Chapter 4.00

AIDING AND ABETTING

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4.01 AIDING AND ABETTING

(1) For you to find _____ guilty of _____, it is not necessary for you to find that he personally committed the crime. You may also find him guilty if he intentionally helped [or encouraged] someone else to commit the crime. A person who does this is called an aider and abettor.

(2) But for you to find _____ guilty of _____ as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime of _____ was committed.

(B) Second, that the defendant helped to commit the crime [or encouraged someone else to commit the crime].

(C) And third, that the defendant intended to help commit [or encourage] the crime.

(3) Proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You can consider this in deciding whether the government has proved that he was an aider and abettor, but without more it is not enough.

(4) What the government must prove is that the defendant did something to help [or encourage] the crime with the intent that the crime be committed.

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

Use Note

The bracketed language in paragraphs (1), (2)(B), (2)(C) and (4) should be included when there is evidence that the defendant counseled, commanded, induced or procured the commission of the crime.

Committee Commentary 4.01
(current through December 31, 2007)

The Committee made no change in the instruction.

In United States v. Katuramu, 174 Fed. Appx. 272, 2006 WL 773038, 2006 U.S. App. LEXIS 7640 (6th Cir. 2006)(unpublished), a panel approved Instruction 4.01(3) and (4).

As noted in the 1991 Commentary, the standard for accomplice liability is set out in 18 U.S.C. § 2:

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

In United States v. Brown, 151 F.3d 476 (6th Cir. 1998), the court reversed convictions for aiding and abetting a violation of 18 U.S.C. § 1001 (making false statements to a federal agency) for two reasons. First, the court found the evidence of mens rea insufficient because the defendant lacked the "specific intent" required for aiding and abetting. *Id.* at 487. The government's theory was that the defendant aided and abetted the making of false statements in vouchers for Section 8 housing eligibility because the vouchers were given to persons other than those on the waiting list. Because there was no evidence the defendant knew the function of the waiting list for Section 8 housing, the court held the mens rea evidence did not meet the standard for aiding and abetting. In addition, the court held that the evidence of conduct was insufficient because the defendant failed to engage in the sort of active role necessary to an aiding and abetting conviction. *Id*. There was no evidence the defendant helped in the preparation or submission of the documents to HUD; overall, her participation was too limited to establish that she did any act to bring about filing false documents with HUD.

The Sixth Circuit has discussed 18 U.S.C. § 2 in the context of three offenses which raise unique issues. The first is using or carrying a firearm under 18 U.S.C. § 924(c). In Wright v. United States, 182 F.3d 458 (6th Cir.1999), the court sustained a conviction under 18 U.S.C. § 2, holding that a defendant could be convicted of using or carrying a firearm even though he never personally used or carried any weapon. The court concluded that the holding in Bailey v. United States, 516 U.S. 137 (1995), did not preclude this result. In *Bailey*, the Supreme Court held that in order to show "use" under § 924(c), the government must show that the defendant actively employed the firearm during and in relation to the predicate crime. In *Wright*, the Sixth Circuit stated that *Bailey* did not affect aiding and abetting liability under § 924(c). Wright v. United States, *supra* at 464. Relying on Rattigan v. United States, 151 F.3d 551 (6th Cir. 1998), the court held that for aiding and abetting liability under § 924(c), the government must prove more than that the defendant knew others were armed; the defendant must know others were armed and must perform some act with the intent to assist or influence the commission of the underlying predicate crime. *Wright*, 182 F.3d at 465. This standard was met in the case by the defendant's activity of cutting cocaine in the back room of another defendant's apartment. The court quoted the district court's statement that " 'this division of labor does not eliminate Mr. Wright's liability for using a firearm under the principles of aiding and abetting.'" *Id.* at 466.

The second offense raising unique questions on the application of § 2 is the Illegal Gambling Business Statute, 18 U.S.C. § 1955. In United States v. Hill, 55 F.3d 1197, 1199 (6th Cir.1995), the court held that aiding and abetting liability for § 1955 offenses required particular knowledge of the predicate offense. The court stated that § 1955 offenses required what it called a "refined theory" of accomplice liability under § 2, *id.* at 1201, and explained that § 2 is applicable to § 1955, but only "when the aider and abettor has knowledge of the general nature and scope of the illegal gambling enterprise and takes actions that demonstrate an intent to make the illegal gambling enterprise succeed by assisting the principals in the conduct of the business." *Id.* at 1199. The point of this standard is to insure that the defendant knew he was an

accomplice to an illegal gambling business which met the size, scope and duration requirements to be a federal crime under § 1955. *Id.* at 1202.

Finally, the court has resolved specific accomplice liability questions for the offense of felon-in-possession-of-a-firearm under 18 U.S.C. § 922(g)(1). In United States v. Gardner, 488 F.3d 700 (6th Cir. 2007), the court reversed the defendant's conviction for aiding and abetting a felon in possession on the basis that the evidence was insufficient. Accomplice liability requires the government to prove that the defendant intended to aid the commission of the crime. The court held that to meet this element in the context of a felon-in-possession charge, "the government must show that the defendant knew or had cause to know that the principal was a convicted felon." *Id*. at 715, *citing* United States v. Xavier, 2 F.3d 1281, 1286 (3d Cir. 1993). Because the government presented no such evidence, the court reversed the conviction.

