic.

The Sixth Circuit recognizes defendants’ flight, concealment of evidence and implausible stories as evidence which allows an inference of guilty knowledge. *See United States v. Jackson*, 55 F.3d 1219, 1226 (6<sup>th</sup> Cir. 1995).

In *United States v. Carter*, 236 F.3d 777 (6<sup>th</sup> Cir. 2001), the trial court gave an instruction on flight substantially similar to Pattern Instruction 7.14. The Sixth Circuit concluded that giving the instruction was not an abuse of discretion and did not unconstitutionally require the defendant to testify or explain prior incidents of flight. The instruction did not appear to suggest guilt on the defendant’s part, but rather stated that “evidence of flight *may or may not* indicate a defendant’s guilty conscience or intent to avoid punishment.” *Id.* at 792 n.11 (italics in original), *citing* *Illinois v. Wardlow*, 528 U.S. 119, 123-27 (2000). *See also* *United States v. Swain*, 2007 U.S. App. LEXIS 16825 at 7-9, 2007 WL 2031447 (6<sup>th</sup> Cir. 2007) (unpublished) (giving Instruction 7.14 on flight was not error because adequate evidence existed; Instruction 7.14 accurately reflects the law, *citing* *United States v. Carter*, *supra* and *United States v. Diakite*, 5 Fed. Appx. 365, 370-71 (6<sup>th</sup> Cir. 2001) (unpublished)).

The Sixth Circuit has approved implausible stories as evidence allowing an inference of guilt in several cases. *See Jackson, supra*, *quoting* *United States v. Diaz-Carreón*, 915 F.2d 951, 955 (5<sup>th</sup> Cir. 1990) *and citing* *United States v. Mari*, 47 F.3d 782, 785 & n.2 (6<sup>th</sup> Cir. 1995) and *United States v. Chu*, 988 F.2d 981, 984 (9<sup>th</sup> Cir. 1993).

False exculpatory statements are also recognized as evidence from which the jury may infer consciousness of guilt. *See, e.g.,* United States v. Tedesco, 1996 WL 690152 at 2, 1996 U.S. App. LEXIS 31285 at 7 (6<sup>th</sup> Cir. 1996) (unpublished). *Cf.* United States v. McDougald, 990 F.2d 259, 262-63 (6<sup>th</sup> Cir. 1993)(defendant's false exculpatory statements "of little value" in establishing guilty knowledge at relevant time because statements were made eight months after the crime when he was questioned by police; conviction reversed for insufficient evidence).

In *Illinois v. Wardlow, supra*, the Supreme Court recognized flight as a factor the police could use in determining whether they had reasonable suspicion to justify a stop under the Fourth Amendment. The Court stated, "Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Wardlow*, 528 U.S. at 124.

### *1991 Edition*

Certain actions of a defendant after the commission of the charged crime are deemed relevant to show guilt through consciousness of guilt. This includes evidence of flight, *United States v. Touchstone*, 726 F.2d 1116, 1119 (6th Cir.1984); *United States v. Rowan*, 518 F.2d 685, 691 (6th Cir.), cert. denied, 423 U.S. 949, 96 S.Ct. 368, 46 L.Ed.2d 284 (1975), false exculpatory statements, *Stanley v. United States*, 245 F.2d 427 (6th Cir.1957), and concealment or fabrication of evidence, *United States v. Mendez-Ortiz*, 810 F.2d 76, 79 (6th Cir.1986), cert. denied, 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 697 (1987); *United States v. Franks*, 511 F.2d 25, 36 (6th Cir.1975). The relevance of such evidence depends on a series of inferences. For example, the relevancy of evidence of flight depends on being able to draw three inferences: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; and (3) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Some courts have questioned the reliability of this chain of inferences, focusing on the ambiguity of the behavior. *Miller v. United States*, 320 F.2d 767, 771 (D.C.Cir.1963). The Supreme Court has expressed its lack of confidence in the probative value of flight evidence. In *Wong Sun v. United States*, 371 U.S. 471, 483 n. 10, 83 S.Ct. 407, 415 n. 10, 9 L.Ed.2d 441 (1963), the Court noted that "we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime. In *Alberty v. United States*, 162 U.S. 499, 16 S.Ct. 864, 40 L.Ed. 1051 (1895), this court said: '... it is not universally true that a man, who is conscious that he has done a wrong, will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper, since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that the wicked flee when no man pursueth, but the righteous are as bold as a lion'."

The admission of the evidence is particularly troublesome when the weak probative value is balanced against its potential prejudice. One commentator has noted that "one is forced to wonder whether the evidence is not directed to punishing the 'wicked' generally rather than resolving the issue of guilt of the offense charged." McCormick, *Evidence*, s 271, at 803 (1984).

Despite these reservations, the Sixth Circuit has held that evidence of flight is admissible even though the flight was not immediately after the commission of the crime or after the defendant is accused of the crime. *Touchstone*, supra, 726 F.2d at 1119-1120. In that case the court explicitly approved the following instruction:

"The intentional flight or concealment of a defendant is not of course sufficient in itself to establish his guilt; but is a fact which, if proved, may be considered by the jury in the light of all other evidence in the case, in determining guilt or innocence." *Id.* at n. 6.

Spoliation of evidence is admissible to show consciousness of guilt. The fact that a defendant attempts to fabricate or conceal evidence indicates a consciousness that his case is weak and from that the defendant's guilt may be inferred. *United States v. Mendez-Ortiz*, 810 F.2d 76, 79 (6th Cir.1986), cert. denied, 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 697 (1987); *United States v. Franks*, 511 F.2d 25, 36 (6th Cir.), cert. denied, 422 U.S. 1042, 95 S.Ct. 2654, 45 L.Ed.2d 693 (1975). It has been held to be reversible error for the court to instruct that such evidence might be considered evidence of guilt rather than evidence of "consciousness of guilt." As with all consciousness of guilt evidence, there is some dispute as to its admissibility. See *Weinstein's Evidence*, Section 401(10).

The Fifth, Seventh, Ninth and Eleventh Circuits either do not include any consciousness of guilt instructions, or specifically recommend that these matters be left to argument and that no such instructions be given. See the Committee Comments to Seventh Circuit Instruction 3.05 and Ninth Circuit Instruction 4.03. The Eighth Circuit includes instructions on concealment, destruction or fabrication of evidence, influencing a witness's testimony and false exculpatory statements. See Eighth Circuit Instructions 4.09 and 4.15. The Federal Judicial Center includes a general instruction on "Defendant's Incriminating Actions After the Crime." See Federal Judicial Center Instruction 43. But the Committee Commentary recommends that it should not be given in most cases, and that generally these matters should be left to argument by counsel.

Based on Sixth Circuit authority, the Committee recommends one generic instruction for all consciousness of guilt situations which can be modified as circumstances dictate.

## 7.15 SILENCE IN THE FACE OF ACCUSATION

(No Instruction Recommended)

### **Committee Commentary 7.15** (current through December 31, 2007)

The Committee withdrew this instruction in view of *Combs v. Coyle*, 205 F.3d 269, 283 (6<sup>th</sup> Cir. 2000)(use of prearrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination). However, evidence of the defendant's prearrest, pre-*Miranda* silence is still admissible to impeach the defendant if he testifies at trial. See *Fletcher v. Weir*, 445 U.S. 603, 607 (1982); *Jenkins v. Anderson*, 447 U.S. 231, 238-39 (1980); *Combs v. Coyle*, 205 F.3d at 280.

#### *1991 Edition*

The prosecution is generally permitted to prove that a defendant has adopted the statement of another. This adoption may be manifested by silence when an accusatory statement is made in the defendant's presence and hearing, and he understands and has an opportunity to deny it. McCormick, *Evidence*, s 270, at 800-801. See also *Heller, Admissions by Acquiescence*, 15 U.Miami L.Rev. 161 (1960).