1991 Edition

18 U.S.C. § 2 provides:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Aiding and abetting is a method of making a co-defendant equally culpable when another defendant actually carried out the substantive offense. A defendant need not be specifically charged with aiding and abetting to be convicted under 18 U.S.C. s 2, but can be charged as a principal and convicted as an aider and abettor. Standefer v. United States, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980).

In order to aid and abet, one must do more than merely be present at the scene of the crime and have knowledge of its commission. The Supreme Court set out the standard for the offense in Nye & Nissen v. United States, 336 U.S. 613, 619, 69 S.Ct. 766, 769, 93 L.Ed. 919 (1949), when it quoted Judge Learned Hand's statement from United States v. Peoni, 100 F.2d 401, 402 (2d Cir.1938):

"In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed'."

Accord United States v. Martin, 920 F.2d 345, 348 (6th Cir.1990); United States v. Quinn, 901 F.2d 522, 530 n. 6 (6th Cir.1990).

This requires proof of something more than mere association with a criminal venture. United States v. Morrow, 923 F.2d 427, 436 (6th Cir.1991). The government must prove "some active participation or encouragement, or some affirmative act by (the defendant) designed to further the (crime)." Id.

The defendant must act or fail to act with the intent to help the commission of a crime by another. Simple knowledge that a crime is being committed, even when coupled with presence at the scene, is usually not enough to constitute aiding and abetting. United States v. Luxenberg,

374 F.2d 241, 249-50 (6th Cir.1967). Because of its importance in determining whether the accused is an accomplice, the jury must be charged fully and accurately as to intent. The failure to instruct on intent constitutes plain error. United States v. Bryant, 461 F.2d 912 (6th Cir.1972).

Although the defendant must be a participant rather than merely a knowing spectator before he can be convicted as an aider and abettor, it is not necessary for the governments to prove that he had an interest or stake in the transaction. United States v. Winston, 687 F.2d 832, 834 (6th Cir.1982).

See generally Fifth Circuit Instruction 2.06, Seventh Circuit Instruction 5.08, Eighth Circuit Instruction 5.01, Ninth Circuit Instruction 5.01 and Eleventh Circuit Special Instruction 6.

4.01A CAUSING AN ACT

(1) For you to find _____ guilty of _____, it is not necessary for you to find that he personally committed the act(s) charged in the indictment. You may also find him guilty if he willfully caused an act to be done which would be a federal crime if directly performed by him or another.

(2) But for you to find _____ guilty of _____, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant caused _____ to commit the act of _____.

(B) Second, if the defendant or another person had committed the act it would have been the crime of _____.

(C) And third, that the defendant willfully caused the act to be done.

(3) Proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You may consider this in deciding whether the government has proved that he caused the act to be done, but without more it is not enough.

(4) What the government must prove is that the defendant willfully did something to cause the act(s) to be committed.

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

Commentary

(current through December 31, 2007)

This instruction is new. It is based on 18 U.S.C. § 2(b). Section 2 provides:
"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

In United States v. Hourani, 1999 WL 16472, 1999 U.S. App. LEXIS 431 (6th Cir. 1999)(unpublished), a panel of the Sixth Circuit stated that § 2(b) was added "to clarify the implicit meaning of § 2(a)" and then quoted the Historical and Statutory Notes accompanying the statute:

> Section 2(b) is added to permit the deletion from many sections throughout the revision of such phrases as "causes or procures." The section as revised makes clear the legislative intent to punish as a principal not only one who directly commits an offense

> and one who "aids, abets, counsels, commands, induces or procures" another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States. It removes all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.

Hourani, 1999 WL at 3-4, 1999 LEXIS at 9-10.

In United States v. Maselli, 534 F.2d 1197, 1200 (6th Cir. 1976), the court stated that § 2(b) deals with a class of activities which do not involve direct violations of the law, but which contribute to the commission of the offense and are punishable in the same manner as direct violations. *Maselli* also noted that subsections 2(a) and 2(b) are not mutually exclusive. "They are ... two statements of indirect illegal actions which carry the same consequences for the actor as direct violation of criminal statutes." *Id.* The court noted that it is proper to instruct on both subsection 2(a) and 2(b) if the evidence justifies it. *Id.*

"[I]t has long been held that an indictment need not specifically charge 'aiding and abetting' or 'causing' the commission of an offense against the United States, in order to support a jury verdict based upon a finding of either." United States v. Lester, 363 F.2d 68, 72 (6th Cir. 1966).

The difference between "inducing" in § 2(a) and "causing" in 2(b) has been described by the Sixth Circuit as "somewhat unclear." United States v. Brown, 151 F.3d 476, 486 (6th Cir. 1998). However, the Sixth Circuit recognized that § 2 has two parts. *See id.* (describing § 2 as having "two components"). The court also stated that the two subsections are alternatives, explaining that a defendant can be guilty as an accomplice "so long as the evidence shows that she aided, abetted, counseled, induced, or procured the commission of the fraud, or, alternatively, caused the false statements to be made." *Id., citing* United States v. Twitty, 107 F.3d 1482, 1491 n.10 (11th Cir. 1997).