Before admitting the admission by silence, the trial judge must determine whether the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond. The jury then decides, with proper instructions from the court, whether in the context of the surrounding facts, the defendant actually heard, understood, and acquiesced in the statement. *United States v. Moore*, 522 F.2d 1068, 1075-76 (9th Cir.1975), cert. denied, 423 U.S. 1049, 96 S.Ct. 775, 46 L.Ed.2d 637 (1976).

Various considerations raise doubts about the propriety of permitting the introduction of statements adopted by silence by the defendant when an accusation is made by the police. In addition to the inherently ambiguous nature of the inference itself, silence by the defendant may be motivated by various other factors including his privilege against self-incrimination. In *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the Supreme Court held that it violates due process to use a defendant's silence after he has received *Miranda* warnings to impeach an exculpatory story given for the first time at trial. Obviously, once the *Miranda* warnings have been given advising the defendant of his right to remain silent, the defendant's failure to speak may not be considered an admission. *United States v. McKinney*, 379 F.2d 259 (6th Cir.1967); *McCarthy v. United States*, 25 F.2d 298 (6th Cir.1928). However, testimony by a government witness that a defendant had been advised of his *Miranda* rights, with no subsequent testimony concerning the defendant's failure to make statements, does not constitute improper comment on the right to remain silent. *United States v. Whitley*, 734 F.2d 1129 (6th Cir.1984).



## **7.16 POSSESSION OF RECENTLY STOLEN PROPERTY**

(1) You have heard testimony that the defendant had possession of some property that was recently stolen.

(2) If you believe that the defendant had possession of this property, you may consider this, along with all the other evidence, in deciding whether the defendant knew that the property was stolen (or stole the property). But the longer the period of time between the theft and his possession, the less weight you should give this evidence.

(3) You do not have to draw any conclusion from the defendant's possession of the property. You may still have a reasonable doubt based on all the other evidence. Remember that the burden is always on the government to prove beyond a reasonable doubt that the defendant committed the crime charged.

### **Use Note**

The bracketed language in paragraph (2) should be used when the government is attempting to prove in the alternative that the defendant either possessed the property knowing that it was stolen, or stole the property.

### **Committee Commentary 7.16** (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 *Barnes v. United States*, 412 U.S. 837, 843, 93 S.Ct. 2357, 2361, 37 L.Ed.2d 380 (1973), the Supreme Court noted that "(f)or centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods." The inference is only possible where the accused is found in exclusive possession of property recently stolen and the possession is not otherwise explained. *Pendergrast v. United States*, 416 F.2d 776 (D.C.Cir.), cert. denied, 395 U.S. 926, 89 S.Ct. 1782, 23 L.Ed.2d 243 (1969).

How far the inference may be taken is somewhat in question. In *Barnes*, the prosecution was for the possession of checks, and the inference only extended to the knowledge of the defendant that they were stolen. However, some courts have extended the inference, when combined with the other evidence in the case, from possession of stolen goods to the theft itself. *United States v. Carter*, 522 F.2d 666, 679 (D.C.Cir.1975); *United States v. Johnson*, 433 F.2d 1160 (D.C.Cir.1970).

In *United States v. Jennewein*, 580 F.2d 915 (6th Cir.1978), the Sixth Circuit initially reversed an interstate theft conviction because the district court had given an instruction that authorized the jury to infer that the defendant had participated in the theft based on his possession of recently stolen property. The panel said that "(n)either Barnes nor any other authority cited or discovered justifies the additional inference that would permit the finder of fact to conclude that the possessor of stolen property by virtue of such possession may be deemed to have participated in its theft." But on rehearing, the Sixth Circuit vacated its initial decision and upheld the district court's instruction, stating that the instruction "did not misstate the law." *United States v. Jennewein*, 590 F.2d 191, 192 (6th Cir.1978).

The instruction approved and reprinted by the D.C. Circuit in *Pendergrast v. United States*, supra, 416 F.2d at 790, clearly extends the inference to the theft or robbery itself:

"In weighing the evidence adduced at this trial, you may consider the circumstance, if you find that it is established beyond a reasonable doubt, that the defendant had the exclusive possession of property specified in the (\_\_\_\_\_ count of the) indictment, recently after that property was stolen in the robbery alleged therein. You are not required to draw any conclusion from that circumstance, but you are permitted to infer, from the defendant's unexplained or unsatisfactorily explained possession of the recently stolen property, that the defendant is guilty of the offense, if in your judgment such an inference is warranted by the evidence as a whole.

The defendant's possession of the recently stolen property does not shift the burden of proof. The burden is always upon the Government to prove beyond a reasonable doubt every essential element of an offense before the defendant may be found guilty of that offense. Before you may draw any inference from the defendant's unexplained or unsatisfactorily explained possession of property stolen in the robbery charged in the (\_\_\_\_\_ count of the) indictment, you must first find that the Government has proved beyond a reasonable doubt every essential element of that offense, and as to those elements I have already instructed you. If you should find that the Government has proved beyond a reasonable doubt every essential element of that offense, the defendant's unexplained or unsatisfactorily explained possession of the recently stolen property is a circumstance from which you may find, by the process of inference, that the defendant was the person (one of the persons) who stole it. In short, if the Government has proved beyond a reasonable doubt every essential element of the offense of robbery charged in this case, then, but only then, the defendant's unexplained or unsatisfactorily explained possession of property stolen in that robbery permits you to infer that the defendant was the robber (one of the robbers).

The word 'recently,' as used in these instructions, is a relative term, and it has no fixed meaning. Whether property may be considered as recently stolen depends upon all the facts and circumstances shown by the evidence. The longer the period of time since the theft of the property, the more doubtful becomes the inference which may reasonably be drawn from its unexplained or unsatisfactorily explained possession.

In considering whether the defendant's possession of the recently stolen property has been satisfactorily explained, you must bear in mind that the defendant is not required to (take the witness stand or) furnish an explanation. His possession may be satisfactorily explained by other circumstances shown by the evidence independently of any testimony by the defendant himself. And even though the defendant's possession of the recently stolen property is unexplained or is not satisfactorily explained, you cannot draw the inference under consideration if on the evidence as a whole you have a reasonable doubt as to his guilt.

It is exclusively within your province to determine (a) whether property specified in the

(\_\_\_\_\_ count of the) indictment was stolen in the robbery alleged and, if so, (b) whether while recently stolen it was in the exclusive possession of the defendant and, if so, (c) whether the possession of the property has been satisfactorily explained, and (d) whether the evidence as a whole warrants any such inference.

If you should find that the Government has proved beyond a reasonable doubt every essential element of the offense of robbery charged in the (\_\_\_\_\_ count of the) indictment, and that property specified in the (\_\_\_\_\_ count of the) indictment was stolen as alleged, and that, while recently stolen, it was in the exclusive possession of the defendant, you may draw, but you are not required to draw, from these circumstances the inference that the defendant is guilty of the offense of robbery charged in the (\_\_\_\_\_ count of the) indictment, unless his possession of the property is satisfactorily explained by other circumstances shown by the evidence, or unless on the evidence as a whole you have a reasonable doubt as to his guilt.

If you should find that the Government has failed to prove beyond a reasonable doubt every essential element of the offense of robbery charged in the (\_\_\_\_\_ count of the) indictment; or if you should find that the Government has failed to prove beyond a reasonable doubt that property specified in the (\_\_\_\_\_ count of the) indictment was in the exclusive possession of the defendant while recently stolen; or if the defendant's possession of the stolen property is satisfactorily explained by other circumstances shown by the evidence; or if, on the evidence as a whole, you have a reasonable doubt as to the defendant's guilt; then, in any one or more of these events, you must find the defendant not guilty of the offense of robbery charged in the (\_\_\_\_\_ count of the) indictment."