The Tenth Circuit has defined the term "causing" in the context of § 2(b) in United States v. Levine, 457 F.2d 1186 (10th Cir. 1972). "Cause means a principal acting through an agent or one who procures or brings about the commission of a crime." *Id*. at 1188.

Paragraph (1) of the instruction is based on the language of the statute and United States v. Keefer, 799 F.2d 1115, 1124 (6th Cir. 1986). *Keefer* held that under § 2(b) one can be punished as a principal even though the agent who committed the act lacks criminal intent. *See also* United States v. Norton, 700 F.2d 1072, 1077 (6th Cir. 1983)(defendants treated as principals even though they may not have physically done the criminal act).

Paragraph (2) sets forth the elements that must be proved beyond a reasonable doubt by the government. The elements are based upon the language of the statute. *See also* United States v. Murph, 707 F.2d 895, 896 (6th Cir.1983), which held that the further act done by the agent was foreseen by the defendant and thus the defendant "caused" the act to be done.

The word "willfully" in paragraph 2(C) is taken from the statute, and there is no case law in the Sixth Circuit to guide the Committee further on defining this mens rea in the context of § 2(b). The Committee recommends that the term "willfully" be defined by reference to the particular underlying act involved in the case. Cf. Instruction 2.05 Willfully (recommending no general instruction on the meaning of willfully and suggesting in commentary that the term be defined based on the particular offense involved). The other circuits' pattern instructions do not define "willfully" for purposes of § 2(b) either, although the Eighth Circuit notes in commentary that willfully means "voluntarily and intentionally." See Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 5.02 (2003).

Paragraph (3) is based upon United States v. Elkins, 732 F.2d 1280, 1287 (6th Cir. 1984)(knowledge of the criminal conduct is insufficient).

Paragraph (4) of the instruction is based on the instruction quoted with approval in *Hourani*, 1999 WL at **4, 1999 LEXIS at *10-*11. The panel approved the instruction on accomplice liability under § 2(b) although the instructions did not specify either §§ 2(a) or 2(b).

The other circuits have not provided an independent jury instruction on the causing prong of § 2(b). The Federal Jury Practice and Instructions, § 18.01, Fifth Edition (2000), provides in commentary that if the government is proceeding on the theory that the defendant "willfully caused" another to commit an offense under § 2(b), no specific additional instruction is necessary. It suggests that the instruction should be changed to include the language of "cause." The First Circuit Committee is divided on the meaning, in terms of jury instructions, of the difference between the two subsections of 18 U.S.C. § 2. See Pattern Jury Instructions: First Circuit Cases, Instruction No. 4.02 Comment ¶ (2) (1998 ed.). The Eighth Circuit, in the commentary to its pattern jury instructions, indicates that the elements instruction should be modified to indicate that the "defendant voluntarily and intentionally caused any acts he did not personally do." See Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 5.02 (2003).

4.02 ACCESSORY AFTER THE FACT

(1) _____ is not charged with actually committing the crime of _____. Instead, he is charged with helping someone else try to avoid being arrested, prosecuted or punished for that crime. A person who does this is called an accessory after the fact.

(2) For you to find _____ guilty of being an accessory after the fact, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant knew someone else had already committed the crime of _____.

(B) Second, that the defendant then helped that person try to avoid being arrested, prosecuted or punished.

(C) And third, that the defendant did so with the intent to help that person avoid being arrested, prosecuted or punished.

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

Committee Commentary 4.02
(current through December 31, 2007)

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

1991 Edition

18 U.S.C. § 3 provides:
"Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts, or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than ten years."

A defendant is guilty under Section 3 where he knowingly assists an offender in order to hinder the offender's apprehension, trial or punishment. He is distinguished from an aider and abettor by not being entangled in the commission of the crime itself. For example, the driver of a getaway car in a bank robbery may be treated as a principal, while a defendant who learns

about a crime afterwards and then supplies a place of refuge would be an accessory after the fact. It is important that the felony not be in progress when assistance is rendered in order for the person to be treated as an accessory after the fact, rather than as a principal.

"The gist of being an accessory after the fact lies essentially in obstructing justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime ... The very definition of the crime also requires that the felony not be in progress when the assistance is rendered because then he who renders assistance would aid in the commission of the offense and be guilty as a principal." United States v. Barlow, 470 F.2d 1245, 1252-1253 (D.C.Cir.1972).

The line between an aider and abettor and an accessory after the fact is sometimes difficult to draw, particularly when dealing with the escape immediately following the crime. The defendant in United States v. Martin, 749 F.2d 1514, 1518 (11th Cir.1985), was convicted of aiding and abetting in a bank robbery under an instruction in which the jury was told that the robbery was not complete as long as the money was being "asported or transported." The Eleventh Circuit held that the instructions extended the crime too far since "the money could be transported long after the possibility of hot pursuit had ended."

See generally Fifth Circuit Instruction 2.07, Seventh Circuit Instruction 5.09 and Ninth Circuit Instruction 5.02.