## 7.17 TRANSCRIPTIONS OF TAPE RECORDINGS

(1) You have heard some tape recordings that were received in evidence, and you were given some written transcripts of the tapes.

(2) Keep in mind that the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The tapes themselves are the evidence. If you noticed any differences between what you heard on the tapes and what you read in the transcripts, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of the tapes, you must ignore the transcripts as far as those parts are concerned.

### **Committee Commentary 7.17** (current through December 31, 2007)

The Committee made no change in the instruction.

The Sixth Circuit continues to rely on the guidelines for transcript use adopted in *United States v. Robinson*, 707 F.2d 872, 876 (6th Cir. 1983), discussed in the 1991 Committee Commentary. *See, e.g.*, *United States v. Elder*, 90 F.3d 1110, 1129-30 (6th Cir. 1996); *United States v. Scarborough*, 43 F.3d 1021, 1024 (6th Cir. 1994); *United States v. Segines*, 17 F.3d 847, 854 (6th Cir. 1994).

In *Segines*, the Sixth Circuit elaborated on the procedural alternatives when a transcript is used:

The preferred method is stipulation to its accuracy by all parties. The next best alternative is for the transcriber to attest to its accuracy and for the court to test that accuracy, outside of the jury's presence, "by reading the transcripts while listening to the tapes." (Citation omitted.) When tapes are unintelligible, however, a transcript intended as an aid to the jury inevitably becomes, in the minds of the jurors, the evidence itself (citation omitted). As is required whenever a transcript is used and there is no stipulation as to its accuracy, the trial court here gave a cautionary instruction to the jury regarding the limited use to be made of the transcript. Such an instruction does not suffice, however, to erase the prejudice created by "shepherding hearsay to the jury via the transcripts...."

*Id.*

One point made clear in *Segines* is that cautionary instructions on the limited role of the transcript alone are not sufficient to justify its use. The *Segines* court concluded that use of transcripts was error, despite repeated use of a cautionary instruction on the limited role of the transcript, because the judge found much of the tape unintelligible. The Sixth Circuit stated that at retrial, a transcript should not be given to the jury. *Id.* at 855.

*See also* *United States v. Scarborough*, *supra* at 1024-25 (no error to use government's transcript where district court reviewed it and found it accurate and gave limiting instruction);

United States v. Wilkinson, 53 F.3d 757 (6<sup>th</sup> Cir. 1995)(any potential prejudice from use of government's transcript was remedied, *inter alia*, by a cautionary jury instruction), *citing* United State v. Hughes, 895 F.2d 1135, 1147 (6<sup>th</sup> Cir. 1990). In United States v. Elder, 90 F.3d 1110, 1129-30 (6<sup>th</sup> Cir. 1996), the Sixth Circuit held that it was not error to allow transcripts as an aid to the jury when the trial judge followed the *Robinson* guidelines to review the tapes and gave a limiting instruction substantially the same as Pattern Instruction 7.17.

On the question of whether transcripts can be used by the jury during deliberations, the Sixth Circuit has allowed such use. See United States v. Scarborough, *supra* at 1024-25 (transcripts can be used in deliberations, even if transcripts not admitted into evidence, as long as court instructs that the tapes and not the transcripts are evidence), *citing* United States v. Puerta Restrepo, 814 F.2d 1236, 1242 (7<sup>th</sup> Cir. 1987). While the Committee takes no position on whether transcripts should go to the jury room, if they do, the court should instruct the jury again that the tapes are the evidence rather than the transcripts.

### *1991 Edition*

Tape recordings are generally admissible unless the incomprehensible portions of the tapes are so substantial as to render the recordings as a whole untrustworthy. United States v. Terry, 729 F.2d 1063, 1068 (6<sup>th</sup> Cir.1984). The decision to admit tape recordings into evidence rests with the trial court. United States v. Vinson, 606 F.2d 149 (6<sup>th</sup> Cir.1979), cert. denied, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980). Such tapes must be authentic, accurate, trustworthy and sufficiently audible and comprehensible for the jury to consider the contents. See United States v. Robinson, 707 F.2d 872, 876 (6<sup>th</sup> Cir.1983).

When a recording is admissible, an accurate transcript of the recording may be provided, in the trial court's discretion, for the jury to use while the recording is played, so that the jury may follow the recording more easily. See United States v. Robinson, *supra*, 707 F.2d at 876. But the Sixth Circuit has expressed a clear preference that a transcript not be submitted to the jury unless the parties stipulate to its accuracy. *Id.* See also United States v. Vinson, *supra*, 606 F.2d at 155.

In the absence of a stipulation, the transcriber should verify that he or she has listened to the tape and accurately transcribed its content, and the court should make an independent determination of accuracy by comparing the transcript against the tape and directing the deletion of the unreliable portion of the transcript. United States v. Robinson, *supra*, 707 F.2d at 879.

Another option, but the least preferred, is to submit two transcripts to the jury, one from the government and one from the defense. See United States v. Martin, 920 F.2d 393, 396 (6<sup>th</sup> Cir.1990). But this has been held to be prejudicial error requiring reversal if the tape is significantly inaudible, even if a cautionary instruction is given. United States v. Robinson, *supra*, 707 F.2d at 879.

## **7.18 SEPARATE CONSIDERATION--EVIDENCE ADMITTED AGAINST CERTAIN DEFENDANTS ONLY**

(1) You have heard testimony from \_\_\_\_\_ that \_\_\_\_\_.

(2) You can only consider this testimony against \_\_\_\_\_ in deciding whether the government has proved him guilty. You cannot consider it in any way against any of the other defendants.

### **Committee Commentary 7.18** (current through December 31, 2007)

The Committee made no change in the instruction.

Recent cases indicate that limiting instructions such as Instruction 7.18 can cure a risk of prejudice when there are multiple defendants. In *Zafiro v. United States*, 506 U.S. 534 (1993), the Supreme Court held that mutually antagonistic defenses alone do not mandate separate trials; there must be some risk of prejudice. Even when the risk of prejudice is high, the Court explained, severance may not be necessary because “less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.” *Id.* at 539. In *Zafiro*, the Court found the risk of prejudice was cured by proper instructions, including an instruction that told the jury to “give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his or her case determined from his or her own conduct and from the evidence [that] may be applicable to him or to her.” *Id.* at 541.

The Sixth Circuit relied on *Zafiro* in *United States v. Pierce*, 62 F.3d 818 (6<sup>th</sup> Cir. 1995) to find no error in a joint trial because the risk of prejudice was cured by several cautionary instructions, including one stating “[y]ou must decide, for each defendant, whether the United States has presented proof beyond a reasonable doubt that the particular defendant is guilty of a particular charge.” *Id.* at 830-31.

This issue is also covered by Pattern Instruction 2.01B, Separate Consideration – Multiple Defendants Charged with a Single Crime.

### *1991 Edition*

This instruction is modeled after Federal Judicial Center Instruction 19. It is designed to supplement any mid-trial instructions given when evidence admissible against only one defendant is introduced. See Fed.R.Evid. 105 and *United States v. Gallo*, 763 F.2d 1504, 1528 (6<sup>th</sup> Cir.1985), cert. denied, 475 U.S. 1017, 106 S.Ct. 1200, 89 L.Ed.2d 314 (1986), for when such an instruction must be given.

## **7.19 JUDICIAL NOTICE**

(1) I have decided to accept as proved the fact that \_\_\_\_\_, even though no evidence was presented on this point. You may accept this fact as true, but you are not required to do so.

**Committee Commentary 7.19**  
(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 based on Ninth Circuit Instruction 2.05, and on Fed.R.Evid. 201(g). It should be given whenever the court has taken judicial notice of a fact.